

FLORIDA

1. Citation for the state's workers' compensation statute

The Florida Workers' Compensation Act is set forth in Chapter 440, Florida Statutes. In 2003, the Florida legislature enacted substantial reforms of the Florida Workers' Compensation Act, many of which became effective on October 1, 2003, with other changes taking effect on January 1, 2004. Please note that the law discussed herein is applicable to the current Workers' Compensation Act and, therefore, may not apply to dates of accident prior to October 1, 2003.

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

An "employee" is defined as any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors. Fla. Stat. §440.02(15)(a) (2006).

The term "employee" also includes the following:

- (1) any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous;
- (2) a sole proprietor or a partner who is not engaged in the construction industry, devotes full time to the proprietorship or partnership, and elects to be included in the definition of employee by filing notice thereof, as provided in Section 440.05, Florida Statutes;
- (3) all persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with Section 440.10, Florida Statutes, for work performed by, or as a, subcontractor;
- (4) an independent contractor working or performing services in the construction industry; and
- (5) a sole proprietor who engages in the construction industry and a partner or partnership that is engaged in the construction industry.

Fla. Stat. §440.02(15)(b)-(c) (2006).

The term "employee" does not include the following categories of workers:

- (1) an independent contractor who is not engaged in the construction industry;
- (2) a real estate licensee, if that person agrees, in writing, to perform for remuneration solely by way of commission;
- (3) bands, orchestras, and musical and theatrical performers, including disk jockeys, performing in licensed premises, if a written contract evidencing an independent contractor relationship is entered into before the commencement of such entertainment;
- (4) an owner-operator of a motor vehicle who transports property under a written contract with a motor carrier which evidences a relationship by which the owner-operator assumes the responsibility of an employer for the performance of the contract, if the owner-operator is required to furnish motor vehicle equipment as identified in the written contract and the principal costs incidental to the performance of the contract, including, but not limited to, fuel and repairs, provided a motor carrier's advance of costs to the owner-operator when a written contract evidences the owner-operator's obligation to reimburse such advance shall be treated as the owner-operator furnishing such cost and the owner-operator is not paid by the hour or on some other time-measured basis;
- (5) a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of the employer;
- (6) a volunteer, except a volunteer worker for the state or a county, municipality, or other governmental entity (a person who does not receive monetary remuneration for services is presumed to be a volunteer unless there is substantial evidence that a valuable consideration was intended by both employer and employee);
- (7) an officer of a corporation who elects to be exempt from Chapter 440;
- (8) an officer of a corporation engaged in the construction industry who elects to be exempt from Chapter 440;
- (9) an exercise rider who does not work for a single horse farm or breeder, and who is compensated for riding on a case-by-case basis, provided that a written contract is entered into prior to commencement of such activity which reflects that an employee/employer relationship does not exist;
- (10) a taxicab, limousine, or other passenger vehicle-for-hire driver who operates said vehicles pursuant to a written agreement with a company which provides any dispatch, marketing, insurance, communications, or other services under which the driver and any fees or charges

paid by the driver to the company for such services are not conditioned upon, or expressed as a proportion of, fare revenues;

(11) a person who performs services as a sports official for an entity sponsoring an interscholastic sports event or for a public entity or private, nonprofit organization that sponsors an amateur sports event; and

Fla. Stat. §440.02(15)(d) (2006).

In 2010, the First DCA looked at the owner-operator exception. They held the exception only applies if the owner-operator pays all costs associated with the operation of the vehicle. Reynolds v. CSR Rinker Transport, 31 So. 3d 268 (Fla. 1st DCA 2010). In Reynolds, the employer paid for the insurance that covered the owner's equipment. The court held that, based on the plain language of the statute, because not all of the expenses were paid for by the owner, the exception did not apply.

3. Identify and describe any "statutory employer" provision. What is the definition of "employer" under the Act?

According to Section 440.02(16), Florida Statutes (2006), the Florida Workers' Compensation Act defines "employer" as the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. Fla. Stat. §440.02(16)(a) (2006). The term "employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. Id. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of Sections 440.105, 440.106, and 440.107, Florida Statutes.

A homeowner shall not be considered the employer of persons hired by the homeowner to carry out construction on the homeowner's own premises if those premises are not intended for immediate lease, sale, or resale. Fla. Stat. §440.02(16)(b) (2006).

4. What type of injuries are covered and what is the applicable standard of proof for each?

A. Traumatic or "single occurrence" claims.

A carrier must provide benefits to a worker who has sustained an injury by accident arising out of and occurring within the course of employment. The Act defines "injury" as personal injury or death by accident arising out of and in the normal course and scope of employment, and such diseases or infection as naturally or unavoidably result from such injury. Fla. Stat. §440.02(19)

(2006). The term "accident" is defined under the Act to mean only an unexpected or unusual event or result that happens suddenly. Fla. Stat. §440.02(1) (2006).

The injury, its occupational cause, and any resulting manifestations or disability shall be established within a reasonable degree of medical certainty and based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries. Fla. Stat. §440.09(1) (2003). The term "major contributing cause" has been defined as the cause which is more than 50% responsible for the injury as compared to all other causes combined for which treatment or benefits are sought. Id. Major contributing cause must be demonstrated by medical evidence only. Id. Pain and subjective complaints alone, without objective relevant medical findings, are not compensable. Id. "Objective relevant medical findings" are those findings which correlate to the subjective complaints of the employee and are confirmed by physical examination findings and diagnostic testing. Id.

B. Occupational diseases (including respiratory and repetitive use).

Pursuant to Section 440.151, Florida Statutes, an "occupational disease" is defined as a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment, and to exclude all ordinary diseases of life to which the general public is exposed, unless the incidence is substantially higher in the particular trade, occupation, process, or employment than for the general public. Fla. Stat. §440.151(2) (2003). In addition, "occupational disease" means only a disease for which there are epidemiological studies showing that exposure to the specific substance involved, at the levels to which the employee was exposed, may cause the precise disease sustained by the employee. Id.

The statute essentially requires that the following six factors be shown in order to find an occupational disease compensable: (1) a condition peculiar to the occupation causes the disease; (2) the employee contracts the disease during employment in the occupation; (3) the occupation presents a particular hazard of the disease; (4) incidence of ordinary diseases of life is substantially higher in the occupation than in the public; (5) the nature of employment was the major contributing cause of the disease; and (6) there are epidemiological studies showing that exposure to the substance involved, at the levels at which the employee was exposed, may cause the precise disease sustained by the employee.

For accidents occurring prior to October 1, 2003, in order to prove an occupational disease, an employee was only required to show the following: (1) the disease must actually be caused by employment conditions that are characteristic of, and peculiar to, a particular occupation; (2) the disease must be actually contracted during employment in the particular occupation; (3) the occupation must present a particular hazard of the disease occurring so as to distinguish that occupation from usual occupations, or the incidence of the disease must be substantially higher in the occupation than in usual occupations; and (4) if the disease is an ordinary disease of life, the incidence of such a disease must be substantially higher in the particular occupation than in the general public. Hamilton v. Stamas Yachts 496 So. 2d 230 (Fla. 1st DCA 1986); King Motor

Company v. Pollack, 409 So. 2d 160 (Fla. 1st DCA 1982); Lake v. Irwin Yacht & Marine Corp., 398 So. 2d 902 (Fla. 1st DCA 1981).

Effective October 1, 2003, the Act provides that an occupational disease is not compensable unless the nature of employment where the disease was contracted is the major contributing cause of the disease. Fla. Stat. §440.151(1)(a) (2003). Major contributing cause must be shown by medical evidence only, as demonstrated by physical examination findings and diagnostic testing. Id. Major contributing cause is statutorily defined as the cause which is more than 50% responsible for the injury as compared to all other causes combined.

An occupational disease differs from an exposure injury. Although these two doctrines occasionally overlap and exposure to repeated trauma could possibly also be an occupational disease, these two concepts are not identical. Exposure and repetitive trauma are compensable only if the injured employee can show all of the following: (1) prolonged exposure; (2) the cumulative effect of which is injury or aggravation of a pre-existing condition; (3) that he has been subjected to a hazard greater than that to which the general public is exposed; and (4) for a pre-existing condition to be compensable, it must be exacerbated by some non-routine, job-related physical exertion or by some form of physical trauma. Festa v. Teleflex, Inc., 382 So. 2d 122 (Fla. 1st DCA 1980); University of Florida v. Massie, 602 So. 2d 516 (Fla. 1992).

5. What, if any, injuries or claims are excluded?

Compensation is not payable for injuries primarily caused by intoxication of the employee under the influence of drugs, barbiturates or other stimulants not prescribed by a physician or by the willful intention of the employee to injure or kill himself, herself, or another. Fla. Stat. §440.09(3) (2003). In addition, an employee is not entitled to compensation or benefits under the Act if any Judge of Compensation Claims, Administrative Law Judge, court, or jury convened in Florida determines that the employee has knowingly and intentionally engaged in any of the acts described in Section 440.105, Florida Statutes (pertaining to fraudulent acts), or any criminal act for the purpose of securing workers' compensation benefits. Fla. Stat. §440.09(4) (2003). Providing a false social security number for the purpose of obtaining benefits falls under this section and bars the employee from compensation, even if they are an "illegal alien" entitled to benefits. See Arreola v. Administrative Concepts, 17 So. 3d 792 (Fla. 1st DCA 2009).

The Act also excludes the following injuries: (1) those arising from recreational and social activities, unless such activities are expressly required by the employer and produce a substantial, direct benefit to the employer beyond improvement in the employee's health and morale that is common to all kinds of recreation and social life; (2) those suffered while going to, or coming from work, whether or not the employer provided such transportation if such means of transportation was available for the exclusive personal use by the employee, unless the employee was engaged in a special errand or mission for the employer; (3) those sustained while

deviating from the course of employment, including leaving the employer's premises, unless such deviation is expressly approved by the employer, or unless such deviation or act is in response to an emergency and designed to save life or property; and (4) those caused by a subsequent intervening accident arising from an outside agency which are the direct and natural consequence of the original injury, unless suffered while traveling to or from a health care provider for the purpose of receiving remedial treatment for a compensable injury. Fla. Stat. §440.092 (1)-(3), (5) (2001). However, an employee that is required to travel in connection with his or her employment, who suffers an injury while traveling, is eligible for workers' compensation benefits under the Act only if the injury arises out of and in the course and scope of employment while he or she is actively engaged in the duties of employment. Fla. Stat. §440.092(4) (2001). Note that the Florida courts have historically applied this section liberally in favor of awarding benefits to "traveling employees."

Any subsequent injuries the employee suffers as a result of an original injury are not compensable unless the original injury is the major contributing cause of this subsequent injury. Fla. Stat. §440.09(1)(a) (2003). If an injury arising out of employment combines with a pre-existing disease or condition to cause or prolong disability or the need for treatment, compensation and/or benefits are only payable as long as the injury arising out of employment is and remains more than 50% responsible for the injury as compared to all other causes combined and thereafter remains the major contributing cause of the disability or need for treatment. Fla. Stat. §440.09(1)(b) (2003).

6. What psychiatric claims or treatments are compensable?

A mental or nervous injury due to stress, fright or excitement only is not an injury by accident arising out of the employment. Fla. Stat. §440.093(1) (2003). In order for benefits to be payable for mental or nervous injuries, an accompanying "physical injury" requiring medical treatment, must also be present. *Id.* A mere touching cannot suffice as the physical injury necessary to make a mental or nervous injury compensable. However, the fact that the physical injury is relatively minor will not necessarily bar compensation for such an injury. City of Holmes Beach v. Grace, 598 So. 2d 71 (Fla. 1992).

Mental or nervous injuries occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence by a psychiatrist. Fla. Stat. §440.093(2) (2003). The compensable physical injury must be, and remain, the major contributing cause of the mental or nervous condition. *Id.* In addition, compensation and medical treatment are not due and owing for depression resulting from the employee being out of work or losing employment opportunities, resulting from a pre-existing mental, emotional or psychological condition, or due to pain or other subjective complaints which cannot be substantiated by objective medical findings. *Id.*

For accidents occurring after October 1, 2003, temporary total disability benefits are not payable for disability caused by a compensable mental injury for more than six months after the claimant reaches maximum medical improvement for the physical injury. Fla. Stat. §440.093(3) (2003).

7. What are the applicable statutes of limitations?

The right to any benefits, medical or indemnity, under the Act is time barred unless a claim is filed within two years after the date on which the employee knew or should have known that the injury or death arose out of work performed in the course and scope of employment. Fla. Stat. §440.19(1) (1997). Payment of any medical or indemnity benefits shall toll the limitations period for one year from the date of such payment. Fla. Stat. §440.19(2) (1997).

The filing of a Petition for Benefits tolls the statute of limitations unless said petition fails to meet the specificity requirements in Section 440.192, Florida Statutes. Fla. Stat. §440.19(3) (1997). The employer/carrier must raise the statute of limitations defense in its initial responsive pleading or the defense is waived. Fla. Stat. §440.19(4) (1997). Any claim asserted via a Petition for Benefits, even a claim for just attorney's fees and costs, will toll the statute of limitations. Longley v. Miami-Dade County School Board, 82 So. 3d 1098 (Fla. 1st DCA 2012); Black v. Tomoka State Park, 106 So.3d 973 (Fla. 1st DCA 2013).

8. What are the reporting and notice requirements for those alleging an injury?

An employee suffering an injury arising out of his or her employment must advise his or her employer of said injury within 30 days after the date, or the initial manifestation, of the injury. Fla. Stat. §440.185(1) (2004).

The 30-day notice requirement may be excused if the employer had actual knowledge of the injury or if the cause of the injury could not be identified without a medical opinion and the employer was advised within 30 days after the medical opinion was obtained. Fla. Stat. §440.185(1)(a)-(b) (2004). The requirement may also be waived if the employer failed to notify its employees of their rights to workers' compensation benefits. Fla. Stat. §440.185(1)(c) (2004). Finally, "exceptional circumstances," outside the scope of the previously described exceptions, may also justify a failure to timely report an injury. Fla. Stat. §440.185(1)(d) (2004).

Within 7 days after actual knowledge of an employee's injury or death, the employer shall report said injury or death to its carrier. Fla. Stat. §440.185(2) (2004). If an injury results in death, the employer is also required to notify the Department of Financial Services, by telephone or telegraph, within 24 hours. Fla. Admin. Code r. 69L-56.401.

9. Describe available defenses available based on an employee's conduct:

A. Self-inflicted injury.

These claims are generally barred. Fla. Stat. §440.09(3) (2003). However, the Act requires a willful intent to injure oneself (or another) in order to bar a claim. Fla. Stat. §440.09(3) (2003). An injury is deemed to be intentional and willful if the employee's actions are committed with premeditation and deliberation and the employee reasonably expected that his acts would cause injury to himself or another. 391st Bomb Group v. Robbins, 654 So. 2d 1200 (Fla. 1st DCA 1995); see also Restoration Technology v. Reyes, 936 So. 2d 1187 (Fla. 1st DCA 2006).

B. Willful misconduct, "horseplay" etc.

The defense of "horseplay" focuses on the concept of deviation from employment. The classification of horseplay as a substantial deviation precluding compensability depends on: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (whether it involved an abandonment of employment duties); (3) the extent to which similar conduct had either been forbidden or had become an accepted or tolerated practice; and (4) the extent to which such horseplay may have been expected or reasonably foreseeable in the employment. Times Publishing Co. v. Walters, 382 So. 2d 720 (Fla. 1st DCA 1980). In addition, when horseplay occurs during a lull at work, this is a factor of substantial importance, since the deviation does not involve the abandonment of any work duties and may actually be an expected consequence of a waiting period. Id. To render an injury not compensable, a deviation must amount to a wholesale abandonment of the employee's work. Boyd v. Florida Mattress Factory, Inc., 128 So. 2d 881 (Fla. 1961).

C. Injuries or occupational diseases involving drugs and/or alcohol.

Injuries caused primarily by intoxication or drugs, barbiturates or other stimulants not prescribed by a physician are barred. Fla. Stat. §440.09(3) (2003). If, at the time of injury, the employee has a blood alcohol level of 0.08 or more grams per 100 milliliters of blood, pursuant to Section 316.193, Florida Statutes, or a positive confirmation of a drug, it is presumed that the injury was occasioned primarily by the intoxication of, or by the influence of, the drug upon the employee. Fla. Stat. §440.09(7)(b) (2003). If the employee refuses to submit to a drug test, it is presumed that the injury was caused primarily by the influence of drugs, absent clear and convincing evidence to the contrary. Fla. Stat. §440.09(7)(c) (2003).

D. Aggressor Doctrine / Fight Cases.

Injuries resulting from fights at work are possibly compensable, depending upon the connection between the fight and the employment. However, the "aggressor" in a physical confrontation is generally denied compensation. The "aggressor" is the individual who first made an assault upon

another person with the intention to injure or kill. Florida Forest and Park Service v. Strickland, 18 So. 2d 251 (Fla. 1944).

10. What, if any, penalties or remedies are available in claims involving fraud?

Pursuant to Section 440.09(4), Florida Statutes (2003), an employee forfeits his right to workers' compensation benefits if it is determined by a Judge of Compensation Claims, Administrative Law Judge, court or jury that the employee knowingly or intentionally engaged in any of the acts described in Section 440.105, Florida Statutes, for the purpose of securing workers' compensation benefits. Section 440.105, Florida Statutes, describes the prohibited activities and includes such things as knowingly making false, fraudulent or misleading statements. In order to establish the fraud defense, it must be shown not only that the employee violated Section 440.105, but that the violation was done for the purpose of securing workers' compensation benefits. Matrix Employee Leasing v. Hernandez, 975 So. 2d 1217 (Fla. 1st DCA 2008).

The statute imposes an affirmative obligation on all parties to send a report of, or information pertaining to, any suspected fraudulent activity to the Division of Insurance Fraud, Bureau of Workers' Compensation Fraud. Fla. Stat. §440.105(1)(a) (2003). In absence of fraud or bad faith, an individual is not subject to civil suit for slander or defamation for the reporting of fraudulent activities pursuant to Section 440.105(1)(b), Florida Statutes. However, a person who knowingly and falsely reports workers' compensation fraud or who retaliates against a person making such a report commits a third-degree felony. Fla. Stat. §440.105(1) (2003).

11. Is there any defense for falsification of employment records regarding medical history?

Section 440.15(5)(a), Florida Statutes (2012) codifies this defense which is more commonly known as the "Martin v. Carpenter defense," having been first established by the case of Martin Co. v. Carpenter, 132 So. 2d 400 (Fla. 1961). A false representation as to one's physical condition or health made by an employee in procuring employment will preclude workers' compensation benefits for an otherwise compensable injury if the following requirements are met: (1) there is evidence of a causal relationship between the injury and the false representation; (2) there is knowledge by the employee that the representation is false; (3) there is reliance by the employer on the false representation; and (4) said reliance results in consequent damage to the employer. Id.

Of note, if an employee does not answer questions on an application or medical questionnaire, those omissions are not deemed to be representations or misrepresentations. An employer has an obligation to obtain answers to the questions and exercise some diligence in investigating a misrepresentation or omission. If the employer does not do so, the employer cannot claim reliance on said omissions regarding same. Landers v. Medical Personnel Pool, 647 So. 2d 173 (Fla. 1st DCA 1994).

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

The Act provides that recreational or social activities are not compensable unless such activities are expressly required by the employer and produce a substantial, direct benefit to the employer beyond the improvement in employee health and morale that is common to all kinds of recreation and social life. Fla. Stat. §440.092(1) (2001).

13. Are injuries by co-employees compensable?

Injuries by co-employees are compensable if they arise out of and in the course of employment. To preclude compensability there must be a complete deviation from the job duties. Boyd v. Florida Mattress Factory, Inc., 128 So.2d 881 (Fla. 1961). The deviation from the job duties must be a wholesale abandonment and more than momentary fooling around by co-employees. Dunlevy v. Seminole County Dep't of Public Safety, 792 So.2d 592 (Fla. 1st DCA 2001).

14. Are acts by third parties unrelated to work, but committed on the premises, compensable (e.g. "irate paramour" claims)?

Acts by third parties unrelated to work but committed on the employer's premises are generally not compensable so long as the work-place is merely the fortuitous site of the personal assault, the altercation is purely private in origin, and the employment does not otherwise impact on the altercation, even if the employee is not the aggressor. However, if the employment is a contributing factor, the injury could be compensable. Carnegie v. Pan American Linen, 476 So. 2d 311 (Fla. 1st DCA 1985).

BENEFITS

15. What criterion is used for calculating the average weekly wage?

If the employee has worked in the employment in which he or she was working on the date of accident, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the accident, his or her average weekly wage will be 1/13 of the total wages earned during the 13 weeks. Fla. Stat. §440.14(1)(a) (2004). The 13 weeks to be used in calculating the average weekly wage are the 13 calendar weeks before the accident, excluding the week during which the accident occurred. Id. "Substantially the whole of 13 weeks" is defined as at least 75% of the employee's total customary hours of employment within such period considered as a whole. Id. Please note that for accident dates occurring on or before September 30, 2003, the 13-week period used to determine the average weekly wage was the consecutive period of 91 days prior to the injury and the term "substantially the whole of 13

weeks" was defined as at least 90% of the total customary full time hours of employment within that time period. Fla. Stat. §440.14(1)(a) (1997).

If an employee did not work during substantially the whole of the 13 weeks prior to the date of accident, the average weekly wage is calculated pursuant to the earnings of a similar employee in the same employment who has worked substantially the whole of such 13 weeks. Fla. Stat. §440.14(1)(b) (2004). A similar employee is considered as one who does the same type of work as the injured worker, works in the same place and preferably on the same crew as the injured worker, receives pay at the same rate as the injured worker, and works substantially the same hours as the injured worker. Coleman v. Burnup & Sims, Inc., 95 So. 2d 895 (Fla. 1957); Hilton v. Coral Springs Honda, 572 So. 2d 7 (Fla. 1st DCA 1990). If there is no similar employee available, the average weekly wage is based upon either the contract rate of pay or the injured worker's actual earnings. Fla. Stat. §440.14(1)(d) (2004).

Outside or concurrent employment is included in the calculation of the average weekly wage so long as the wages earned in such employment are reported for tax purposes and the employee was subject to workers' compensation coverage and benefits at the concurrent employment. Fla. Stat. §440.02(28) (2004); Fla. Stat. §440.14 (2004); and Vegas v. Globe Sec., 627 So. 2d 76 (Fla. 1st DCA 1993).

The average weekly wage is calculated from wages earned and reported for federal income tax purposes on the job where the employee was injured and any other concurrent employment where the employee is covered by workers' compensation coverage. Fla. Stat. §440.02(28) (2004). Of note, a claimant's unreported income to the I.R.S. did not constitute "wages" for the purpose of calculating the claimant's AWW under the Act. Fast Tract Framing, Inc. v. Caraballo, 994 So. 2d 355 (Fla. 1st DCA 2008).

Also included in the average weekly wage is the reasonable value of housing, if provided by the employer and such housing is the permanent and year-round residence of the employee, gratuities to the extent reported to the employer in writing as taxable income, and employer contributions for health insurance for the employee and his or her dependents. Vegas v. Globe Sec., 627 So. 2d 76 (Fla. 1st DCA 1993). However, if employer contributions for housing or health insurance are continued after the time of injury, the contributions are not considered "wages" for the purpose of calculating average weekly wage. Id.

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

Temporary total disability benefits are paid at a rate of 66 2/3 percent of the employee's average weekly wage, not to exceed the maximum amount or time limits for the year in which the accident occurred. Fla. Stat. §440.15(2)(a) (2012). The minimum rate is \$20.00, unless an employee's wages are less than \$20.00, in which case the employee's full weekly wages are paid.

Fla. Stat. §440.12(2) (2012). Effective January 1, 2021, the maximum compensation rate is \$1,011.00 per week. (A list of the maximum and minimum compensation rates by year can be found at http://www.myfloridacfo.com/division/wc/insurer/bma_rates.htm.) For accident dates occurring on or after January 1, 1994, the maximum period of temporary disability benefits payable is arguably 104 weeks. Fla. Stat. §440.15(2) (2012).¹

An employee who has suffered a catastrophic work-related injury (defined as the loss of an arm, leg, hand, or foot, has been rendered a paraplegic, paraparetic, quadriplegic, or quadriparetic, or has lost the sight of both eyes) shall be paid temporary total disability benefits at the rate of 80% of his or her average weekly wage. Fla. Stat. §440.15(2)(b) (2012). This increased compensation must not exceed a period of 6 months from the date of accident. Id. In addition, these benefits are not due and owing if the employee is eligible for, entitled to, or collecting permanent total disability benefits. Id.

Temporary partial disability benefits are paid at the rate of 80% of the difference between 80% of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn post-injury, as compared weekly. Fla. Stat. §440.15(4)(a) (2012). Weekly temporary partial disability benefits may not exceed an amount equal to 66 2/3 percent of the employee's average weekly wage at the time of the accident and are also subject to the maximum compensation rate set forth above. Id.

17. How long does the employer/carrier have to begin temporary benefits from the date disability begins?

The employer/carrier must issue the first installment of compensation to the employee "no later than the 14th calendar day after the employer receives notice of the injury or death, when disability is immediate and continuous for 8 calendar days or more after the injury." Fla. Stat. §440.20(2) (2013). If the first 7 days of disability are not consecutive, the first installment of compensation is due on the 6th day after the first 8 calendar days of disability. Id.

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out ____ days before recovering benefits for the first ____ days)?

No compensation is allowed for the first 7 days of disability. Fla. Stat. §440.12(1) (2012). The employee must be out of work due to his or her disability for more than 21 days before he or she can recover compensation for the first 7 days of disability. Id. For example, if an employee is out of work due to his injury for 3 days, he receives no compensation for same. If he is out of work for 16 days, he can collect compensation benefits only for the 8th through the 16th day, a total

¹ The Florida Supreme Court in Westphal v. City of St. Petersburg, 194 So.3d 311 (Fla. 2016) declared the statutory limitation unconstitutional and in turn revived the portion of the statute prior to the 1994 amendments, which provided for temporary indemnity benefits up to 260 weeks..

of 9 days. Finally, if the employee is out of work for 22 days, compensation is due for the entire period of time that he was out of work (from the date of accident through the 22nd day).

19. What is the standard/procedure for terminating temporary benefits? When are temporary benefits most often terminated?

Any time that an employee's compensation benefits are suspended or changed, a carrier must file a Notice of Action/Change (Form DWC-4) with the Division, stating the reasons for the suspension or change of benefits.

Temporary total disability benefits are most frequently suspended when an employee is released to return to work or is placed at maximum medical improvement by his or her treating physician.

Even if the employee is assigned work restrictions by his or her treating physician, if he or she is able to return to work within said restrictions, temporary compensation benefits may also be suspended, so long as the employee continues to earn 80% or more of his or her average weekly wage. Fla. Stat. §440.15(4) (2012). In addition, if an employee is terminated from post-injury employment based on the employee's own misconduct, temporary partial disability benefits are not payable and may be suspended. Fla. Stat. §440.15(4)(e) (2004). Further, if an employee refuses suitable employment that is offered to him, temporary compensation benefits are not payable and may be suspended during the continuance of such refusal unless a Judge of Compensation Claims determines that such refusal is justifiable. Fla. Stat. §440.15(6) (2012).

Temporary disability benefits can also be suspended if the carrier has paid out the maximum weeks of benefits. Temporary disability benefits, whether for total or partial disability, shall not be paid for a period of more than 104 weeks. Fla. Stat. §440.15(2)(a) (2012).²

20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?

In Florida, workers assigned a permanent impairment rating for their work-related injuries are entitled to impairment benefits. An employee's entitlement to impairment benefits begins the day after the employee reaches maximum medical improvement or the expiration of temporary benefits, whichever occurs earlier. Fla. Stat. §440.15(3)(c) (2012). Therefore, an employee's temporary disability benefits may be credited toward the employee's impairment benefits when the employee continues to receive temporary disability benefits after being placed at maximum medical improvement.

² As noted above, this statutory limitation has been deemed unconstitutional and the time period has been increased to 260 weeks, in regards to TTD benefits. See Westphal v. City of St. Petersburg, 194 So.3d 311 (Fla. 2016).

21. What disfigurement benefits are available and how are they calculated?

All permanent impairment benefits are calculated in the same manner, whether for disfigurement or other permanent disabilities. The method of calculation of impairment benefits under the Act is set forth in the paragraph below.

22. How are permanent partial disability/impairment benefits calculated, including the minimum and maximum rates?

All impairment benefits are based on the impairment ratings set forth in the Florida Impairment Guidelines, and the amount of benefits an employee is entitled to is based on the impairment rating assigned by the employee's treating physician. Impairment ratings must be based on objective abnormalities. Fla. Stat. §440.15(3) (2012).

Impairment benefits are paid biweekly at a rate of 75% of the employee's average weekly temporary total disability benefits, not to exceed the maximum weekly benefit. However, such benefits shall be reduced by 50% for each week in which the employee has earned income equal to or in excess of the employee's average weekly wage. Fla. Stat. §440.15(3)(c) (2012). If the employee makes less than the average weekly wage, there does not have to be a causal connection between the injury and the reduced earnings; the employer is required to pay at the 75% rate. See Seminole County Government v. Baumgardner, 28 So. 3d 145 (Fla. 1st DCA 2010). The employee is paid two weeks of impairment benefits for each percentage point of impairment from 1% up to and including 10%. Fla. Stat. §440.15(3)(g)1. (2012). For each percentage point of impairment from 11% up to and including 15%, the employee receives 3 weeks of benefits. Fla. Stat. §440.15(3)(g)2. (2013). For each percentage point of impairment from 16% up to and including 20%, the employee receives 4 weeks of benefits. Fla. Stat. §440.15(3)(g)3. (2012). Finally, for each percentage of impairment from 21% or higher, the employee is paid 6 weeks of benefits. Fla. Stat. §440.15(3)(g)4. (2012).

Please note that for accidents occurring between January 1, 1994 through September 30, 2003, impairment benefits are calculated in a different manner. For these accident dates, the weekly impairment benefit is an amount equal to 50% of the employee's average weekly temporary total disability benefit, not to exceed the maximum benefit. Fla. Stat. §440.15(3)(a) (2002). In addition, an injured worker is entitled to 3 weeks of impairment benefits for each percentage point of impairment. Id.

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

The carrier may require the employee to undergo a reemployment assessment as it considers appropriate. Fla. Stat. §440.491(4)(a) (2011). However, the carrier is encouraged to obtain a reemployment assessment if it determines that the employee has a risk of remaining unemployed or if the case involves a catastrophic or serious injury. Id. The carrier shall

authorize only a qualified rehabilitation provider to provide the reemployment assessment. Fla. Stat. §440.491(4)(b) (2011). The rehabilitation provider shall conduct its assessment and issue a report to the carrier, the employee, and the Department of Education within 30 days after the time such assessment is complete. Id. If the rehabilitation provider recommends that the employee receive medical care coordination or reemployment services, the carrier shall advise the employee of the recommendation and determine whether the employee wishes to receive such services. Fla. Stat. §440.491(4)(c) (2011). The employee shall have 15 days after the date of receipt of the recommendation in which to agree to accept such services. Id. If the employee chooses to receive these services, the carrier may refer the employee to a rehabilitation provider for such coordination and services within 15 days of receipt of the assessment report or notice of the employee's election, whichever is later. Id.

Once the carrier has assigned a case to a qualified rehabilitation provider for medical care coordination or reemployment services, the provider shall develop a reemployment plan and submit the plan to the carrier and the employee for approval. Fla. Stat. §440.491(5)(a) (2011). If the rehabilitation provider concludes that training and education are necessary to return the employee to suitable gainful employment, or if the employee has not returned to suitable gainful employment within 180 days after referral for reemployment services or receives \$2,500.00 in reemployment services, whichever comes first, the carrier must discontinue reemployment services and refer the employee to the Department of Education for a vocational evaluation. Fla. Stat. §440.491(5)(b) (2011).

Upon referral of an injured employee by the carrier or upon request of the employee, the Department of Education shall conduct a training and education screening to determine whether it should refer the employee for a vocational evaluation and, if appropriate, approve training and education or other vocational services for the employee. Fla. Stat. §440.491(6)(a) (2011). If the Department of Education, Division of Workers' Compensation, approves retraining for an injured employee, the carrier must pay temporary total disability benefits to the employee for 26 weeks. Fla. Stat. §440.491(6)(b) (2011). This period can be extended for an additional 26 weeks if such extended period of time is determined to be necessary and proper by a Judge of Compensation Claims. Id. Of note, an employee is not entitled to these benefits beyond the 104-week temporary benefit limitation set forth in Section 440.15(2), Florida Statutes. However, an employee that refuses to accept training or education that is recommended by the vocational evaluator and considered necessary by the Department will forfeit any additional training and education benefits and any payment for lost wages under this section. Fla. Stat. §440.491(6)(b) (2011). Id. For dates of accident prior to October 1, 2003, rehabilitation temporary total disability benefits under Section 440.491, Florida Statutes, were payable in addition to the 104 weeks of temporary benefit entitlement. See Bober v. Bush Air Conditioning, 826 So. 2d 487 (Fla. 1st DCA 2002).

24. How are permanent total disability benefits calculated, including the minimum and maximum rates? Under what circumstances are permanent total disability benefits due and owing?

Permanent total benefits are calculated at 66 2/3 percent of the employee's average weekly wage during the term of total disability. Fla. Stat. §440.15(1)(a) (2012). No permanent total disability benefits shall be payable if the employee is engaged in, or is physically capable of engaging in, at least sedentary employment. Id.

An injured employee is presumed to be permanently and totally disabled if any of the following conditions are present: (1) a spinal cord injury involving severe paralysis of an arm, leg, or the trunk; (2) amputation of an arm, hand, foot or leg involving the effective loss of use of that appendage; (3) severe brain or closed head injury as evidenced by severe motor or sensory disturbance, severe communication disturbances, severe complex integrated disturbances of cerebral function, severe episodic neurological disorders, or other severe brain and closed head injury conditions at least as severe in nature as the prior listed conditions; (4) second degree or third degree burns of 25% or more of the total body surface or third degree burns of 5% or more to the face and hands; and (5) total or industrial blindness. Fla. Stat. §440.15(1)(b) (2012). This presumption can be overcome if the employer/carrier can show that the employee is physically capable of engaging in at least sedentary employment within a 50-mile radius of the employee's residence. Id. In all other cases, in order to obtain permanent total disability benefits, an employee must establish that he or she is not able to engage in at least sedentary employment within a 50-mile radius of the employee's residence due to his or her physical limitation. Id.

Entitlement to permanent total disability benefits ceases when an employee reaches age 75, unless the employee is not eligible for Social Security benefits because the employee's compensable condition has prevented the employee from working sufficient quarters to be eligible for such benefits. Id. If the employee is injured on or after the age of 70, benefits are payable for permanent and total disability for no more than a period of 5 years following determination of entitlement to same. Id. Of note, prior to the 2003 amendments, a permanently and totally disabled employee was entitled to permanent total disability benefits for life. Fla. Stat. §440.15(1) (1997).

The employee also receives supplemental compensation benefits equal to 3% of the weekly compensation rate, multiplied by the number of calendar years since the date of injury. Fla. Stat. §440.15(1)(f) (2012). Please note that, prior to the 2003 amendments, these supplemental benefits were payable at a rate of 5% per annum. Fla. Stat. §440.15(1)(f) (1997).

The weekly compensation payable and the supplemental benefits payable, when combined, may not exceed the maximum weekly compensation rate in effect at the time of payment. Id. Supplemental benefits shall not be paid or payable after the employee attains the age 62, regardless of whether the employee has applied for, or is eligible to apply for, Social Security disability or Social Security retirement benefits, unless the employee is not eligible for Social Security benefits because the employee's compensable injury prevented him from working sufficient quarters to be eligible for such benefits. Id.

25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

Actual funeral expenses up to \$7,500.00 are payable. Fla. Stat. §440.16(1)(a) (2004).

B. Dependency claims.

Dependency benefits are payable to spouses, children, parents, brothers, sisters, and grandchildren, if the individual received substantial and regular support from the deceased. A child must be under the age of 18 (unless the child is a student and then dependency ends at age 22) and includes a posthumous child, a child legally adopted prior to the employee's injury, a step-child, and an acknowledged illegitimate child. Benefits are payable on a scheduled basis depending on the dependent status of the beneficiary at a rate of two-thirds of the employee's average weekly wage, not to exceed \$150,000.00. Fla. Stat. §440.16 (2004).

26. What is the criteria for establishing a "second injury" fund recovery?

Florida's second injury fund is known as the Special Disability Trust Fund. However, entitlement to any potential recovery from the Special Disability Trust Fund was repealed prospectively by the Florida Legislature with the January, 1998 amendments to Chapter 440.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

Claims for modification of orders must be made within 2 years after the date of the last payment of compensation pursuant to any order or within 2 years after the date copies of an order rejecting a claim are mailed. A claim for modification can only be made if there is a change in the employee's condition or when there is a mistake in the judge's determination of the facts. Fla. Stat. §440.28 (1994).

28. What situation would place responsibility on the employer to pay an employee's attorney fees? How are such fees calculated?

Normally, an employee is responsible for the payment of his or her own attorney's fees. However, there are several exceptions to this rule. An employer/carrier may become responsible for the payment of a reasonable attorney's fee if a) the claimant successfully asserts a claim for medical benefits only and the claimant has not filed or is not entitled to file a claim for disability, permanent impairment, wage-loss, or death benefits arising from the same accident; b) if the employer/carrier denies that an accident occurred and the claimant prevails on the issue of compensability; c) if the employer/carrier files a response to a petition for benefits denying benefits and the claimant hires an attorney who successfully obtains the benefits requested; or d) if the claimant prevails in a proceeding to enforce or modify an order.

Fla. Stat. §440.34 (2009). Effective July 1, 2002, an attorney's fee does not attach until 30 days after the employer/carrier receives a petition for benefits, regardless of the date the benefits were originally requested. Therefore, as long as the employer/carrier provides the benefits requested in a petition within 30 days, it will not become responsible for the payment of attorney's fees. Fla. Stat. §440.34(3) (2009).

If there is no pending petition for benefits and an employer/carrier takes the deposition of the claimant, the employer/carrier will be responsible for a reasonable fee for the claimant's attorney's preparation for, and attendance of, the deposition. Fla. Stat. §440.30 (1991).

The law allowing for the entitlement to an attorney's fee has not changed significantly since 1994. However, in October of 2003, the legislature provided significant changes to this section affecting the amount of attorney's fees allowed. Pursuant to these amendments, a claimant's attorney is entitled to recover a fee for only the benefits he or she has secured on behalf of the claimant. The fee is based on a statutory fee schedule (the statutory fee schedule has since been questioned by the Florida Supreme Court as noted below), with one exception, and must be approved by the Judge of Compensation Claims. Fla. Stat. §440.34(1), (2) (2009). The exception to this rule applies when the case involves a petition for medical benefits only. In such a case, the Judge of Compensation Claims may award, as an alternative to the scheduled fee, an attorney's fee not to exceed \$1,500.00 based on a maximum hourly rate of \$150.00 per hour. Such an alternative fee may only be awarded once per accident. Fla. Stat. §440.34(7) (2009).

In April of 2016, the Florida Supreme Court addressed the issue of the calculation of attorney's fees under Section 440.34 in Castellanos v. Next Door Co., 192 So.3d 431 (Fla. 2016). In Castellanos, the Florida Supreme Court found the mandatory fee schedule in § 440.34, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, unconstitutional under both the Florida and United States Constitutions as a violation of due process. In doing so, the Court revived the immediate predecessor statute, which was addressed in Murray v. Mariner Health, 994 So.2d 1051 (Fla. 2008). Id. at 448. With Murray as a guide, courts must now allow a claimant to present evidence to show that application of the statutory fee schedule will result in an unreasonable fee. Id. at 448-49. In Murray, the Court explained that as § 440.34 does not define a "reasonable fee", same is to be determined based on the factors set forth in Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454, 458 (Fla. 1968) which include the following: (1) the time and labor required; (2) the novelty and difficulty of the questions involved in the case; (3) the skilled required to properly conduct the case; (4) whether acceptance of the case will preclude the attorney from appearing in other cases; (5) the customary charge for similar services; and (6) the amount involved in controversy.

An additional change made in 2003 involves offers to settle. If the employer/carrier offers to settle the issues raised in a petition for benefits, the Judge of Compensation Claims can only award the claimant's attorney a fee based on the benefits secured in excess of the benefits

referenced in the offer to settle. Such offer must be made in writing to the claimant's attorney at least 30 days prior to the hearing date. Fla. Stat. §440.34(2) (2009).

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The workers' compensation liability of an employer is exclusive and replaces all other liability of such employer to any third-party tortfeasor and to the employee, legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. Fla. Stat. §440.11 (2003).

Effective October 1, 2003, the legislature amended the Act to extend immunity to subcontractors from suits brought by the employees of the general contractor or by employees of another subcontractor. Such immunity applies only if the general contractor provided workers' compensation insurance on behalf of the subcontractor or the subcontractor purchased its own workers' compensation insurance and the injury was not the result of the subcontractor's gross negligence. Fla. Stat. §440.10(1)(e) (2004).

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

There are exceptions to the employer's immunity for independent intentional torts and for failure to secure workers' compensation insurance. Fla. Stat. §440.11(1) (2003). Prior to October 1, 2003, an employee was found to have met the burden of showing that the employer's actions constituted an intentional tort if objective evidence established that the injury was substantially certain to occur. See R.L. Haines Const., LLC v. Santamaria, 161 So.3d 528 (Fla. 5th DCA 2014). However, effective October 1, 2003, the legislature amended the Act to provide that the employee has the burden of proving by clear and convincing evidence that (1) the employer intended to injure the employee; or (2) that the employer engaged in conduct that the employer knew, based on prior similar accidents or an explicit warning specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer concealed or misrepresented the danger. Fla. Stat. §440.11(1)(b) (2003). This is a much stricter standard and the law now requires the employee to prove that the employer intended to cause an injury either by action or inaction. If intent cannot be shown, the employee can only establish an intentional tort by showing that the employer knew that an injury was virtually certain to occur, but deliberately concealed or misled the employee about the danger.

30. Are there any penalties against the employer for unsafe working conditions?

The statute regarding penalties for unsafe working conditions was repealed by Laws 1993, c.93-415, 109, effective January 1, 1994. Fla. Stat. §440.56(6) (1994).

31. What is the penalty, if any, for an injured minor?

There is no "penalty" for an injured minor unless he or she was employed in violation of Florida's Child Labor laws. In such a case, the employer will be responsible for additional compensation as determined by the Judge of Compensation Claims. However, the total compensation payable cannot exceed double the amount otherwise payable. The increased amount is payable by the employer alone. Fla. Stat. §440.54 (1991).

32. What is the potential exposure for "bad faith" claims handling?

For accidents occurring prior to October 1, 1989, an employer/carrier owed attorney's fees if it was determined that the employer or carrier handled the claim in bad faith and such bad faith caused an economic loss to the injured employee. However, Florida no longer provides a separate cause of action for bad faith claims handling in workers' compensation cases. That being said, the Supreme Court of Florida has held that adjusters and carriers are not completely immune from independent tort actions when their conduct rises to the level of an intentional tort. The court recognized that a statutory bad faith cause of action is not available in workers' compensation cases. However, the court found that carriers could be held liable for the intentional infliction of emotional distress if the adjuster's conduct goes beyond simple bad faith and rises to the level of intentional conduct that is outrageous. See Aguilera v. Inservices, Inc., 905 So. 2d 84 (Fla. 2005).

33. What is the exposure for terminating an employee who has been injured?

An employer may not discharge, threaten to discharge, intimidate or coerce an employee for filing a valid claim for compensation or for attempting to claim compensation. Fla. Stat. §440.205 (1991). Violation of this section creates a third party civil cause of action for wrongful termination.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. An employee has the sole right to sue third parties within the first 12 months after the industrial accident. During the second year, both the employee and the employer have the right to sue a third-party tortfeasor directly. However, if the carrier provides 30 days notice to the

employee of its intent to bring suit, the employee is barred from bringing its own separate action. If the employer fails to file suit during the second year, the right of action reverts solely to the employee. The employee continues to have the sole right to bring suit until the applicable statute of limitations expires. Fla. Stat. §440.39(4)(a), (b) (1997).

35. Can co-employees be sued for work-related injuries?

Generally, employees enjoy the same immunity as the employer as long as the employee is acting in furtherance of the employer's business and the employee is entitled to receive workers' compensation benefits. However, there are several exceptions to this rule. Immunity does not apply if the co-worker's actions constitute willful and wanton disregard, unprovoked physical aggression, or gross negligence. Further, immunity does not apply to employees of the same employer if the employee is assigned primarily to unrelated works. Unfortunately, what is considered an "unrelated work" has yet to be defined and such a determination is made on a case by case basis. Fla. Stat. §440.11(1) (2003).

36. Is subrogation available?

Yes. An insurer is subrogated to the rights of the employee and his or her dependents against third party tortfeasors to the extent of the amount of compensation and medical benefits paid or to be paid. The insurer may file in the third party suit a notice of payment of compensation and medical benefits to the employee. This notice constitutes a lien upon any judgment or settlement recovered to the extent that the court may determine to be its pro rata share for compensation and medical benefits paid or to be paid. The subrogation right does not apply to payment of vocational benefits, attorney's fees or miscellaneous claims expenses such as investigation or the use of experts. Fla. Stat. §440.39(2),(3)(a) (1997). See also Employer's Casualty Insurance Company v. Manfredo, 542 So. 2d 1365 (Fla. 3rd DCA 1989), *aff'd*, 560 So. 2d 1162 (Fla. 1990).

MEDICALS

37. Is there a time limit for medical bills to be paid and are penalties available for late payment?

For medical services provided after January 1, 2004, all medical, hospital, pharmacy or dental bills properly submitted by the provider, except for bills that are disallowed or denied by the carrier, must be paid within 45 calendar days after the carrier's receipt of the bill. Penalties are imposed for late payments that fall below a minimum of 95% timely performance standard. For late payments that fall below the 95% timely performance standard, a \$25.00 per bill penalty is assessed. For late payments that fall below the 90% timely performance standard, a \$50.00 per bill penalty is assessed. Fla. Stat. §440.20(6)(b) (2011). Providers must enforce the payment of

unpaid medical bills. Claimants do not have standing to seek payment of same. See J.D.B. Brother's v. Miranda, 25 So. 3d 1271 (Fla. 1st DCA 2010).

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

Subject to certain limitations, a physician is required to provide medical records, reports and information regarding an injured employee upon a reasonable request from the employer, the carrier, an authorized qualified rehabilitation provider, or the attorney for the employer/carrier as long as the records are relevant to the particular injury or illness for which compensation is sought. In addition, the physician is required to discuss the employee's medical condition upon a reasonable request. The release of medical information does not require authorization from the injured employee. If the health care provider willfully refuses to provide medical records or to discuss the employee's medical condition after a reasonable request is made, the health care provider is subject to one or more penalties as prescribed by the statute. Such penalties may include an order barring the provider from payment, deauthorization of care, denial of payment for care rendered in the future, decertification of the health care provider as an expert medical advisor, and/or a fine not to exceed \$5,000.00. Fla. Stat. §440.13(4)(c), (8)(b) (2008).

Effective January 1, 1994, the insurer must respond to a written request for authorization within 3 business days or it will be deemed to have consented to the medical necessity for such treatment. Fla. Stat. §440.13(3)(d) (1994). Effective October 1, 2003, the legislature amended this section to provide that the time limitation to respond to a request for authorization only applies to referrals from an authorized health care provider. Unfortunately, it is unclear from the language of the statute what requests for authorization this section applies to. However, the applicable case law suggests that this section only applies to referrals from an authorized physician to another physician. See Walmart Stores, Inc. v. Mann, 690 So. 2d 649 (Fla. 1st DCA 1997); Wuesthoff Memorial Hospital v. Schmitt, 694 So. 2d 145 (Fla. 1st DCA 1997); St. Augustine Marine Canvas v. Lunsford, 917 So. 2d 280 (Fla. 1st DCA 2005).

A claim for specialist consultations, surgery, physiotherapeutic or occupational therapy procedures, x-rays, or special diagnostic laboratory tests that cost more than \$1,000.00 will not be valid and reimbursable unless services have been expressly authorized by the carrier, or unless the carrier has failed to respond to a written request for authorization within 10 days, or unless emergency care is required. Fla. Stat. §440.13(3)(l) (2008).

Case law has held that an employer/carrier is estopped from arguing that a referral to a specialist was not reasonable or medically necessary when the employer/carrier failed to respond to written requests by the claimant's authorized treating physician for such referral during the three or ten day deadlines set forth in Sections 440.13(3)(d) and (i). Elmer v. Southland Corp., 5 So.3d 754 (Fla. 1st DCA 2009).

In addition, the case of Butler v. Bay Center, 947 So. 2d 570 (Fla. 1st DCA 2006), establishes that Section 440.13 prescribes the procedure for authorizing medical providers and, therefore, any changes to this statute apply retroactively and regardless of the date of the claimant's accident.

39. What is the rule on (a) the claimant's choice of physician; and (b) the employer's right to a second opinion?

A. Choice of Physician.

Prior to the October 1, 2003 legislative changes, the extent of an employee's right to the choice of physician was controlled by whether or not managed care applied. Under a managed care arrangement, an employee was entitled to one change to another medical provider within the same specialty and network. Fla. Stat. §440.134(10)(c)(1994). For claims outside of managed care, the employee was entitled to one change of physician during the course of treatment for any one accident. Under the old law, upon written request from the employee for a change in physician, the carrier had the obligation to provide the employee with a list of at least 3 physicians from which the employee could choose. Fla. Stat. §440.13(2)(f) (2001).

Effective October 1, 2003, the legislature repealed the provision requiring that a managed care plan provide for a one time change in physician and provided that the procedures for allowing for a change in physician under a managed care plan are the same as those applicable in non-managed care situations. Pursuant to these amendments, the law provides that, upon the written request of the employee, the carrier shall provide the employee the opportunity for one change of physician during the course of treatment for any one accident. This section requires the carrier to authorize an alternate physician within 5 days after the receipt of the written request, and the alternate physician may not be professionally affiliated with the previous physician. If the carrier fails to provide an alternate physician within 5 days, the employee is free to select the physician and such physician shall be considered authorized. Fla. Stat. §440.13(2)(f) (2008). Pursuant to Butler v. Bay Center, 947 So. 2d 570 (Fla. 1st DCA 2006), the current procedures for providing a one-time change of physician would apply retroactively to any and all dates of accident and not simply those subsequent to October 1, 2003. The 5-day period to provide an alternate physician refers to 5 calendar days and not 5 business days. Hinzman v. Winter Haven Facility Operations, Inc., 109 So.3d 256 (Fla. 1st DCA 2013).

B. Second Opinions.

Prior to the October 1, 2003 amendments, an employee was entitled to one second opinion in the same specialty and within the network for claims falling under managed care. Fla. Stat. §440.134(6)(c)(9) (1994). However, effective October 1, 2003, the legislature repealed this section and a managed care plan is no longer required to contain a provision allowing for a second opinion. Further, there is no statutory provision allowing for a second opinion in a non-managed care situation. However, the First DCA has held that a claimant may be entitled to

a second opinion at the expense of the employer/carrier if the claimant can show that same is reasonable and medically necessary. See Lombardi v. Southern Wine & Spirits, 890 So. 2d 1128 (Fla. 1st DCA 2004).

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

The employer/carrier must provide treatment that is reasonable and medically necessary. Fla. Stat. §440.13(2)(a) (2008). Treatment is considered to be medically necessary if it is used to identify or treat an illness or injury, is appropriate to the employee's diagnosis and status of recovery, and is consistent with the location of the service, the level of care provided, and applicable practice parameters. Fla. Stat. §440.13(1)(k) (2008). Effective October 1, 2003, an employee is entitled to chiropractic care for a maximum of 24 treatments or 12 weeks from the date of first chiropractic treatment. Fla. Stat. §440.13(2)(a) (2008).

41. Which prosthetic devices are covered, and for how long?

An employee is entitled to all medically necessary prosthetic devices. Fla. Stat. §440.13(2)(a) (2008). Prior to December 31, 1993, there was no statute of limitations on the right to remedial treatment related to the insertion or attachment of a prosthetic device. Fla. Stat. §440.19(1)(b). However, effective January 1, 1994, the legislature repealed this section and prosthetic devices are now subject to the same statute of limitations as all other medical treatment.

42. Are vehicle and/or home modifications covered as medical expenses?

Home modifications may be covered as long as they are considered reasonable and medically necessary. If the claimant's current home cannot be modified, the employer/carrier may be required to provide a modified home. However, the employer/carrier will only be responsible for the difference between the cost of the claimant's current home and the cost of a fully equipped home. See Ramada Inn South Airport v. Lamoureux, 565 So. 2d 376 (Fla. 1st DCA 1990). Similarly, vehicle modifications may also be covered if same are considered to be reasonable and medically necessary.

43. Is there a medical fee guide or schedule, or other provisions for cost containment?

Yes.

44. What, if any, provisions or requirements are there for "managed care"?

Beginning January 1, 1997, an employer/carrier was required to provide all medically necessary medical treatment through a managed care arrangement. Fla. Stat. §440.134 (1997). In order to utilize a managed care arrangement, the employer/carrier was required to file a completed application with the agency, along with a payment of a \$1,000.00 application fee, and the agency had to be satisfied that the applicant had the ability to provide quality of care consistent with the

prevailing professional standards of care. Fla. Stat. §440.134(2)(b) (2003). Effective October 1, 2001, employer/carriers were no longer required to provide medical treatment through a managed care arrangement. However, managed care could continue to be provided on a voluntary basis. Fla. Stat. §440.134(2)(a) (2001). This law remains unchanged with the 2003 amendments, and the criteria governing managed care arrangements are set forth in Section 440.134, Florida Statutes (2011).

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

If the employer/carrier initially chooses to controvert all or a portion of a claim, it must file a Notice of Denial within 14 days after receiving the first report of injury. If a petition for benefits is filed, the employer/carrier has 14 days in which it must either pay the requested benefits (without prejudice to its right to deny within 120 days of receipt of the petition), or file a Notice of Denial with the Division. A carrier that fails to respond to a petition for benefits within 14 days by either filing a Notice of Denial or providing the benefits requested is considered to have denied the requested benefits. Fla. Stat. §440.192(8) (2011).

If the employer/carrier initially accepts the claim as compensable and provides benefits, but later decides to deny the claim, it must admit or deny compensability within 120 days after the initial provision of compensation or benefits. This is more commonly referred to as the "pay and investigate" provision. The initial provision of compensation or benefits means the first installment of compensation or benefits to be paid by the carrier pursuant to Florida Statutes, Section 440.20(2), or pursuant to a petition for benefits. Fla. Stat. §440.20(4) (2011). An employer/carrier that does not deny compensability within 120 days is deemed to have accepted the accident (but not necessarily all injuries or treatment claimed) as compensable, unless it can establish material facts relevant to the issue of compensability that could not have been discovered through reasonable investigation within the 120 day period. Fla. Stat. §440.192(8) (2011); see also Checkers Restaurant v. Wiethoff, 925 So. 2d 348 (Fla. 1st DCA 2006).

46. What is the method of claim adjudication?

A. Mediation and trial court.

A mediation conference must be held within 130 days after a Petition for Benefits is filed. Fla. Stat. §440.25(1) (2011). The parties are given at least 60 days to conduct discovery and a final hearing must be held and concluded within 90 days after the mediation. The final hearing shall be held within 210 days after receipt of the Petition for Benefits in the county where the injury occurred. Fla. Stat. §440.25 (2011). The adjudicators of all workers' compensation claims in Florida are Judges of Compensation Claims.

B. Appeals.

Decisions of the Judges of Compensation Claims can be appealed by either party to the First District Court of Appeals in Tallahassee, Florida, by filing a Notice of Appeal within 30 days of the date copies of the order are mailed to the parties. Fla. R. App. P. 9.180(b)(3) (1997). Benefits that are specifically appealed may be withheld pending the outcome of the appeal. All other benefits ordered to be paid, but not appealed, must be paid as ordered. Fla. R. App. P. 9180(d). Decisions of the First District Court of Appeals are appealed to the Supreme Court of Florida as provided by the Appellate Rules of Procedure.

47. What are the requirements for stipulations or settlements?

If a claimant is unrepresented, the parties can enter into a lump sum settlement of all benefits if the claimant has reached maximum medical improvement or if the employer/carrier has filed a Notice of Denial within 120 days after the employer receives notice of the injury. Fla. Stat. §440.20(11) (2011). Settlements reached under Sections 440.20(11)(a) and (b) must be approved by a Judge of Compensation Claims, who must find that the settlement is in the best interests of the claimant.

When a claimant is represented by counsel, he or she may waive all rights to any and all benefits under Chapter 440, Florida Statutes, by entering into a settlement agreement releasing the employer and the carrier from liability for workers' compensation benefits in exchange for a lump sum payment to the claimant. This type of settlement does not require that the claimant have reached maximum medical improvement and only requires approval by the Judge of Compensation Claims as to the amount of the attorney's fees paid to the claimant's attorney and as to whether the settlement provides for appropriate recovery of any child support arrearage. Neither the employer nor the carrier is responsible for any attorney's fees relating to the settlement and/or release of claims. Fla. Stat. §440.20(11)(c) (2011).

Effective October 1, 2001, the Judge of Compensation Claims must consider whether a settlement provides for appropriate recovery of any child support arrearage. This applies to all settlements regardless of whether or not the claimant is represented by an attorney. Fla. Stat. §440.20(11)(d) (2011).

48. Are full and final settlements with closed medical available?

Yes.

49. Must stipulations and/or settlements be approved by the state administrative body?

Settlements where the claimant is unrepresented must be approved by the Judge of Compensation Claims. Fla. Stat. §440.20(11)(a)(b) (2011). However, settlements where the

claimant is represented by an attorney only require approval from the Judge of Compensation Claims as to the amount of attorney's fees and child support being paid. Fla. Stat. §440.20(11)(c) (2011). The proceeds from a settlement must be paid within 14 days after the Judge of Compensation Claims mails the order approving the attorney's fees. Fla. Stat. §440.20(11)(c) (2011).

RISK FINANCE FOR WORKER'S COMPENSATION

50. When is workers' compensation insurance required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

All private employers not in the construction industry with more than 4 employees must secure workers compensation coverage. Fla. Stat. §440.02(17)(b) (2006). Non-construction employers with less than 4 employees may voluntarily come under the Florida Workers' Compensation Act by securing coverage. However, they are not required to. Employers in the construction industry are required to carry workers' compensation coverage regardless of how many employees they have. Fla. Stat. §440.02(17)(b) (2006). Employers can secure workers' compensation coverage by either buying an insurance policy directly or through an association or by qualifying as a self-insurer. Fla. Stat. §440.38 (2004).

51. What are the provisions/requirements of self-insurance?

Employers within the scope of Section 440.38(6) are deemed to be self-insured unless they elect to procure and maintain a policy of insurance. All other individual employers shall qualify for self-insurance under Section 440.38(1)(b), and must have and maintain a minimum net worth of \$1,000,000.00, have at least 3 years of financial statements or summaries in the name of the applicant, provide a copy of the Amended Articles of Incorporation if the name of the business has changed in the last 3 years, and have the financial strength to ensure the payment of current and estimated future compensation claims when due, as determined through review of their financial statement or summary by the division. Fla. Admin. Code R. 69L-5.102 (2006). All self-insurers must join the Florida Self-Insurers Guaranty Association which takes over the handling of an employee's claim if the self-insured employer becomes insolvent. Fla. Stat. §440.385 (2011).

52. Are "illegal aliens" entitled to workers' compensation as The Immigration Control Act indicates that they cannot be employees although most state acts include them within definition of "employee"?

Florida's definition of "employee" includes aliens. Fla. Stat. §440.02(15)(a) (2006). The First District Court of Appeals has held that the statutory definition of "employee" includes illegal aliens and that same are not precluded from receiving workers' compensation benefits. See

Cenvill Development Corp. v. Candelo, 478 So. 2d 1168 (Fla. 1st DCA 1985); Safeharbor Employer Services I, Inc. v. Cinto, 860 So. 2d 984 (Fla. 1st DCA 2003). However, effective October 1, 2003, the Act was amended to provide that providing false information about a person's identity in order to obtain employment constitutes a felony. Fla. Stat. §440.105(2) (2010). The First District Court of Appeals analyzed this section in conjunction with Section 440.09(4), which states that an employee is not entitled to compensation under the act if a Judge of Compensation Claims determines that the employee has knowingly and intentionally engaged in any of the acts described in Section 440.105 or any criminal act for the purpose of securing workers' compensation benefits. Matrix Employee Leasing v. Hernandez, 975 So. 2d 1217 (Fla. 1st DCA 2008). In Hernandez, the claimant, who presented false identification for obtaining employment, was not precluded from obtaining workers' compensation benefits because, although he was in clear violation of Section 440.105, he did not do so for the purpose of securing workers' compensation benefits.

Of note, the First DCA has held that a claimant's unreported income to the I.R.S. did not constitute "wages" for the purpose of calculating the claimant's AWW under the Act. Fast Tract Framing, Inc. v. Caraballo, 994 So. 2d 355 (Fla. 1st DCA 2008). In Caraballo, the claimant received cash payments from an employer, which were not reported to the I.R.S., while also receiving Social Security Disability benefits. "Wages" as defined by Section 440.02(28), Florida Statutes, includes "wages earned and reported for federal income tax purposes" and, therefore, any earnings not reported to the I.R.S. would not fall within the definition of "wages" for the purpose of determining AWW under Section 440.14, Florida Statutes. Although the Caraballo case did not specifically involve an illegal alien, Judge Padavano dissented from the majority's opinion, stating that he feared the decision may encourage employers to hire undocumented aliens and compensate them with unreported cash payments, thereby avoiding the provision of compensation for workplace injuries. Judge Padavano also indicates that the majority's interpretation of the term "wages" is at odds with the statutory definition of the term "employee" which includes undocumented aliens. He stated, "[a] worker who is unlawfully employed would be qualified to receive benefits, but he could succeed in obtaining benefits only if he were to report the existence of his unlawful employment to the government. The worker would be covered only in a theoretical sense. As a practical matter, the employer would never have to pay." Id. at 359. Despite Judge Padavano's opinion on dissent, the majority's decision remains the binding authority on this issue. See Centimark Corp. v. Gonzalez, 10 So. 3d 644 (Fla. 1st DCA 2009). The First DCA addressed this issue again in a case where they distinguished Fast Tract and Gonzalez. The claimant, although undocumented, filed forms with the IRS disclosing his wages. The employer argued he did not properly comply with the tax code and, therefore, did not meet the reporting requirements of the statute. The court disagreed, finding that the employee was entitled to benefits because reported his income. See Rene Stone Work Corp. v. Gonzalez, 25 So. 3d 1272 (Fla. 1st DCA 2010).

53. Are terrorist acts or injuries covered or excluded under workers' compensation law?

A terrorist act would be subject to the same principles applicable to injuries by other third parties. There is no specific exclusion for injuries as a result of terrorist acts.

54. Are there state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

There are no state specific requirements under the Workers' Compensation Act with regard to the parties' obligation to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act. However, under the Medicare regulations, Medicare is the secondary payer concerning the payment of workers' compensation by an employer/carrier. 45 C.F.R. Part 411.1, *et seq.* The obligation to pay medical benefits for a compensable condition cannot be shifted to Medicare. Therefore, Medicare's interests must be taken into account in all lump sum settlements, regardless of whether the employee is a Medicare recipient. Further, any settlement in which Medicare is an issue must account for any claim Medicare may have for medical bills it has already paid as "conditional payments" in its role as "secondary payer." 42 U.S.C. §1395y. In addition, while Medicare's interest must be considered in all settlements, Medicare approval of a Medicare set aside trust must only be obtained if the settlement amount exceeds \$25,000.00 and, at the time of the settlement, the employee meets the following criteria:

- (1) the employee has already qualified to receive Medicare benefits; or
- (2) there is a reasonable expectation that the employee will become qualified for Medicare within 30 months of the settlement *and* the settlement amount is greater than \$250,000.00.

Medicare has several options and sanctions for not taking its interests into consideration, including pursuing the employee, the employer/carrier and the attorneys for benefits that it is required to pay in the future, plus double damages and interest.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

The Federal Medicaid statute requires states to include in its plan for medical assistance provisions (1) that the individual will assign to the state any rights to payment for medical care from any third party and (2) that the individual will cooperate with the state in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. §1396k(a). The state is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. §1396k(b).

In Florida, Medicaid is to be considered the payer of last resort. Should Medicaid make payments that are later determined to be covered under workers' compensation, Medicaid is

entitled to a full recovery of any benefits paid on behalf of the Medicaid recipient. Fla. Stat. §409.910 (2010).

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462, provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. 45 C.F.R. 164.512. Therefore, it is permissible under Florida law to obtain medical records in relation to workers' compensation claims. In addition, Florida law provides that there shall be reasonable access to medical information by all parties in a workers' compensation case. An employee who reports a work-related injury waives any physician-patient privilege with respect to any condition or complaint reasonably related to the condition for which the claimant is seeking compensation. Fla. Stat. §440.13(4)(c) (2008). Therefore, employers, carriers and their representatives (including attorneys) have the statutory right to meet with the employee's authorized treating physicians and discuss the employee's compensable conditions without notice to, or the presence of, the employee and/or his attorney.

However, an exception to the above applies for medical records dealing with a claimant's HIV testing or treatment. The law prohibits disclosure of HIV or AIDS tests or results without written authorization from the claimant or an order from the Judge of Compensation Claims. Fla. Stat. §381.004 (2008).

57. What are the provisions for "Independent Contractors"?

In general, independent contractors, except those in the construction industry, are not employees and, therefore, an independent contractor not in the construction industry is not eligible for benefits from the hiring entity. On the other hand, independent contractors in the construction industry are considered to be employees of the hiring entity and are eligible for benefits. This rule essentially means that there is no such person as an "independent contractor" in the construction industry. Fla. Stat. §440.02(15)(c)3. (2006).

Prior to January 1, 2004, the law provided that independent contractors were not considered "employees" under the Act if they met all of the following conditions:

- (1) maintains a separate business with its own work facility, truck, equipment, materials or similar accommodations;
- (2) holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to do so;
- (3) does, or agrees to do, specific services or work for specific amounts of money and controls the means of doing the services;

- (4) incurs the principal expenses related to the services;
- (5) is responsible for the satisfactory completion of work or services and is or could be held liable for failure to complete same;
- (6) receives compensation for work or services done for a commission or on a per-job or competitive bid basis and not on any other basis;
- (7) may realize a profit or suffer a loss concerning the work or services;
- (8) has continuing or recurring business liabilities or obligations; and
- (9) the success or failure of the independent contractor's business depends on the relationship of the business receipts to expenditures.

Fla. Stat. §440.02(13)(d)1. (1994).

Effective January 1, 2004, an individual is considered an independent contractor if at least four of the following criteria are met:

- (1) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;
- (2) The independent contractor holds or has applied for a federal employer identification number, unless the individual is a sole proprietor who is not required to obtain same;
- (3) The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than an individual;
- (4) The independent contractor holds one or more bank accounts in the name of the business entity for the purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;
- (5) The independent contractor performs work or is available to perform work for any entity in addition to or besides the employer at his own election without the necessity of completing an employment application or process; or
- (6) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement unless such agreement expressly states that an employment relationship exists.

Fla. Stat. §440.02(15)(d)1.a. (2006). If four of these criteria do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions:

- (1) the independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work;
- (2) the independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform;
- (3) the independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform;
- (4) the independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis;
- (5) the independent contractor may realize a profit or suffer a loss in connection with performing work or services;
- (6) the independent contractor has continuing or recurring business liabilities or obligations;
- (7) the success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

Fla. Stat. §440.02(15)(d)1.b. (2006). An individual claiming to be an independent contractor has the burden of providing that he or she is an independent contractor. Fla. Stat. §440.02(15)(d)1.c. (2006).

58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?

There are no provisions specifically addressing "independent contractors" with regard to professional employment organizations/temporary service companies/leasing companies. However, the Act provides that, when an employer leases its workers from an employee leasing company, the leased workers are considered borrowed employees of the employer. The actual employer/client company is responsible for providing the workers' compensation coverage if the leasing company does not do so. Fla. Stat. §440.11(2) (2003). In addition, statutory immunity extends to employers who lease their workers from employee leasing companies and the fact that the leasing company may provide the workers' compensation coverage does not alter the actual employer's immunity status. *Id.* The First DCA looked into this issue in Crum Services v. Lopez, 975 So. 2d 1184 (Fla. 1st DCA 2008). In Lopez, the leasing company was responsible for providing payroll services and workers' compensation benefits for the employees it leased to the

contractor. However, the roofing worker in Lopez was hired directly by the contractor and never filled out any employment forms for the contractor or leasing company. Therefore, he was found to have no employer/employee relationship with leasing company. Because the leasing company was only required to provide workers' compensation coverage for those individuals with whom it had an employer/employee relationship, it was not required to provide workers' compensation benefits to the worker. In addition, the leasing company was not a contractor under the statutory employee provision of the Act and, therefore, could not be the statutory employer of the roofing worker hired by the contractor.

59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Individuals are considered "independent contractors" only if they meet the provisions listed above. However, the Act sets forth specific provisions as to whether owner-operators of trucks or other vehicles for the delivery of people or property are considered "employees" and are covered under the Act.

Pursuant to Section 440.02(15)(d)4. (2006), the term "employee" under the Act does not include an owner-operator of a motor vehicle who transports property under a written contract with a motor carrier which evidences a relationship by which the owner-operator assumes the responsibility of an employer for the performance of the contract, if the owner-operator is required to furnish motor vehicle equipment as identified in the written contract and the principal costs incidental to the performance of the contract including, but not limited to, fuel and repairs, provided a motor carrier's advance of costs to the owner-operator when a written contract evidences the owner-operator's obligation to reimburse such advance shall be treated as the owner-operator furnishing such cost and the owner-operator is not paid by the hour or on some other time-measured basis. Fla. Stat. §440.02(15)(d)4. (2006). Therefore, the owner-operator is excluded from receiving workers' compensation benefits if the owner-operator transports property under a written contract with the motor carrier that contains all of the above provisions.

The term "employee" also does not include a taxicab, limousine, or other passenger vehicle-for-hire driver who operates the vehicles pursuant to a written agreement with a company which provides any dispatch, marketing, insurance, communications, or other services under which the driver and any fees or charges paid by the driver to the company for such services are not conditioned upon, or expressed as a proportion of, fare revenues. Fla. Stat. §440.02(15)(d)10. (2006).

60. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?

There are no state specific requirements under the Workers' Compensation Act with regard to the parties' obligation to satisfy Medicare's interests when settling the right to medical treatment benefits.³

61. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

Florida passed the Medical Marijuana Initiative (*Amendment 2*), Art. X §28, Fla. Const., on November 8, 2016, effective January 3, 2017. Section 381.986, Fla. Sta., Medical Use of Marijuana became effective on June 23, 2017. Under section 381.986 provides stringent requirements before medical marijuana is prescribed to a patient, such as: being diagnosed with one of the enumerated medical conditions within the statute, and being evaluated by a qualified physician or medical director who is eligible to prescribe medical marijuana.

Under Florida Worker's Compensation law, recently a Judge of Compensation Claims has ruled that without complying with the requirements of section 381.986, a claimant is not entitled to medical marijuana as a benefit. The court has not commented on work and activity restrictions, as the issue has not yet been presented to the court. Greenfield v. City of Tallahassee & Tallahassee Police Dept., Tallahassee District Office, Judge John J. Lazzara, OJCC No. 12-025601JL (Dec. 6, 2017).

62. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

The State of Florida does not permit the recreational use of marijuana.

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³ As stated in the Answer to Question 54, Medicare is the secondary payer, and as such, the obligation to pay medical benefits cannot be shifted to Medicare. Medicare's interests, therefore, must be taken into account in all lump sum settlements, regardless of whether the claimant receives Medicare. Medicare approval of a Medicare set aside trust must only be obtained if the settlement amount exceeds \$25,000.00. See answer to Question 54 for more information regarding this.