

RISSMAN, BARRETT, HURT,
DONAHUE & MCLAIN, P.A.
ATTORNEYS AT LAW

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. MCLAIN III
RICHARD S. WOMBLE
JOHN P. DALY
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
J. GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACCORD II
ROBERT D. BARTELS

OF COUNSEL
ROBERT J. JACK
NAHN T. LEE

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

207 SOUTH SECOND STREET
FT. PIERCE, FLORIDA 34950
TELEPHONE (772) 409-1480
TELECOPIER (772) 409-1481
FTPIERCE@RISSMAN.COM

SEAN M. CROCKER
CHRISTOPHER E. DENNIS
SARAH E. EGAN
JONATHAN D. EICHELBERGER
JOSHUA T. FRICK
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
DARA L. HAGGERTY
CHRISTOPHER A. HANSON
JEFFREY J. KERLEY
VICTORIA S. LUNA
LAURA F. LYTLE
JEDEDIAH A. MAIN
DARIEN M. MCMILLAN
ERIC F. OCHOTORENA
KARISSA L. OWENS
JEREMY T. PALMA
JEFFREY M. PATNEAUDE
WENDY L. PEPPER
JONATHAN K. POLK
D. BLAKE REHBERG
AMANDA H. REHER
KELLEY A. RICHARDS
JUAN A. RUIZ
BRYAN R. SNYDER
JILL M. SPEARS
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
CHRISTINE V. ZHAROVA

WWW.RISSMAN.COM

PLEASE REPLY TO: TAMPA

Florida Law Weekly
Week of November 25, 2011

Limitations of Actions

Miranda v. Azul Plastering Corp and The Hartford, 36 Fla. L.
Weekly D2515 (Fla. 1st DCA November 16, 2011).

The claimant had an accident in June 2003. The E/C did not provide notice of the statute of limitations at the time of the accident. The claimant last treated in June 2008. Thereafter, in April 2009, the E/C sent the claimant notice of the statute of limitations. The claimant then filed a Petition in July 2010 which the E/C denied based on the statute of limitations. The JCC concluded that the claimant received actual notice and did not prove estoppel by clear and convincing evidence. The claimant appealed the JCC's Order denying his claims based on the Employer/Carrier's statute of limitations defense.

The First DCA held that the burden of proof on the claimant is by the preponderance of the evidence, unless the E/C has complied with both sections of F.S. Section 440.185 and 440.055, in which case the claimant's burden becomes clear and convincing evidence. Since the First DCA determined that the JCC's relied upon facts were insufficient as a matter of law to establish the claimant's actual knowledge of the statute of limitations, the case was remanded for application of the correct standard of proof.

Compensable Accidents

Keeton v. Kentucky Fried Chicken and Gallagher Basset, 36 Fla. L. Weekly D2517 (Fla. 1st DCA November 16, 2011).

The claimant appealed the JCC's Order denying all claims related to her carpal tunnel syndrome on the basis of testimony from the Expert Medical Advisor who indicated that the carpal tunnel syndrome was not work related. The First DCA affirmed the JCC's ruling.

The Employer/Carrier initially authorized Dr. DiGeronimo to evaluate the claimant's alleged injuries. The physician opined that the claimant's carpal tunnel syndrome was not work related. Thereafter, pursuant to F.S. Section 440.13(5)(a), the Employer/Carrier obtained an IME who opined that the condition was work related. The E/C requested the appointment of an Expert Medical Advisor based on the conflicting testimony from the authorized provider and IME. The claimant objected to the EMA being appointed and argued that the E/C was bound by the opinion of its IME. The claimant based her argument on F.S. Section 440.13(5)(b) which provides in part that "each party is bound by his or her selection of an independent medical examiner, including the selection of the independent medical examiner in accordance with s. 440.134 and the opinions of such independent medical examiner."

The JCC rejected the claimant's argument and reasoned that the limitation in subsection (5)(b) precludes serial independent medical examinations and does not preclude application of subsection (9)(c). Florida Statute Section 440.13(9)(c) does not contain an exception to its mandatory language based on the "bound" limitation in subsection (5)(b). The First DCA agreed with the JCC's decision. In the concurring opinion, the First DCA further elaborated and cited to F.S. Section 440.13(9)(c) and *Amos v. Gartner, Inc.*, 17 So.3d 839 (Fla. 1st DCA 2009), noting that a disagreement in the opinions of health care providers requires the JCC to appoint an EMA.

NET/eal