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
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
GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS
JOHN P. DALY

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

709 SEBASTIAN BOULEVARD
SUITE B
SEBASTIAN, FLORIDA 32958
TELEPHONE (772) 228-3228
TELECOPIER (772) 228-3229
SEBASTIAN@RISSMAN.COM

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

AMY L. BAKER
AMANDA L. BRUS
STEVEN B. BURRES
DEREK J. BUSH
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
AARON E EAGAN
JAMES E. FAVERO III
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
VICTORIA S. LUNA
LAURA F. LYTLE
ERIC F. OCHOTORENA
JEREMY T. PALMA
D. BLAKE REHBERG
KELLEY A. RICHARDS
RICHARD B. ROBBINS
JUAN A. RUIZ
BRYAN R. SNYDER
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
MEGHAN C. WHISENHUNT
MICHAEL C. WOODARD
CHRISTINE V. ZHAROVA

July 1, 2013

FLORIDA LAW WEEKLY
Week of June 7, 2013

Workers' compensation immunity

Gonzalez v. J.W. Cheatham LLC, 38 Fla. L. Weekly D1183 (Fla. 4th DCA May 29, 2013)

Defendant's motion for summary judgment on the plaintiff's negligence complaint was granted on the ground that the suit was barred by workers' compensation immunity. This decision was reversed by the Fourth District, as there was a genuine issue of material fact as to whether the plaintiff was under a written contract "with a motor carrier," and whether the plaintiff is thus excluded from the definition of "employee" under section 440.02(15)(d)(4).

The plaintiff was injured in a single-vehicle dump truck accident at the "Winding Waters" construction project. The defendant, J.W. Cheatham, was the general contractor for the project. Cheatham entered into a subcontract with Austin Tupler Trucking to provide earth moving services related to the Winding Waters project. Specifically, Austin Tupler agreed to furnish

all supervision, labor, tools, equipment, materials and supplies necessary to haul fill from Winding Waters to the Palm Beach County Solid Waste Authority.

Austin Tupler then entered into an agreement with the plaintiff to transport materials for Austin Tupler with his own dump truck. The service contract indentified Austin Tupler as a "broker" and the plaintiff as an "independent contractor." As the "broker," Austin Tupler was "engaged in the business of arranging for the transportation by others of certain road building and construction and construction aggregates, and related commodities."

The contract required the plaintiff to provide all equipment, maintain his vehicle at his own expense, pay for fuel expenses, pay for all licensing and other governmental fees, and carry liability and cargo insurance. He was paid by Austin Tupler on a commission basis, not hourly. The plaintiff had the discretion to work when and in the manner he wished.

In Cheatham's motion for summary judgment, it argued that the plaintiff's suit was barred by workers' compensation immunity because the plaintiff was an independent contractor working in the construction industry, qualifying him as Cheatham's statutory employee. Cheatham further argued that Austin Tupler was a "broker," not a "motor carrier," and thus the plaintiff did not fall within the "owner-operator" exclusion in section 440.02(15)(d)4.

The issue, according to the Fourth District, turned on whether the plaintiff was under a written contract "with a motor carrier," as it was undisputed that the plaintiff otherwise met the necessary elements for owner-operator status.

The Florida Statutes generally define the term "motor carrier" as "any person owning, controlling, operating, or managing any motor vehicle used to transport persons or property over any public highway." Although Florida Statutes do not define the term "broker," federal law defines the term as "a person, other than a motor carrier . . . that as a principal or agent sells, offers for sale, negotiates for, or holds itself out . . . as selling, providing, or arranging for, transportation by motor carrier for compensation."

Under the CFR, "*a motor carrier . . . is not a broker . . . when it arranges or offers to arrange the transportation of shipments which it is authorized to transport and which it has accepted and legally bound itself to transport*."

The dispositive issue in this case was whether Austin Tupler chose to use its carrier authority to ship the load or simply chose to broker the shipment to another authorized carrier. If Austin Tupler accepted responsibility for ensuring delivery of the goods, regardless of who actually transported them, then it qualifies as a carrier. If, however, it merely agreed to locate and hire a third party to transport the goods, then it was acting as a broker.

In this case, there was a genuine issue of material fact regarding whether Austin Tupler was a "motor carrier." Accordingly, the order granting summary judgment in favor of the defendants was reversed and remanded.

PTD – discovery

Miami Dade County School Bd v. Smith, 38 Fla. L. Weekly D1206 (Fla. 1st DCA June 3, 2013)

Here, the JCC entered an order granting PTD benefits to the claimant. The issue on appeal was whether the JCC improperly denied the employer's motion to depose an authorized treating doctor whose opinions clearly played a significant role in the JCC's determination that the claimant was PTD.

The employer timely set and properly noticed the doctor's deposition. On the date of the deposition, the court reporter and counsel for the employer timely appeared at the doctor's Miami office, the location identified on the written notice. The doctor and counsel for the claimant were at the doctor's Plantation office. Counsel for the employer attempted to move forward by taking the deposition telephonically, but the doctor declined because the court reporter was not in his presence.

Counsel for the employer filed a motion for continuance, or alternatively, for the employer to be allowed to take and submit the deposition post-hearing. The First District held that denying this motion was not harmless error, as examination of

the doctor *may* have yielded a different result. Thus, the JCC's decision was reversed and remanded.

Ruling on fraud/misrepresentation defense

Johns Eastern Company v. Schraw, 38 Fla. L. Weekly D1210 (Fla. 1st DCA June 3, 2013)

Although the finding of compensability of the claimant's heart condition was affirmed, it was reversible error for the JCC to not rule on the E/C's fraud defense.

LDS