OA 6-6-91

IN THE SUPREME COURT OF FLORIDA

UNIVERSITY OF FLORIDA and
DIVISION OF RISK MANAGEMENT,

Petitioners,

vs. CASE NO.: 76,414

EMMETT H. MASSIE,

Respondent.

ON PETITION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF THE FIRST DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT, EMMETT H. MASSIE

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STATEMENT OF THE CASE AND FACTS

Respondent disagrees with petitioner's Statement of the Case and Facts in numerous instances. Critical areas of disagreement will be addressed below. Emmett Massie became totally disabled at the age of 50 due to the effects of multiple sclerosis (hereinafter "M.S."), the course of which was greatly accelerated by conditions he encountered on the job. (R:181, 331). Prior to commencing his employment with WUFT in the Summer of 1979, although Emmett Massie was diagnosed as having M.S., he was essentially symptom free. (R:129). In a few short years on the job, Emmett Massie's M.S. progressed to the point where he was totally disabled. (R:324, 260). But for the exacerbations caused by Emmett Massie's employment at WUFT, significant changes in his functional status would not have been anticipated, even over a period of ten years. (R:350).

The deleterious job conditions which greatly accelerated Massie's M.S. included physical stress and strain caused by exceptionally long hours (for over one and half years, Emmett Massie worked essentially a double shift, at times he worked virtually round the clock) necessitated by occurrences beyond Massie's control. (R:134-149, 215, 216, 282). Massie was also subjected to emotional stress (including pressure to violate state laws) brought on by factors which were again beyond his control. (R:101, 102, 141-146, 367-372, 388, 392).

Prior to taking his job at WUFT, other than when he travelled to conferences (approximately 15 to 25% of his job),

Massie worked strict eight-hour days, five days per week. (R:41-43, 135, 297). His hours were assured as the building in which he worked was kept locked during all but regular business hours of 8:00 A.M. to 5:00 P.M. (R:297).

Commencing approximately one year after he began working at WUFT and continuing throughout 1980, Emmett Massie suffered a series of attacks or exacerbations which resulted in increasing disability. (R:160-164). In 1981, in response to increasing disability brought on by the progression of his M.S. and at the recommendation of his doctor who felt that the long hours were aggravating his condition, Massie began to reduce his hours. (R:138-139, 299). At first, he worked no more than eight hours per day, then gradually he tapered off to no more than two to three hours a few days per week. (R:138-139).

Although Mr. Pappas (Massie's unchallenged "stress expert") testified that "within certain technical areas, there are more inherent stressors" (R:115) and that "in many instances," stress becomes a subjective matter (R:115) and that some job stress is not unusual (R:108), he never testified that Mr. Massie's stress was not unusual. (R:94-121). Rather, he identified at least four stressors specific to Emmett Massie's job which he opined were excessive. (R:101). Pappas characterized the level of physical and emotional stress and strain present in Emmett Massie's job as an 8 or 9 on a scale of 1 to 10. (R:30).

Dr. Mouat made plain in his deposition testimony that when he used the term "job related stresses," he was speaking in terms of

> conflicts between an individual's efforts and their productivity. Perhaps best saying it as in the sense that someone is on a treadmill and they are getting further behind.

(R:340-341).

The doctor also testified that stress results when "expectations are greater than we can deliver at times." (R:348). Dr. Mouat never testified that Emmett Massie was subjected to only emotional or psychological stress; he consistently talked in terms of stress resulting from expectations or demands exceeding productivity. (R:316-360).

The judge of compensation claims (hereinafter "JCC") made no finding that the stress to which Emmett Massie was exposed in his job was in the nature of psychological trauma only. The JCC merely stated generally,

> Stress while it may exacerbate multiple sclerosis, or for that matter many other organic diseases, is in the nature of psychological trauma and is not compensable.

(R:407).

No facts or testimony were cited in support of that "finding" and the finding was not in any way related to the physical and mental stress and strain Emmett Massie encountered in his employment. (R:407). The JCC never found that Massie's long hours, resulting from events beyond his control, did not constitute physical stress. (R:404-407). On the other hand, the JCC reached the following findings,

> (Massie) was required to work long hours, often 10 to 12 hours per day for as many as 6 or 7 days a week . . . . This condition continued from the commencement of his duties through October of 1980, when . . . the claimant's hours increased

> to as many as 18 hours per day . . . these hours were necessitated not only by the emergency created when the tower was destroyed, but also due to the move of WUFT TV . . . . It was noted that the station was also undergoing extensive expansion during this period which also required the acquisition of a considerable amount of new equipment. During this entire period of time, the engineering division was plagued by unusually high turnover, which was in the neighborhood of 86% during the claimant's first year.

(R:405).

Nonetheless, in complete contradiction with the above findings, the JCC found:

> That the stress which (Massie) testified to over a long period of time was not to an extent greater than that to which the general public is exposed.

(R:406).

Later on in the record, the JCC conceded:

> I know there is no support for it (the finding quoted above), but that is what I found.

(R:439).

The JCC made this statement in conjunction with the statement:

> (I) just (don't) think that the situation (Massie's claim) fits the philosophy of worker's compensation.[1]

(R:439).

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[1]Contrary to the rules of appellate procedure, the employer/petitioner argues during the statement of facts that the JCC's statement was made facetiously. A review of the record demonstrates that the attorney representing the employer/petitioner before this court was not even present at the hearing when the JCC made that statement. Furthermore, the JCC more than anyone is aware that the record does not transmit any tone and that any statements made on the record, must of necessity, be given their ordinary understanding and meaning. Certainly, the JCC knew his statement was being made on the record. He has had ample opportunity to explain or retreat from that statement, but has chosen not to do so.

At the hearing for modification, Massie testified that the accelerated course of his M.S. ceased once he left his job at WUFT. (R:39). Mr. Pappas testified that his earlier testimony had been misquoted, misconstrued, and taken out of context by the first district court of appeal. (R:24-37). He stated that contrary to the opinions and statements attributed to him by the first district, he, in fact, had testified that the physical and emotional stress and strain experienced by Massie in his job was unusual, out of the ordinary, excessive, and not within his control. (R:24-37). In order to make his testimony crystal clear, Mr. Pappas stated on a scale of 1 to 10, it was his opinion that the physical and mental stress and strain experienced by Massie was 8 or 9. (R:30).

On appeal, the first DCA reviewed the entire record and found:

> This court is now confronted with a clear instance of manifest injustice apparent from the record of the original hearing before the deputy commissioner.
>
> * * *
>
> Upon review of the entire record, it is now manifest that this court's prior decision was in error and should not continue to control the parties and the deputy commissioner in subsequent proceedings in this case.
>
> The facts presented by claimant in support of his claim and found credible by the deputy commissioner's first order are legally sufficient to support a finding of aggravation of the cliamant's pre-existing multiple sclerosis due to unusual and excessive physical and mental stress and strain.

570 So.2d at 976 (emphasis added).

SUMMARY OF ARGUMENT

It is conceded that at the age of 50, Emmett Massie became totally disabled due to the effects of M.S., the course of which was greatly accelerated by conditions he encountered on the job. The deleterious job conditions included physical stress and strain caused by exceptionally long hours (for over one and one-half years, Emmett Massie worked essentially a double shift, and at times he worked virtually around the clock), necessitated by occurrences beyond Massie's control. Massie was also subjected to emotional stress (including pressure to violate state laws) brought on by factors which, again, were beyond his control. None of the above is in dispute.

Under these circumstances, Massie is entitled to compensation as it is well settled that disability resulting from exposure to conditions peculiar to a particular job which exacerbate or accelerate a non-disabling, pre-existing condition is compensable as occurring "by accident" within the meaning of section 440.02, Florida Statutes. **Worden v. Pratt & Whitney Aircraft**, 256 So.2d 209 (Fla. 1971). Although Massie would take the position that his claim is governed by the law as set forth in **Worden** and **Festa v. Teleflex, Inc.**, 382 So.2d 122 (Fla. 1st DCA 1980) (particularly because there was no "sudden failure" such as a heart attack), the facts in this case meet the **Victor Wine** test as set forth in **Silvera v. Miami Wholesale Grocery, Inc.**, 400 So.2d 439 (Fla. 1981). In **Silvera**, this court held that disability caused by psychological pressure closely associated with physical activity (including long hours) is

compensable. Furthermore, as Massie's disability results from aggravation of a preexisting condition (M.S.), the carrier/petitioner may claim against the Special Disability Trust Fund pursuant to section 440.49, Florida Statutes.

Section 440.28 provides the basis for relief from orders based on a mistake in a determination of fact. Certainly, where there is no substantial evidence supporting a finding, and such is conceded by both the appellate court and the JCC, it is an abuse of discretion to fail to order modification. It is beyond dispute that the JCC's original finding that Massie's job stress and strain was not greater than that to which the general public is exposed, is not supported by any evidence in the record. Particularly in the self-executing field of workers' compensation, the search for justice must prevail, even over the quest for consistency. Should this court determine that section 440.28 is not the appropriate vehicle for relief, the ruling of the district court must be affirmed in order to avoid manifest injustice.

Finally, as there is no "express" and "direct" conflict between **Massie v. University of Florida**, 570 So.2d 963 (Fla. 1st DCA 1990), and this court's opinions in **Victor Wine & Liquor, Inc. v. Beasley**, 141 So.2d 481 (Fla. 1962), **Power v. Joseph G. Moretti, Inc.**, 120 So.2d 433 (Fla. 1960), and **United States Casualty Co. v. Maryland Casualty**, 55 So.2d 741 (Fla. 1951), this court should decline jurisdiction. **Jenkins v. State**, 385 So.2d 1356 (Fla. 1980).

ARGUMENT

I. DISABILITY RESULTING FROM AGGRAVATION OF M.S. BY PROLONGED EXPOSURE IN EMPLOYMENT TO A COMBINATION OF MENTAL AND PHYSICAL STRESS AND STRAIN ATTRIBUTABLE TO UNUSUAL CIRCUMSTANCES AND EXCEPTIONALLY LONG HOURS IS COMPENSABLE WHEN THE EXPOSURE IS GREATER THAN THAT TO WHICH THE GENERAL PUBLIC IS EXPOSED.

It is undisputed that at the age of 50, Emmett Massie became totally disabled due to the effects of M.S., the course of which was greatly accelerated by conditions he encountered on the job. This was the unanimous and uncontroverted opinion of Drs. Mouat and Rottman. The deleterious job conditions included physical stress and strain caused by exceptionally long hours required by Massie's employer and necessitated by occurrences beyond Massie's control. From the day Massie started at WUFT until the day he was advised by his physician that he must cut back his hours because the physical strain was aggravating his M.S., Massie regularly worked between 75 and 80 hours per week. At one point, in response to an emergency caused by an airplane accident, for a period of two months, he worked 18 hours a day, seven days a week. In effect he did half a year's work in only two months. Massie was also subjected to emotional stress, (including pressure to violate state laws) brought on by factors which were beyond his control. Outside of his job, Massie was subject to no physical or emotional stress. None of the above facts are in dispute.

Although the JCC reached all of the above findings, he denied the claim, "finding,"

> I find that the stress which the claimant testified to over a long period of time was not to an extent greater than that to which the general public is exposed.

(R:407).

He further stated:

> job pressure and long hours of work in and of itself have never been held to be factors which result in entitlements under the Workers' Compensation Act.

(R:407).

The JCC's order was affirmed on appeal in **Massie v. University of Florida**, 468 So.2d 383 (Fla. 1st DCA 1985), on the basis of the fact that, "There was expert testimony that Massie's stress was not unusual." Id. at 384.

Both the JCC (notwithstanding petitioners' claim to the contrary) and the DCA have acknowledged that the findings quoted above, which formed the basis for denying Massie's claim, were made in error. Indeed, the DCA has termed this a case of manifest injustice, and stated:

> Upon review of the entire record, it is manifest that this court's prior decision was in error and should not continue to control the parties and the deputy ccmmissioner in subsequent proceedings in this case. The facts presented by teh claimant in support of his claim and found credible by the deputy commissioner's first order are legally sufficient to support a finding of aggravation of the claimant's pre-existing multiple sclerosis condition due to unusual and excessive physical and mental stress and strain.

570 So.2d at 976 (emphasis added).

Thereupon, the DCA remanded the case to the JCC for further proceedings consistent with the law and uncontroverted facts.

The review provided by the First District Court of Appeal

can only be termed exhaustive. The original panel took two years to review the entire record before issuing an opinion on June 2, 1988. Thereafter, that opinion was withdrawn on the court's own motion upon the vote of a majority to reconsider the case en banc. Upon consideration of the revised opinion, a majority of the court voted to dissolve en banc. The revised opinion was issued June 29, 1990, more than two years after the original opinion. In its revised opinion, the first district recognized that the material facts were not in dispute; and that the decision to affirm the original order (**Massie v. University of Florida**, 463 So.2d 383 (Fla. 1st DCA 1985)), rather than to remand for further findings of fact was based on a mistake in determining the facts due to the first district's erroneous understanding of plaintiff's expert testimony. The court went on to recognize that making the explicit finding of fact was a task that, under prior appellate decisions, should have been left to the JCC as a trier fact.

The findings and holdings of the DCA come to this court with a presumption of correctness. Particularly where the district court has found a need for clarification of a JCC's finding this court should not intervene, absent a clear showing that the district court acted arbitrarily. **Vargas v. Americana of Bal Harbour**, 345 So.2d 1052 (Fla. 1977). Certainly, such is the case where the district court has taken the extraordinary step of reviewing the entire record.

One of the most notable aspects of petitioners' instant appeal is that they do not argue, and thus concede, that: 1)

there is no support for the JCC's finding that "the stress to which (Massie was exposed) was not to an extent greater than that to which the general public is exposed"; 2) there's no support for the original appellate opinion finding that, "There was expert testimony that Massie's stress was not unusual"; 3) as a result of job conditions, Massie's M.S. was accelerated such that he became disabled at the age of 50; and 4) Massie worked exceptionally long hours demanded by his employer, due to conditions beyond his control.

Rather than focusing on the undisputed facts and the erroneous findings which formed the basis of the JCC's original order, as well as the original and subsequent district court opinions, petitioners have chosen to delve back into the record, wage a war of semantics, and argue that the JCC didn't mean what he clearly said and did mean what he never said. While conceding the fact arguments properly before this court, petitioners raise a host of new arguments as though resurrecting an army of straw men.

This court lacks jurisdiction to review the decision of the district court unless it directly or expressly conflicts with a decision (in the field of workers' compensation) of this court. **Jenkins v. State**, 385 So.2d 1356 (Fla. 1980). The material facts recognized by the district court not to be in dispute and set forth at 570 So.2d 964 and 965 are essentially identical to the JCC's own fact findings set forth in paragraph 6 of his original order. (R: 405, 406). Quite simply, the material facts as found by the JCC and the district court are not in

conflict. Thus, in particular, there is no basis for the petitioners' contention that **Massie v. University of Florida**, 570 So.2d 963 (Fla. 1st DCA 1990) conflicts with **United States Casualty Co. v. Maryland Casualty Co**, 55 So.2d 741 (Fla. 1951).

A. IN LIGHT OF THE UNREFUTED FACTS, MASSIE'S DISABILITY IS COMPENSABLE AS ARISING "BY ACCIDENT."

It is well settled that a disability resulting from exposure to conditions peculiar to a particular job, which exacerbate or accelerate a non-disabling, pre-existing condition is compensable as occurring "by accident" within the meaning of Section 440.02(1), Florida Statutes. **Worden v. Pratt & Whitney Aircraft**, 256 So.2d 209 (Fla. 1971). In **Worden**, the claimant developed cataracts as a result of having to look into a small, electric, high-intensity furnace over a number of years. The claimant's physician testified that the cataracts were caused by the infra-red radiation to which claimant was repeatedly exposed. In finding that the claimant's condition arose "by accident," this court chose to characterize the claimant's repeated exposure to infra-red radiation as a series of "repeated accidents arising out of and in the course of (the claimants) employment." Id. at 211.

In reaching that holding, this court cited for precedent a series of so-called "exposure" cases, including: **Victor Wine & Liquor, Inc. v. Beasley**, 141 So.2d 581 (Fla. 1962) where the claimant suffered a heart attack brought on by unusually hard work; **Davis v. Artley Construction Company**, 154 Fla. 41, 18 So.2d 255 (Fla. 1944) where the claimant became overstressed

while unloading a box car on a hot day and suffered a cerebral hemorrhage; **Alexander Orr, Jr., Inc. v. Florida Industrial Commission**, 129 Fla. 369, 176 So. 172 (1937) where a plumber died of a sunstroke after being subjected to intense heat while using a blow torch on a hot August day.

Nine years later, in **Festa v. Teleflex, Inc.**, 382 So.2d 1119 (Fla. 1980), the first district was called upon to eliminate the inconsistency existing in the worker's compensation field between cases awarding compensation benefits to workers injured by "exposure" to deleterious conditions, while denying benefits to workers whose injuries resulted from repeat minor trauma.[2] Utilizing a historical approach, the first district reviewed the "principles" established in the landmark exposure cases of **Orr**, supra; **Czepial v. Krohne Roofing Co.**, 93 So.2d 84 (Fla. 1957); **Victor Wine**, supra; and **Worden**, supra. The court noted that in **Orr**, supra, this Court stated:

> If the heat exhaustion arose out of the employment, as well as in its course, we think it is clear that any harmful effect upon the physical structure of the body of the employee, which was a proximate result of it, is an accident under our statute . . . . In connection with the sort of accident here involved, the principle to which most authorities give assent is that the harmful condition does arise out of the employment, if, in the performance of the duties for which he was engaged, in the manner required or contemplated by the employer, it is necessary for the employee

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[2]Interestingly, repetitive strain injuries now account for nearly half of the nation's occupational illnesses. AFTL Journal Number 337, at page 4, citing the Washington Post, August 31, 1990, at page 87.

> to expose himself to a danger, materially in excess of that to which people commonly in that locality are exposed . . . and that such excessive exposure may be found to have been a direct cause of the injury, though operating upon other conditions of common exposure . . . .

Orr, 176 So. at 173 (emphasis added).

In **Czepial**, supra, this court found a direct causal connection between the injury and the exposure and stated:

> The fundamental accidental nature of the injury is not altered by the fact that, instead of a single occurrence, it is the cumulative affect of the inhalation of dust and fumes to which a claimant is peculiarly susceptible that accelerates a claimant's pre-existing disability.

Czepial, 93 So.2d at 86 (emphasis added).

In **Victor Wine**, supra, this court pointed out that the exposure claimant was required to show that he was "subjected to more than the ordinary hazards confronting people generally," but that no cases required "that the ill effects of the exposure must occur suddenly and be immediately related to an identifiable incident." Id. at 588.

On the other hand, the first district noted that in **Worden**, supra, as discussed above, this Court took a different approach and chose to characterize cataracts resulting from long-term exposure to ultraviolet radiation as having resulted from "repeated accidents arising out of and in the course of a claimant's employment." Id. at 211.

Summarizing the holdings and established principles, the **Festa** court elucidated the factors, established by this court, which a claimant must prove in order to establish compensability as follows:

> 1) prolonged exposure, 2) the cumulative effect of which is injury or aggravation of pre-existing condition, and 3) that he has been subjected to a greater hazard that that to which the general public is exposed. Alternatively, he must demonstrate a series of occurrences, the cumulative effect of which is injury.

Festa, 382 So.2d at 124.

Thus, in **Festa**, the first district emphasized that the controlling factor in both exposure cases and repeat trauma cases (assuming casual connection) was that the claimant demonstrate either: 1) that in the course of his employment he had been subjected to a hazard greater than that to which the general public is exposed, or 2) that as a result of a series of occurrences, an injury has happened. See, **Winn-Dixie Stores v. Morgan**, 533 So.2d 783 (Fla. 1st DCA 1988).

In applying this test to Massie, it is uncontroverted that his M.S. was aggravated by physical and mental stress and strain encountered by him in the course of his employment. It is also uncontroverted that Massie suffered prolonged exposure to excessive physical stress and strain in the form of long hours in attempting to meet both his employer's expectations and the requirements of the job. Put another way, Massie was placed in the conflicting position of having an insufficient number of man-hours, between himself and his short staff, to complete required assignments. This necessitated that he regularly work double shifts, and at times virtually around the clock.

Mr. Massie also suffered prolonged exposure to mental or emotional stress resulting from being pressured to purchase equipment in violation of state laws, which he was charged with

enforcing, and from having to respond to conflicting written job descriptions.

Mr. Massie's direct supervisor confirmed that Massie suffered prolonged exposure to both mental and physical stress and that factors causing the mental and physical stress were beyond his control. This was also the opinion of Massie's stress expert, Pappas.

Thus, all that remained was for Massie to establish that the physical and mental stress to which he was exposed in his employment was greater than that to which the general public is exposed. Again, this was not only the opinion of Massie and his supervisor (Richard Lainwhner), it also was the opinion of the claimant's stress expert (Pappas) and of Massie's treating physician who recommended he reduce his hours, which the doctor opined were aggravating Massie's M.S.

In addition to meeting the **Festa** test, Massie has also met the tests imposed by this court in **Orr**, **Czepial**, **Victor Wine** and **Worden**. As in **Orr**, it is uncontroverted that the physical and mental stress to which Mr. Massie was exposed was a harmful condition arising solely out of and in the course of his employment. Clearly, the progression of Emmett Massie's M.S. was a direct and proximate result of that exposure. Without question, it was necessary for Massie to expose himself to unusual physical and physical stress and strain while performing duties for which he was engaged in the manner required by the employer. Certainly, the physical and mental stress and strain Massie encountered in his employment was materially in excess of

that to which people commonly are exposed.

As in **Czepial**, the "accidental" nature of Emmett Massie's disability is not altered by the fact that instead of a single occurrence, it was the cumulative effects of the ordinary physical and mental stress and strain, to which he was peculiarly susceptible (having pre-existing M.S.), that resulted in his disability.

Finally, as in **Worden**, the effect that the excessive mental and physical stress and strain had on Emmett Massie's pre-existing M.S. is the same whether one chooses to characterize Emmett Massie's disability as caused by M.S., aggravated by excessive physical and mental stress encountered on the job, or as being the result of "repeated accidents arising out of and in the course of his employment."

B. HEART ATTACK AND OTHER SUDDEN INTERNAL FAILURE CASES: THE **VICTOR WINE** RULE.

Although not discussed by the petitioners, under Florida Workers' Compensation law, there are two lines of cases dealing with the compensability of heart attacks. While it is true that **Victor Wine** and its progeny hold that heart attacks are compensable only if suffered while or immediately following some unusual event involving strain or exertion not routine to the employees' custom duties, another line of cases find compensability where an employee is injured in an identifiable accident which either immediately or subsequently results in a heart attack. **Reynolds w. Whitney Tack Lines**, 279 So.2d 293 (Fla. 1973); **Popiel v. Broward County School Board**, 432 So.2d

1374 (Fla. 1st DCA 1983).

The test established in **Victor Wine** is a judicially created exception to the general rule recognizing as appropriate an award of compensation for aggravation of a pre-existing non-disabling condition. The test was established to meet the particular difficulties presented by heart attack cases. As will be seen, the primary difficulty in fairly addressing such cases and justly awarding compensation is in determining medical causation. This is particularly true as a "sudden event" such as a heart attack is generally just as likely to happen off the job as on.

In **Victor Wine**, supra, this court was confronted with the question of whether a heart attack suffered by an employee while at his usual work, with its accustomed physical exertion, was a compensable injury "by accident." On rehearing, this court emphasized that it was

> settled beyond question in this state that an internal failure . . . brought about by exertion in the performance of regular or usual duties . . . may be found to be an injury "by accident."
>
> * * *
>
> It is also settled law in this state that a disability which results from some exposure peculiar to and constituting a hazard of employment, operating upon the physical condition of the employee at the time of such exposure is a compensable injury "by accident."

Victor Wine, 141 So.2d at 588.

This court went on to establish an exception, which was originally applied only to heart attack cases:

> When disabling heart attacks are involved and where such heart conditions are precipitated by work-connected exertion effecting a pre-existing non-disabling heart disease, then injuries are compensable only if the employee was at the time subject to unusual strain or over-exertion not routine to the type of work he was accustomed to performing.

Id. at 589.

As later recognized by this Court, in the case of **Tintera v. Armour & Company**, , 362 So.2d 1344 (Fla. 1978),

> **Victor Wine**, supra, is premised upon recognition of the fact that a great portion of our work force comes upon the work scene with heart defects that would result in heart attacks in any event. Industry should not be made to compensate the employee for these attacks unless it is shown that an identifiable effort over and above that routine for the job produced a strain and exertion that combined with the pre-existing non-disabling heart disease to produce death or disability sooner than it would otherwise have occurred from the normal progression of the disease.

Id. at 1346.

Claimants seeking benefits for disability arising from heart attacks typically suffer from long-standing heart disease. The medical community and the courts have long recognized that at some point the heart disease will, in all likelihood, lead to a heart attack. Therefore, it was necessary for this court to craft a test which took account of these facts. The test had to be fair to employers and claimants alike and place on industry the burden of compensating only those heart attacks which could be demonstrated occurred because of conditions encountered on the job. For example, although the claimant in **Tintera**

attempted to establish a connection between the job stress and anxiety he experienced and his heart attack, additional evidence demonstrated that he was also under stress and suffering from anxiety because he was going through a divorce, had to commute through heavy traffic, and had been in a minor automobile accident.

Another case demonstrating the difficulty, from a medical standpoint, of determining the cause of a sudden internal failure (ruptured aneurysm) is **Richard E. Mosca & Company, Inc. v. Mosca**, 362 So.2d 1340 (Fla. 1978). In **Mosca**, the claimant had a history of medically controlled hypertension. When his business experienced a downturn he had to lay off employees, move, and reduce salaries which caused him to experience stress and to work longer hours. During the course of a tense sales meeting, he suffered a rupture of a congenital cerebral aneurysm.

Claimant's physician acknowledged that a ruptured aneurysm could have occurred at any time, but felt that the pressure brought on by the claimant's business problems, combined with the emotional stress of the important sales meeting, contributed to the rupture. The employer's physician agreed that the rupture could have occurred at any time but felt there was no causal relationship between the sales meeting and the aneurysm.

Faced with this conflicting and uncertain medical testimony, the court held that the same **Victor Wine** rationale for requiring a strict rule in heart attack cases also applied to cases involving other sudden internal failures of the

cardiovascular system. In considering the anxiety and nervousness generated by the sales meeting, this court denied compensation on the grounds that

> [e]motional strain is too elusive a factor to be utilized, independent of any physical activity, in determining whether there is a causal connection between a heart attack or other internal failure of the cardiovascular system and the claimant's employment.

Id. at 1342.

Both the **Victor Wine** test and emotional stress rule established in **Mosca** were applied in denying compensability in the case of **Wobert, Saxon and Middleton v. Warren**, 444 So.2d 511 (Fla. 1st DCA 1984). In **Warren**, the employee alleged that her pre-existing asthmatic condition was aggravated by "emotional trauma" she experienced after discovering irregularities in her boss's trust account records. The only medical evidence in the file supporting this allegation was a brief notation appearing in the claimant's physician's report that "her asthma attack could have been brought on due to her working under stress." Id. at 514 (emphasis in the original text). Faced with these facts, the first district held:

> [the doctor's] speculative statement is clearly insufficient to establish causation. **Kashin v. Food Fair**, 97 So.2d 609 (Fla. 1987) . . . .
>
> Because it is conceded that claimant's asthma attack was not precipitated by any physical condition to which she was exposed in the work place, because it is conceded that no unusual physical effort or event occurred, we find that

the compensation order herein must be reversed."[3]

Id. at 514.

A review of the above cases demonstrates that the **Victor Wine** test is premised on the following factors:

1. A large number of people suffer from congenital conditions which predisposed them to heart attacks (and to a lesser extent other "sudden failures").

2. Establishing medical causation in such situations is difficult and often a matter of speculation.

3. The timing of a heart attack or other sudden failure is generally a fortuitous event related to a personal condition; it is as likely to occur off the job as on.

In recognition of these difficulties and particularly because the failure itself is a sudden event which could occur at any time, this court has established and continues to enforce the **Victor Wine** test.

In the instant case, Massie seeks compensation for disability resulting from aggravation of M.S. by prolonged exposure in employment to a combination of physical and mental stress and strain attributable to unusual circumstances and exceptionally long hours. The factors identified above which

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[3]The holding in **Warren** must be considered an aberration. Certainly, the court never should have even considered whether aggravation of pre-existing asthma constitutes a "sudden failure" of the pulmonary systems as the medical evidence was clearly insufficient to support an award of compensation. **Warren** is a classic example of bad facts creating bad law.

are present in heart attack and the other sudden failure cases are not present in the instant case. Because of these factors and the reasons discussed below, the exceptions established in **Victor Wine**, **Mosca**, and **Warren** should not apply.

First, there are not a large number of people suffering from M.S. and, additionally, M.S. does not pre-dispose individuals to "sudden failures" resulting in death or serious disability. Second, in the instant case, there is no uncertainty concerning the relationship between the prolonged exposure to deleterious conditions in Massie's employment and the accelerated M.S. course leading to total disability. Third, M.S. is not the type of condition which pre-disposes one to a sudden failure which is as likely to occur off the job as on; instead, M.S. is a disease that has a generally slow and predictable course. One does not expect to see significant changes even over a period of 10 years.

Where medical causation has been speculative in the majority of heart attack and sudden failure cases cited by the petitioner (see, for example, **Mosca**, supra, **Warren**, supra, and **Tintera**, supra), medical causation in the instant case is certain, verified by Drs. Rottman and Mouat, and undisputed.

It was Dr. Rottman's opinion that Massie's M.S. was aggravated by job conditions, stress, pressure and long hours. Dr. Mouat stated:

> Measured normally in say five year increments, there will some some objective changes that will

> qualify as worsening, especially in terms of coordination. His overall status is not likely to change significantly; for example, in the next decade . . . .

(R:350).

As none of the considerations peculiar to heart attack or other sudden failure cases are present in this case, it makes neither legal nor logical sense to apply the **Victor Wine** test. However, even if this Court is inclined to apply the **Victor Wine** test to the instant case, recovery cannot be denied. As recognized by this court in **Silvera v. Miami Wholesale Grocery, Inc.**, 400 So.2d 439 (Fla. 1981):

> The issue posed by these facts is whether **Richards Department Store v. Donin**, 365 So.2d 385 (Fla. 1978) requires a precise correlation between physical effort and the onset of a heart injury, and whether an "effort" encompasses a combined physical and emotional sequence which is identifiable apart from normal work pressures. We hold that it does not require a precise temporal correlation, and that the specifically identifiable effort may be a causally related emotional and physical sequence which is independent of normal work pressures.
>
> To be compensable, the "identifiable effort" associated with the onset of a heart attack must be job-related and must stem in part from some non-routine physical exertion. It may, however, involve psychological pressures closely associated with the physical activity.

Id. at 440 (emphasis added).

In **Silvera**, this court found compensable a heart attack brought on by a combination of excessive mental and physical stress, including long hours. It follows that aggravation of Massie's M.S. by exposure over a long period of time to a

combination of physical and mental stress and strain attributable to unusual circumstances and exceptionally long hours is compensable. See also, **Hastings v. City of Ft. Lauderdale Fire Dept.**, 178 So.2d 106 (Fla. 1965) (where claimant suffered a heart attack while engaged in a large drill); **Marhoefer v. Frye**, 199 So.2d 723 (Fla. 1967) (where a foreman on a multi-store construction project suffered a heart attack).

Extension of the **Victor Wine** test to cover situations such as **Massie** could only be accomplished by overruling **Orr**, supra, **Czepial**, supra, **Worden**, supra, and **Festa**, supra. Certainly, one cannot state with any degree of scientific certainty that the physical and mental stress to which Massie was exposed was less of a deleterious force than the heat in **Orr** or the furnace flame in **Worden**. Can one say that the force in the instant case was less than the force in **Winn-Dixie**, supra, where a wrist injury resulted from 23 years of stocking shelves; **Cook v. Henry C. Beck Co.**, 48 So.2d 743 (Fla. 1950), where the claimant contracted pneumonia after having spent considerable time outdoors as a night watchman during cold wet weather; in **Armstrong v. Munchies Caterers, Inc.**, 377 So.2d 748 (Fla. 1st DCA 1979), where lifting heavy cartons eventually led to a rotator cuff tear?

The extension of the judicially created **Victor Wine** exception as urged by petitioner is not warranted, and it should be left up to the legislature. This is particularly true in view of the fact that the legislature has just completed a

substantial revision of the Workers' Compensation Act during which it specifically addressed the issue of stress in the work place. In the face of the "crisis" alluded to by petitioners in their initial brief, the legislature chose only to preclude recovery for mental or nervous injuries due to stress. Certainly, the legislature had the opportunity to also preclude claims for disability resulting from organic conditions aggravated by stress.

C. THE JCC DID NOT FIND THAT MASSIE WAS NOT SUBJECTED TO UNUSUAL OR EXCESSIVE PHYSICAL STRESS AND STRAIN.

Prior to responding to the specifics of petitioners' "creative" fact argument, Massie would reiterate that in order to establish jurisdiction, the conflict must appear expressly in the opinion under review. **Jenkins**, supra. Additionally, where the district court has found a need for clarification of a JCC finding, this court should not intervene absent a clear showing that the district court acted arbitrarily. **Vargas**, supra.

The JCC's finding which was challenged from the outset and which has been the focus of the district court opinions was:

> I find that the stress which the claimant testified to over a long period of time was not to an extent greater than that to which the general public is exposed.

(R:407).

It was this finding that the DCA initially found was supported by "expert testimony that Massie's stress was not unusual." Massie, 463 So.2d at 384. As above, the DCA has now entirely receded from that finding. The petitioner does not

argue, and thus concedes, that there is no support of that finding. Additionally, with respect to the above finding, the JCC admitted, "I know there's no support for it, but that's what I found." (R:439).

While petitioners have argued that this remark was made facetiously or tongue in cheek, this argument must be rejected out of hand. It is noteworthy that the record demonstrates that the petitioner's appellate counsel was not even present at the hearing in question. The JCC is more aware than anyone that the record produced below comes to this court cold and without intonation. A review of the record verifies that immediately prior to making his comment, the JCC was informed that the case would be appealed. The JCC has had ample opportunity to withdraw or explain his concession, both at the original hearing on Massie's motion to vacate or later at the hearing on Massie's claim for modification. Furthermore, the JCC has not, at any time, cited any facts in support of the finding. His failure to do so is easily explained; quite simply, there are absolutely no facts in the record which in any way support that finding.

Contrary to the representations of the petitioners, the deputy commissioner never found that the exceptionally long hours Emmett Massie worked in attempting to discharge duties required of him did not constitute unusual physical stress and strain. Petitioners have attempted to create such a finding by quoting general comments in the judge's order. These comments are non-specific and there are no facts or testimony cited in

support of them. Additionally, they conflict with evidence and testimony relied upon by the judge in reaching other findings. To better understand what the deputy commissioner did and did not find, it is beneficial to examine the pertinent portions of his order. Therefore, paragraphs 6 and 10 are set forth below.

> 6. The claimant testified that immediately upon commencing his duties as Director of Engineering for WUFT-TV-FM in July 1979, he was required to work long hours, often ten to twelve hours per day, for as many as six or seven days a week. This condition continued from the commencement of his duties through October of 1980, when the WUFT-TV transmitting tower satellite dish and micro-transmitters were destroyed in an airplane crash. In order to meet that emergency, the claimant's hours increased to as many as eighteen hours per day, with this condition lasting for one to two months, before the claimant was able to shorten his hours. These hours were necessitated not only by the emergency created when the tower was destroyed, but also due to the move of WUFT-TV from the station building to Weimer Hall on the University of Florida campus. It was noted that the station was also undergoing extensive expansion during this period which also required the acquisition of a considerable amount of new equipment. During this entire period of time, the Engineering Division was plagued by unusually high turnover, which was in the neighborhood of 86% during the Claimant's first year. The claimant testified that during the fist year or two of his employment with the University, he was pressured by the FM Station Manager to purchase equipment for the FM station in a manner that would not comply with the Florida statutory and regulatory requirements. He testified that this caused him considerable pressure as he was the individual directly responsible and accountable for purchasing of broadcast equipment for WUFT-TV-FM during this period of time. Partially as a result of the above-described conflict, the claimant's job descriptions underwent revisions, beginning in early 1981. It was not until approximately August of 1982 that the revision

process was completed and during much of the intervening period two job descriptions continued to be in existence, both of which concerned the position of Director of Engineering. This testimony was corroborated by the claimant's witnesses and was not contradicted by the Employer/Carrier.

* * *

10. I find that the claimant's multiple sclerosis condition pre-existed his employment with the University of Florida. The medical testimony reveals that multiple sclerosis is a progressive, non-curable debilitating disease. Its cause is unknown. The testimony further indicates that stress can accelerate or exacerbate multiple sclerosis, however, I find that the stress which the claimant testified to over a long period of time was not to an extent greater that that to which the general public is exposed, was not an exposure peculiar to and constituting a hazard of his employment operating upon the physical condition of the claimant. The claimant must to have been subject to more than the ordinary hazards confronting people generally. Job pressure and long hours of work in and of itself have never been held to be factors which result in entitlements under the Workers' Compensation Act. Indeed, if job pressure and stress were compensable, there would be no end to compensable claims under the Act, as in today' world, all gainful activities are subject to the disease. Unlike **Festa v. Teleflex, Inc.**, 382 So.2d 111 (Fla. 1st DCA 1980), the claimant was not subjected to repeated trauma. Stress while it may exacerbate multiple sclerosis, or for that matter many other organic diseases, is in the nature of a psychological trauma and is not compensable. See **Polk Nursery Company, Inc. v. Reilly**, 433 So.2d 1233 (Fla. 1st DCA 1983). I therefore find that the claimant has not suffered a compensable accident and that his permanent total disability is not covered under the Workers' Compensation Act.

(R:405-408) (emphasis added).

The judge makes no specific findings that the exceptionally long hours Emmett Massie worked (as found in paragraph 6) to meet the responsibilities of his job and which hours were due to

conditions beyond his control, somehow did not cause him physical stress and strain.

Similarly, nowhere in the order is there any explanation for the judge's general statement that "Unlike **Festa**, the claimant was not subjected to repeated trauma." The deputy commissioner does not explain what he means by repeated trauma; certainly he does not specifically find that the physical strain resulting from working virtually around the clock does not or cannot constitute "repeat trauma."

The other general statement relied upon by the petitioner is found in paragraph 10 where the judge states:

> [s]tress, while it may exacerbate multiple sclerosis, or for that manner, many other organic diseases, is in the nature of a psychological trauma and is not compensable. See **Polk Nursery Company, Inc. v. Reilly**, 433 So.2d 1233 (Fla. 1st DCA 1983).

The case cited by the deputy commissioner concerned claimants who, thinking that they had been poisoned, developed physical symptoms. The evidence in **Reilly** was uncontroverted that they had not, in fact, been poisoned and that their symptoms were due entirely to hysterical reactions to an imagined event.

Reilly has nothing to do with the case at hand. Additionally, the statement of the JCC is in no way directly related to the facts in the instant case. The JCC does not say that the physical strain Emmett Massie experienced when he

worked virtually around the clock was in the nature of psychological trauma; he simply makes a general statement which not only is not applied to the case at hand, but is unsupported by any evidence in the record as well. As there is no support in the record for the statement, the JCC is unable to and does not cite any facts or evidence in support of it.

Petitioners attempt to back up the JCC non-findings by quoting extensively from the testimony of Dr. Mouat. With regard to the testimony of Dr. Mouat, the following is undisputed.

1. It is the doctor's opinion that the course of Emmett Massie's multiple sclerosis was accelerated by job related stresses.

2. In the sense the doctor was using the word "stress" in a medical context, he meant "conflicts between an individual's efforts and their productivity" (R:340) (Emphasis added). By way of example, the doctor stated "perhaps best saying it as in the sense that someone is on a treadmill and that they are getting further behind all the time." (R:341). Additionally, the doctor stated that stress results from situations where "expectations are greater than we can deliver at times." (R:348).

3. The doctor recommended that a stress expert be consulted.

Petitioners pounce on number 2 and argue that the doctor was "clearly speaking in terms of emotional or psychological

stress and not physical." (PB:22). Nothing could be further from the truth or less supported by the record. Obviously, conflicts between efforts and productivity are more likely than not to involve physical stress, as was demonstrably the case in **Massie**. Given the short staff, high turnover, burgeoning responsibilities, and the emergency caused by the airplane accident, Emmett Massie responded in the only way he could. He worked extraordinarily long hours, sometimes around the clock, attempting to meeting the expectations of his job. Clearly, the job expectations were (in the words of Dr. Mouat) "greater than [Emmett Massie] could deliver." Surely, Emmett Massie was "on a treadmill and...getting further behind." The physical stress and strain Massie experienced by working exceptionally long hours was, without question, a component of the stress considered by Dr. Mouat to have accelerated the course of Massie's multiple sclerosis.[4]

At the recommendation of Dr. Mouat, Massie sought out Allan Pappas who possessed unique qualifications enabling him to render an opinion in the area of job stress. As noted above, Mr. Pappas' qualifications to testify in the area of job stress were never challenged by the employer/petitioner. Pappas

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[4]Massie does not dispute the fact that the doctor does not consider M.S. to be an occupational disease nor that the doctor does not believe Massie's M.S. was aggravated by a fall or similar on-the-job injury.

identified four specific excessive stress factors present in Emmett Massie's job. He opined that Massie experienced both physical and emotional stress and strain and that such was excessive, unusual, out of the ordinary, and on a scale of one to ten, an eight or nine. Nowhere does the JCC explain his apparent rejection of the express and uncontroverted opinion of Pappas.

In summary, the material facts have never been in dispute. In 1983, at the age of 50, Emmett Massie became totally disabled due to the effects of M.S., the course of which was greatly accelerated by conditions he encountered on his job. Deleterious job conditions included physical stress and strain caused by exceptionally long hours which were necessitated by occurrences beyond Massie's control. Massie was also subjected to emotional stress brought on by factors which, again, were beyond his control. None of the above has ever been in dispute. Massie's expert stated the job stress was both physical and mental and that it was excessive, unusual, and out of the ordinary.

Nonetheless, the JCC originally found that the stress to which Massie was exposed was not to an extent greater than that to which the general public is exposed. In its original opinion, the first district held that because there was expert testimony that Massie's stress was not unusual, the JCC's denial was supported by competent and substantial evidence. When the JCC's finding later was challenged, he conceded that there was

no support for it. He has never receded from nor explained that concession. Following a complete review of the record, the first district has likewise conceded that its finding was in error.

Under these circumstances, Emmett Massie is entitled to compensation as it is well settled that disability resulting from exposure to conditions peculiar to a particular job which exacerbate or accelerate a non-disabling, pre-existing condition is compensable as occurring by accident within the meaning of section 440.02, Florida Statutes. **Worden**, supra. Furthermore, the facts of the instant case meet the **Victor Wine** test as set forth in **Silvera**, supra.

II. THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT WHEN THERE IS A COMPLETE ABSENCE OF ANY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT AN EARLIER DENIAL OF A CLAIM, SECTION 440.28, FLORIDA STATUTES, REQUIRES THE JUDGE OF COMPENSATION CLAIMS (ONCE A TIMELY MOTION FOR MODIFICATION IS FILED) TO ORDER MODIFICATION.

Appeals concerning workers' compensation litigation necessarily must initially focus on the fact that the court is dealing with the remedial workers' compensation act and the special considerations attendant to that context. This statutory area of law took away the injured worker's common law rights to sue employers and took away large segments of personal injury damages. In return, the workers' compensation law gave injured workers limited benefits that are to be received with promptness and certainty. The Act was designed to be self-executing, and interpretations of law in this area are to be made consistent with the history and objectives of the remedial legislation. See, e.g., **Florida Erection Services, Inc. v. McDonald**, 395 So.2d 203 (Fla. 1st DCA 1981).

Simply stated, the Workers' Compensation Act was always designed to be a self-executing, cooperative procedure where all parties, especially including the employer/carrier and the courts, are under a duty to affirmatively investigate and assure that the statutory limit of benefits are paid to a claimant when justly due on the merits of the claim.

Further, no discussion of the fundamentals of workers' compensation law would be complete without noting that the

Florida workers' compensation laws are remedial in nature and the courts are obligated to resolve any doubt as to the statutory construction in favor of providing benefits to injured workers. **Daniel v. Holmes Lumber Company**, 490 So.2d 1252 (Fla. 1986); **Topeka & Management v. Pate**, 414 So.2d 1184 (Fla. 1st DCA 1982).

Consistent with the design and purpose of such a system, the JCCs in workers' compensation litigation are provided with expansive authority to assure that the beneficial purposes and goals of the act are met. By Florida Statute 440.29(1), the JCCs are charged as follows:

> In making an investigation or inquiry or conducting a hearing, the deputy commissioner shall not be bound by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct such comp hearing, in such manner as to best ascertain the rights of the parties.

Similarly, section 440.25(3)(a), Florida Statutes, states in part that, "The division or deputy commissioner shall make or cause to be paid such investigation as is necessary in respect to the claim."

Finally, in order to assure proper appellate review, the JCC charged with the duty of making such investigation or inquiry as necessary. section 440.25(3)(c) requires that an "order making an award or rejecting the claim shall set forth the findings of ultimate facts."

Consistent with the fundamental premise of justly and properly determining the rights of the parties in a workers' compensation case on the merits, one of the more common

conclusions seen repeatedly in Florida's appellate court opinions is the reversal and remand with specific directions by the appellate court to take such further testimony in evidence below as may be needed to clarify a point that seemed in confusion. See, e.g. **Mills v. Laris Painting Company**, 125 So.2d 745 (Fla. 1960). Furthermore, when an order fails to contain explicit findings of fact necessary to permit adequate appellate review of the basis of the decision below, the proper procedure is to reverse and remand the case for a further proceeding. **Ellerbee v. Concord Roofing Company**, 461 So.2d 206 (Fla. 1st DCA 1984). These actions by even the appellate courts are again clearly to best ascertain the rights of the parties on the merits of a workers' compensation case just as is required from the outset by sections 440.29 and 440.25, Florida Statutes.

From the above, it can be seen that under Florida's remedial, self-executing Worker's Compensation Act, all litigants and the court are under a duty and obligation to best ascertain the rights of the parties and to assure that the limited benefits justly due on the merits of a claim are properly paid to the injured worker.

Under the facts and law, there can be no doubt that Emmett Massie is entitled to workers' compensation benefits for his disability which undisputedly arose from his exposure to peculiar conditions he encountered on his job. In reaching this just result, the first district court of appeal has admitted, based on a review of the complete record, that its decision to

affirm the original order was based on a mistake in determining facts due to the court's erroneous understanding of plaintiff's expert's testimony. That erroneous understanding has now been corrected and certainly the act contemplates no less than that the court take all actions necessary to prevent manifest injustice from befalling Emmett Massie.

Similarly, the JCC has conceded that his original order included findings which were unsupported by any fact in the record. JCC Akins acknowledged that his erroneous finding was influenced by his opinion that "job pressure and long hours of work in and of itself have never been held to be factors which result in entitlements under the Workers' Compensation Act." (R:407). As that misapprehension of the law has now been clarified, the proper course is certainly to remand the case so that justice may be done. Yet petitioner urges that justice will be better served by requiring that both the JCC and the DCA blindly stay the course.

This court has previously recognized that section 440.28 creates an exception to the traditional notions of finality based on the doctrine of res judicata such that the doctrine is not applicable in workers' compensation cases when the statutory grounds are met. Surely they have been met here. However, even should the court find that those grounds have not been met, reversal of the JCC's original opinion is absolutely required in order to prevent manifest injustice.

A. THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH **POWER v. JOSEPH G. MORETTI, INC.**, 120 So.2d 443 (Fla. 1960).

In **Power**, supra, the claimant contracted a fungus infection while working. The infection directly affected his feet and also aggravated a pre-existing hand condition. One doctor expressed the opinion that the original fungus infection continued to aggravate the employee's pre-existing hand ailment, even after the fungus on the feet cleared up. Another doctor, Dr. Funt, "was of the firm opinion that the disabling effect of the industrially related fungus infection (had) terminated." Id. at 440. The deputy commissioner chose to accept the testimony of Dr. Funt and entered an order denying compensation. Thereafter, the employee brought a claim for modification under section 440.28 alleging that there had been a mistake in a determination of fact. At that hearing, in response to the question: "Has the original industrial injury had a continuing effect on claimant's hand condition after April 12, 1985?", the doctor replied, "I don't know, I really don't know." Id. at 445. Thereupon, the deputy commissioner entered an order modifying his original order stating that "in retrospect" he had made a mistake in a determination of fact.

The modification order was reviewed by the IRC which reversed, holding that the modification proceeding had been merely cumulative and that the deputy had simply changed his mind.

The supreme court affirmed the IRC noting that Dr. Funt's testimony at the modification hearing did not even demonstrate a

change of mind; rather, he had merely confessed some doubts regarding his original opinion. This court held that in order to obtain a modification on the ground of mistaken fact, it is not sufficient to produce a witness who will state that he has changed his mind; the mistake in determination must be one which has been committed by the deputy, not by a witness.

In all but three appellate decisions, Florida courts have struggled to give some meaning and purpose to the statutory language of section 440.28, but have always applied it in keeping with the judicial system's traditional quest for finality of decision and denied modification based on a mistake in determination of fact. See **Massie v. University of Florida**, 570 So.2d 963, 970, 971 (Fla. 1st DCA 1990).

However, none of the long line of cases cited by the first district in **Massie**, supra, or cited by the petitioners have involved the issue presented in the instant case. In the words of the first district,

> [n]one of the decisions reviewed have presented the precise situation involved in this case [Massie]; that is, when the deputy commissioner conceded a total lack of competent and substantial evidence in the record to support his findings of fact leading to a denial of compensability. If there is any statutory basis at all for modifying a final order for a mistake in determination of fact under section 440.28, most assuredly it must exist when, upon consideration of a timely motion for modification, the moving party demonstrates and the deputy commissioner concedes a complete absence of competent evidence to support the alleged mistake in fact.

Id. at 976.

Unlike the situation which was present in **Power**, supra, or

the numerous other decisions where a modification based on a mistake in determination of fact was denied, Mr. Pappas was not called to testify at the modification hearing merely to explain his prior testimony, to give it more force or effect, nor to indicate that his opinions had changed. Instead, the thrust of Mr. Pappas' testimony was that the quotes the appellate court erroneously attributed to him and relied upon to deny compensation simply did not exist in the record. Furthermore, the quotes directly conflicted with his actual testimony. Mr. Pappas testified as follows:

> I couldn't find a quote from it (the original district court opinion) that I didn't feel was taken out of context.
>
> * * *
>
> I previously stated that I felt that Mr. Massie experienced stress while at WUFT was excessive, that it was unusual, and I identified four stressors in that environment that I thought lead previous to that opinion [sic].
>
> * * *
>
> The record reflects that I testified, in later stages, that only when there are excessive stressors in the work environment, I feel that a person will have a great deal of difficulty in responding to those stresses. Mr. Massie's case, I particularly thought that those stresses were not within his control.

(R:30,31).

Finally, Mr. Pappas testified that on a scale of 1 to 10, the physical and mental stress Massie encountered on the job was an 8 or 9.

The error in petitioners' argument on this issue tracks the mistaken analysis conducted by the first district in the opinion

dated June 2, 1988. Although Mr. Pappas' opinion with respect to the physical and mental stress and strain Emmett Massie experienced did not change his testimony at the modification hearing clearly established that "quotes" the D.C.A. attributed to him were taken out of context and misconstrued so as to completely change his opinion. Thus, unlike **Power**, supra, the witness was not called so that he could indicate that he had changed his mind or the force of his opinion; rather he was called to confirm that "quotes" had been erroneously attributed to him, and that his opinions were and always had been in direct opposition to opinions which the D.C.A. incorrectly attributed to him.

Although Massie does not contend that a fraud was perpetrated at his original hearing, **Oakdel, Inc. v. Gallardo**, 505 So.2d 672 (Fla. 1st DCA 1987) is the only Florida case construing section 440.28, Florida Statutes, which is remotely similar to Massie. In **Oakdel**, the medical testimony at the original hearing was in conflict. One physician opined that the claimant was 20% disabled while other physicians opined the claimant suffered either no or only very minor permanent impairment. The JCC based his order awarding permanent total disability benefits, in part, on his observations of the claimant at the hearing. The claimant also testified that no one had offered him employment since his accident and that he had conducted an extensive, but unsuccessful work search.

The employer filed a claim for modification based on a mistake in fact and submitted evidence at the modification

hearing that, contrary to the claimant's testimony, he had been employed, full time, as a laborer in a nursery for a period commencing six months prior to his date of MMI until one and a half years after that date. Thus, the claimant was in fact employed full time at the time he testified at the original hearing that he was unemployed, had not been offered employment and had been unsuccessful in locating employment. Nonetheless, the deputy commissioner denied the employer's petition for modification.

The first district reversed, finding that there was no competent substantial evidence to support the original award of permanent total disability benefits. This finding was based on the fact that permanent total disability compensation cannot be awarded if the claimant is "engaged in . . . gainful employment", Section 440.15(1)(b), Fla. Stat.

Although **Massie** does not involve fraud, it certainly does involve a situation where there is no competent substantial evidence to support the JCC's order. This was conceded by both the JCC and the first district, whose decision is based on a review of the entire record. If section 440.28, Fla. Stat., cannot be used in **Massie**, one must question whether it serves any purpose at all.

B. THE DECISION OF THE FIRST DISTRICT MUST BE AFFIRMED IN ORDER TO AVOID MANIFEST INJUSTICE.

Even if this court is persuaded that Massie's claim for modification was properly denied by the JCC, the decision of the first district court of appeals should be affirmed for the reasons the first district set forth in its opinion dated June

2, 1988 (13 FLW 1342, CASE NO. BN-98). There, the first district recognized

> We are, therefore, confronted with a clear case of manifest injustice apparent on the face of this record because the deputy commissioner's orders were based on one theory of law while this court's affirmance of that decision was based on our own construction of testimony in the record which was not the subject of any specific finding of fact by the deputy.

Id. at 1346.

The first district went on to recognize that the deputy commissioner's original order made factual findings that were in direct conflict with the "findings" the first district erroneously established in its original opinion. The court noted that it was not, ordinarily, an appellate court's function to search the record for facts not explicitly found by a deputy commissioner in order to support his order. **Foxworth v. Florida Industrial Commission**, 86 So.2d 147 (Fla. 1955). The court recognized that the proper procedure on the original appeal would have been to reverse and remand the case for further findings. The court then went on to hold that while section 440.28 did not provide an appropriate avenue of relief under the circumstances presented by Massie, the court had the inherent power to correct its own errors to avoid manifest injustice. As Massie is unable to improve on the cogent analysis provided by the first district, that portion of the district court's opinion wherein the court discussed its inherent power to correct errors in order to avoid manifest injustice will be paraphrased and quoted below. In **Strazzulla v. Hendrick**, 177 So.2d 1 (Fla. 1965), the supreme court settled the dispute deriving from its

decisions in **Family Loan Co. v. Smetal**, 123 Fla. 900, 169 So. 48 (1936) (holding that the court was without authority to review or reverse what it had previously decided as the law of the case), and **Beverly Beach Properties, Inc. v. Nelson**, 68 So.2d 604 (Fla. 1953) (suggesting otherwise), and held, as an exception of the "law of the case" doctrine, that the court has inherent power to correct its own prior erroneous decisions to prevent manifest injustice. The first district court stated:

> In the McGregor case [**McGregor v. Provident Trust Co. of Philadelphia**, 1935, 119 Fla. 718, 162 So. 323] the court discussed at length the three principles of law--law of the case, res judicata and stare decisis--which are adhered to by this court and courts of other jurisdictions in order to lend stability to judicial decisions and the jurisprudence of the state, as well as to avoid "piecemeal" appeals and to bring litigation to an end as expeditiously as possible. Respecting the doctrine of "law of the case", it was said:
>
> > "By 'law of the case' is meant the principle that the questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and trial court, through all subsequent stages of the proceedings, and will **seldom** be reconsidered or reversed, even though they appear to have been erroneous." (Emphasis added.)
>
> This particular statement made in the **McGregor** opinion--which clearly implies **authority** to reconsider and reverse--has been quoted in the following cases [citations omitted].
>
> * * *
>
> The **Beverly Beach Properties** decision, as well as the **McGregor** and similar decisions, are, however, consistent with our decisions respecting the doctrine of res judicata and stare decisis [citations omitted], and with what appears to be the trend in other courts to recognize that the

> administration of justice requires some flexibility in the rule. [Citations omitted]
>
> * * *
>
> We think it should be made clear, however, that an appellate court should reconsider a point of law previously decided on a former appeal only as a matter of grace, and not as a matter of right; and that an exception to the general rule binding the parties to "the law of the case" at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons--and always, of course, only where "manifest injustice" will result from a strict and rigid adherence to the rule.

Strazzulla, 177 So.2d at 3-4.

A number of cases from the supreme court and the district courts have since applied this exception in diverse contexts. See, e.g., **Brunner Enterprises, Inc. v. Department of Revenue**, 452 So.2d 550 (Fla. 1984); **Preston v. State**, 444 So.2d 939 (Fla. 1984); **Harris v. Lewis State Bank**, 482 So.2d 1378 (Fla. 1st DCA 1986); **3-M Electric Corporation v. Vigoa**, 443 So.2d 111 (Fla. 3d DCA 1983), **rev. denied**, 447 So.2d 888 (Fla. 1984).

In **Harris v. Lewis State Bank**, 436 So.2d 338 (Fla. 1st DCA 1983), the court affirmed in part and reversed in part a summary judgment entered in favor of defendant. One of the counts the first district disposed of was based on malicious prosecution. On the second appeal, the court receded from its earlier decision and held that summary judgment was not appropriate. In doing so, the first district court made the following observations:

> An appellate court's duty to administer justice under the law outweighs its duty to be consistent. While the law of the case will seldom be reconsidered or reversed, an exception

> to the general rule binding the parties to the law of the case may be made in unusual circumstances where manifest injustice will result from a strict and rigid adherence to the rule....We are convinced that this court's ruling in **Harris I** affirming the summary judgment as to the malicious prosecution count was erroneous and will result in manifest injustice.

Harris v. Lewis State Bank, 482 So.2d 1278, 1383 [Footnotes omitted].

Certainly, in the field of workers' compensation which, by design, is intended to be self-executing, the duty to administer justice far outweighs the duty to follow an earlier decision which resulted in manifest injustice due to an acknowledged error in reviewing the evidence. The right to judicial review is essential to the workers' compensation process under the constitutional right of access to court guaranteed by Section 21 of the Declaration of Rights as Article I of the Florida Constitution.

In summation, **Massie** does not conflict with **Power** since unlike **Power**, Massie did not involve a situation where a witness changed his mind or testified with more or less certainty thereby causing the JCC to "upon reflection" change his mind. In Massie, there has concededly never been any substantial competent evidence to support the finding in the JCC's original order that "the stress which (Massie) testified to over a long period of time was not to an extent greater than that to which the general public is exposed." (R:407). At the modification hearing, Mr. Pappas made that abundantly clear. Under these circumstances, the JCC's failure to order modification was an abuse of discretion.

Additionally, this court must affirm the decision of the first district on the grounds that such action is necessary in order to avoid manifest injustice. As recognized by the first district

> [The] duty to administer justice under the law outweighs [the] duty to be consistent or to follow an earlier decision which due to an error in reviewing the evidence, will result in manifest injustice to a party.

Massie, 13 FLW at 1347.

CONCLUSION

Based on a comprehensive review of the entire record, the first district has conceded, as has the JCC, that there is no support for either the initial Massie appellate decision or for the original order. A court's first duty is to administer justice; this outweighs all other considerations including even the duty to follow earlier decisions. Based on its review of the entire record, the first district stated:

> We no longer have any doubt that the facts presented by claimant in support of his claim and found credible by the deputy commissioner's first order are legally sufficient to support a finding of compensable aggravation of the claimant's preexisting M.S. condition due to unusual and excessive physical and mental stress and strain beyond that to which the general public is subjected....Our error in ruling otherwise on the first appeal has resulted in manifest injustice appearing on the face of this record which justifies the application of this exception to the law of the case doctrine.

Massie, 13 FLW at 1347.

As there is no express and direct conflict between the majority's opinion in **Massie**, supra, and this court's opinions in **Victor Wine**, supra, **Power**, supra, and **Maryland Casualty**, supra, this court should decline jurisdiction. **Jenkins**, supra. Failing that, this court should affirm the opinion of the first district on all issues. Alternatively, this court should reverse the original order of the JCC (to prevent manifest injustice) and remand this case for entry of an order consistent with the findings of fact and law established by the first district with respect to the first issue on appeal.

Respectfully submitted,

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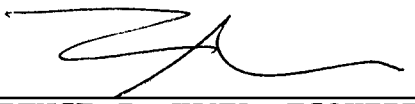
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David A. McCranie, Esquire, McConnaughhay, Roland, Maida, Cherr & McCranie, 4811 Beach Boulevard, Suite 402, Jacksonville, Florida 32207, and to H. George Kagan, Esquire, 455 Fairway Drive, Suite 101, Deerfield Beach, Florida 33441, by United States Mail, this 17th day of May, 1991.

A ABBOTT LAW OFFICES, P.A.



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