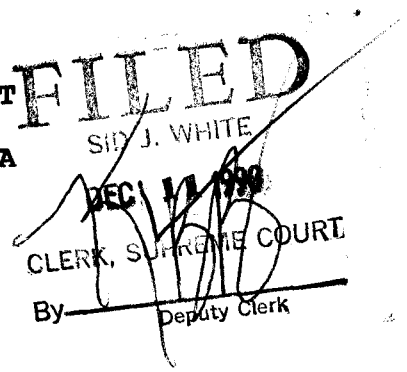
IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA



CITY OF HOLMES BEACH and ISAC, Petitioners, vs. MICHAEL GRACE, Respondent.	:	CASE NO.: 76,883 FLORIDA BAR NO. 593052

ON APPEAL FROM THE STATE OF FLORIDA,
DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,
OFFICE OF THE DEPUTY COMMISSIONER, DISTRICT E

INITIAL BRIEF OF PETITIONERS, CITY OF HOLMES BEACH AND ISAC

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STATEMENT OF THE CASE

This case originated as an appeal from a workers' compensation order determining that the Claimant's post-traumatic stress disorder is a compensable injury and awarding temporary total disability benefits.

The Claimant was employed as a police officer for the Holmes Beach Police Department on July 17, 1985. (R. 284)[1/] That evening, while arresting a suspect, the Claimant accidentally shot and killed the man. (R. 284) A couple of years later, Mr. Grace was diagnosed as suffering from post-traumatic stress disorder. (R. 285) Mr. Grace filed a claim for workers' compensation benefits on the basis that the stress disorder constituted an injury arising out of and in the course of his employment. (R. 261) The Claimant requested payment of medical providers, temporary total disability benefits, continuing medical care and attention, interest, costs, penalties, and attorney's fees. (R. 264) The Employer/Carrier maintained the position that the Claimant's condition was not the result of an "injury" within the meaning of the term as used in the Florida Compensation Act, and that the Claimant's condition was purely psychiatric with no physical impact upon the Claimant and thus not compensable. (R. 262)

1/ For ease of reference herein, the Petitioners, City of Holmes Beach and ISAC, will be referred to by name or as the Employer/ Carrier. The Respondent, Michael Grace, will be referred to by name or as the Claimant.

All references to the Record on Appeal will be referred to as (R.) followed by the appropriate page number to the Record on Appeal.

A hearing on the claim for compensation benefits was held before Judge of Compensation Claims Joe E. Willis on May 24, 1989. In an order dated December 22, 1989, the Judge of Compensation Claims (JCC) determined that the Claimant suffered from post-traumatic stress disorder as a result of the July 7, 1985, incident, and that this disorder constituted a compensable injury. The JCC based this finding on the deposition testimony of Karen Turnbow, Kenneth A. Visser, and Dr. Frank Kulick. (R. 285-86) Judge Willis stated:

> Dr. Kulick felt that the Claimant had a post-traumatic type stress disorder. Dr. Kulick also opined that the Claimant was not capable of returning to work and felt that he needed therapy and treatment. He anticipated at least two years of treatment. He also indicated that the Claimant had not reached maximum medical improvement and hoped he would get better with therapy. I accept this testimony.

(R. 285) The JCC ruled that the "Claimant has been temporarily totally disabled from the time he was last employed by the City of Holmes Beach up until the time of the hearing of May 24, 1989." (R. 286) The Employer/Carrier was ordered to pay the Claimant temporary total disability benefits from April, 1987 through May 24, 1989. (R. 287) The Employer/Carrier was also ordered to pay costs and a reasonable attorney's fee. (R. 287)

The Employer/Carrier subsequently filed a Motion for Rehearing and Amendment. (R. 288-90) The Motion alleged in part that the compensation order failed to set forth sufficient findings of ultimate fact describing a compensable "physical impact" to support the purely psychiatric injury. The Motion also alleged that the

medical evidence indicated that "the proximate cause of Claimant's post-traumatic stress syndrome is directly related to Claimant's killing of the deceased, not the deceased's physical contact, if any, with Claimant during the arrest." (R. 289) An order amending the December 22, 1989, order was entered on January 10, 1990. In it, the JCC deleted an earlier award of penalties. In all other respects, the Employer/Carrier's Motion for Rehearing and Amendment was denied. (R. 291-93)

The Employer/Carrier appealed the JCC's compensation order to the First District Court of Appeal. (R. 294-95) The First District affirmed the JCC's finding that Mr. Grace's post-traumatic stress disorder constituted a compensable injury. The Court stated that "the act of the suspect in striking the Claimant is inseparably interlocked with the Claimant's act of taking his gun out to intimidate and subdue the suspect." Based on prior decisions of the court, the First District affirmed the compensability of the claim. Sheppard v. City of Gainesville Police Department, 490 So.2d 972 (Fla. 1st DCA 1986); Prahl Brothers, Inc. v. Phillips, 429 So.2d 386 (Fla. 1st DCA 1983); City of Tampa v. Tingler, 397 So.2d 315 (Fla. 1st DCA 1981).

Because this Court's decision in Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1101 n.4 (Fla. 1989), cast doubt on the continuing validity of the above-cited cases, the First District certified the following question to this Court:

> Whether Section 440.02(1), Florida Statutes (1985), defining "accident" excludes a mental or nervous injury where the injury suffered by

the Claimant results in only minor physical consequences?

The Employer/Carrier then filed a timely notice to invoke the discretionary jurisdiction of this Court.

STATEMENT OF THE FACTS

The Claimant worked as a police officer for the Holmes Beach Police Department for 14 years. (R. 226) On July 17, 1985, the Claimant stopped an individual who was suspected of stealing an automobile. (R. 17, 255-56) During the arrest procedure, the Claimant had the suspect face down on the ground and was attempting to handcuff him when his gun discharged, shooting the suspect twice in the back. (R. 256) The victim subsequently died. (R. 284) In his deposition of October 23, 1987, the Claimant described the incident as follows:

> A. I kept waiting for the backup to get there, and finally, after watching him move around, raise up, and knowing that he was probably armed, I decided to go ahead and effect the arrest.
>
> Q. Was he standing, or on the ground?
>
> A. On the ground.
>
> Q. Okay. Then you were standing up and over him?
>
> A. Yes, sir.
>
> Q. Okay, and it's my understanding that you attempted to put handcuffs on him?
>
> A. Yes, sir.
>
> Q. And then what occurred?
>
> A. He jerked, his right arm went up underneath him. I grabbed his arm, pulled it back behind him. I again went to cuff him with my weapon against his back to reassure him that I had - - you know, that I was

still in full control. He jerked his left arm, and I went after it, and the gun fired.

Q. Is it safe to say that you had your body weight on him?

A. Not at that time, no, sir.

Q. But you did have control, I mean your hands on his arms?

A. Yes, sir.

(R. 230-31) Mr. Grace admitted that he did not receive any physical injuries in this incident. (R. 234) He was "not injured as a result of the incident." (R. 256) At the compensation hearing, the Claimant was asked whether the suspect hit or struck him. (R. 40) Mr. Grace stated that the victim did not strike him with his fist but that the suspect hit his arm with his elbow when he was squirming. (R. 41) He did not mention this during his deposition because "that never came up." (R. 41)

Dr. Skotko, a licensed clinical psychologist, examined the Claimant on September 11, 1985, and felt that the Claimant was psychologically fit to fulfill his duties as a police officer. (R. 20) The Claimant returned to work shortly thereafter. (R. 41) He continued to work as a police officer until April, 1987, when he was involved in an altercation with a motorist. (R. 49-50, 287) At that time, the Claimant was relieved of his duties by the Chief of Police. (R. 42) Mr. Grace maintains that he left work because he was not able to cope with people. (R. 19) He has not worked since that time and is not currently looking for work.

(R. 243) Mr. Grace is currently receiving disability and social security benefits. (R. 46-7)

Dr. Karen Turnbow, a clinical psychologist, examined the Claimant on May 11, 1989. (R. 67) This was the only time she saw the Claimant. (R. 67)[2/] She did not have the records of Drs. Skotko, Floyd, or Millwood when she prepared her evaluation. (R. 79) Based on the information she had, Dr. Turnbow believed that the Claimant's psychological problems were due to the shooting. (R. 76) However, Dr. Turnbow did not relate the psychological problems to any physical trauma or physical injury. Dr. Turnbow was also under the impression that after the incident Mr. Grace returned to work for only a few months before determining that he was too emotionally distressed to do an adequate job, rather than for almost two years. (R. 88) Dr. Frank Kulick also examined the Claimant. Dr. Kulick believed that Mr. Grace probably had a post-traumatic stress-type disorder. (R. 123-24) He presumed it started shortly after the "traumatic situation." (R. 126) Dr. Kulick did not link the emotional disorder to any physical injury or trauma.

The Claimant was referred to Dr. Kenneth Visser, a psychologist, by the police department on January 14, 1987. (R. 162) Dr. Visser diagnosed the Claimant has having chronic post-traumatic stress syndrome. (R. 163) He believed that the post-traumatic stress disorder was a result of the shooting incident. (R. 166)

[2/] In the final order, the JCC erroneously stated that Dr. Turnbow has seen the Claimant at least weekly. (R. 285)

Like Dr. Turnbow and Dr. Kulick, Dr. Visser did not relate the stress syndrome to any physical injury or trauma. Dr. Visser also never reviewed the records of Dr. Skotko or Dr. Floyd. (R. 170) Dr. Visser has not treated other police officers with this condition. (R. 182)

Dr. Vincent Skotko is a psychologist who works primarily with police departments. (R. 191) He initially saw Mr. Grace on September 11, 1985, in order to do a fitness for duty evaluation. (R. 193-94) He felt the Claimant was psychologically fit to fulfill his duties as a police officer as of September, 1985. (R. 200) Dr. Skotko did not think that the incident impaired the Claimant, and that "he had all the improvement that he needed to make in order to function effectively, efficiently, and safely as a police officer." (R. 203) Dr. Skotko opined that the profile he saw "from [Dr.] Visser is moderately consistent with a fake/bad or a malingering profile." (R. 216)

ISSUE ON APPEAL

WHETHER SECTION 440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT" EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE ALLEGED PHYSICAL INJURY SUFFERED BY THE CLAIMANT RESULTS IN ONLY MINOR PHYSICAL CONSEQUENCES.

SUMMARY OF THE ARGUMENT

Compensation is payable under the workers' compensation law for disability of an employee resulting from an injury arising out of and in the course of employment. Before there can be an award of benefits, the claimant must demonstrate that the injury is causally connected to his employment. A mental or nervous injury due to fright or excitement only is not an injury by accident in the course of employment and is not compensable. Section 440.02(1), Fla. Stat. (1985); City Ice & Fuel Division v. Smith, 56 So.2d 329 (Fla. 1952). In order for a mental or nervous injury to be compensable, there must be an actual physical injury upon which to predicate the compensation claim. Although the physical trauma or injury need not be disabling in order for the mental injury to be compensable, the physical trauma must be a significant causative factor in the claimant's ensuing psychiatric impairment. Additionally, the causal connection between the physical injury and psychoneurosis must not be remote. Compensation is not due when it appears that the claimant did not suffer any mental disorder producing a reticence to work because of fear of physical injury or an inability to get along with people as a result of a physical injury. See, e.g., Nelson & Company v. Holtzclaw, 542 So.2d 473 (Fla. 1st DCA 1989).

In this case, the First District affirmed the JCC's ruling that the Claimant's post-traumatic stress disorder is a compensable injury. The court concluded that the very minor physical trauma suffered by the claimant was sufficient to trigger coverage for his

subsequent post-traumatic stress disorder. The record does not support a finding of a "compensable injury by accident" arising out of and in the course and scope of employment within the meaning of §440.02(1), Fla. Stat. Although the evidence may support a finding that the Claimant suffers from post-traumatic stress disorder, the record is totally devoid of any evidence establishing a causal relationship between a physical trauma and the Claimant's mental condition. The JCC merely concluded that the Claimant's mental disorder was related to the shooting incident. The First District compounded the error when it concluded that the fact the Claimant was bumped several times with the suspect's elbow was sufficient "physical injury" to invoke coverage for the Claimant's mental disorder. Such a conclusion exceeds the limits established for compensating workers for mental or nervous injuries. Additionally, there was no finding in the compensation order that any physical trauma or injury, even a non-disabling physical trauma, occurred and was the cause of the Claimant's ensuing psychiatric disorder.

This Court should answer the question certified to prohibit coverage for mental or nervous injuries in those cases where the injury suffered by the claimant results in only minor physical consequences. This Court should then reverse the decision of the First District and require that the case be remanded for entry of an order finding that the Claimant is not entitled to workers' compensation benefits.

ARGUMENT

SECTION 440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT" EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE ALLEGED PHYSICAL INJURY SUFFERED BY THE CLAIMANT RESULTS IN ONLY MINOR PHYSICAL CONSEQUENCES.

An employee will be entitled to workers' compensation benefits only if he is injured during the course and scope of his employment. A literal "accident," such as a slip or fall is not a condition precedent to obtaining workers' compensation benefits. Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581, 588 (Fla. 1961). Section 440.02(1), Fla. Stat. (1985), defines the term accident as an "unexpected or unusual event or result, happening suddenly." This section also provides that:

> A mental or nervous injury due to fright or excitement only, or disability or death due to the accidental acceleration or aggravation of a venereal disease or of a disease due to the habitual use of alcohol or narcotic drugs, shall be deemed not to be an injury by accident arising out of the employment.

The rule regarding the compensability of a mental or nervous injury is well established. A mental or nervous injury due to fright or excitement only is not an injury by accident in the course of employment and is not compensable. City Ice & Fuel Division v. Smith, 56 So.2d 329 (Fla. 1952). Rather, there must be an actual physical injury upon which to predicate a compensation claim for a disability from a neurosis. Superior Mill Work v. Gabel, 89 So.2d 794 (Fla. 1956). Further, the causal connection between the physical injury and psychoneurosis must not be remote. Id. at 795. Accord Nelson & Company v. Holtzclaw, 542 So.2d 473 (Fla. 1st DCA

1989); Williams v. Hillsborough County School Board, 389 So.2d 1218 (Fla. 1st DCA 1980) (There must be an actual physical injury upon which to predicate compensation to a worker suffering neurosis); Arosa Knitting Corp. v. Martinez, IRC Order 2-3444 (1978). See also Polk Nursery Company, Inc. v. Riley, 433 So.2d 1233 (Fla. 1st DCA 1983), in which the court held that in order for a claimant to have sustained a compensable mental injury some physical trauma or organic injury must be found to have occurred.

By certifying the question it did to this Court, the First District Court of Appeal recognized that the physical injury requirement has become rather attenuated over the past few years. City of Holmes Beach and ISAC v. Grace, 15 F.L.W D2629 (Fla. 1st DCA October 26, 1990). Likewise, this Court also recognized that the First District has extended the principle of compensation for emotional disorders caused by physical injury to include "even those injuries that result in only minor physical consequences, such as bruising that did not require medical treatment." Byrd v. Richardson-Greenshields Securities, 552 So.2d 1099, 1101 n.4 (Fla. 1989). Any physical touching, regardless of whether or not a physical injury occurs, is apparently sufficient to trigger coverage under the Workers' Compensation Act for an ensuing mental or nervous injury. In the opinion entered below, Judge Barfield noted that the present state of the law allowed the court to reach the result it did, even though:

> There does not appear to have been any residual effect from claimant's scuffle with his victim which would lead to psychiatric overlay. Rather, it appears the claimant may have

> caused the death of another during an excited confrontation when the claimant was struck. In this instance, the claimant is emotionally troubled because he removed his pistol from its holster and shot a man in the back, twice, accidently. It is my judgment that such a circumstance should fall within the exclusion for fright and excitement.

City of Holmes Beach, 15 F.L.W. at D2630 (Barfield, J., concurring).

A review of the cases dealing with claims for compensation for psychiatric injury illustrates how the physical injury requirement has become more and more insignificant. For example, in Amoco Container Company v. Aviles, 453 So.2d 894 (Fla. 1st DCA 1984), the claimant sought compensation for a psychiatric condition. The claimant was working in a warehouse when a machine exploded and caught fire approximately 50 feet away from her. As she attempted to flee the building, Ms. Aviles struck her head, bruised her arm, and injured her wrist. She did not, however, receive medical treatment for these physical injuries. 453 So.2d at 895. The claimant returned to work approximately one week after the fire and continued to work for approximately nine more months. She then took a leave of absence because of chest pains. Id.

The claimant was examined by Dr. Suarez shortly thereafter. Dr. Suarez found that the claimant was in a state of high anxiety and related her psychiatric condition to "the incident." Ms. Aviles never mentioned any physical trauma to Dr. Suarez. 453 So.2d at 895. Dr. Leiva, another psychiatrist who examined the claimant, stated that the claimant's condition was caused by the fear associated with the explosion. Id. Based on this testimony,

the deputy commissioner determined that the claimant was entitled to compensation benefits for her psychiatric condition. Id.

On appeal, the court reversed the deputy commissioner's determination of compensability. The court found that there was no evidence that the claimant's psychiatric impairment was precipitated by an employment-related physical injury. The court stated:

> Aviles failed to demonstrate that her psychiatric condition was causally related to any compensable injury. Rather, the evidence shows that her condition was one caused by fright or excitement only, and it is therefore not compensable.

Aviles, 453 So.2d at 895. See Indian River County Sheriff's Department v. Roske, 417 So.2d 1161 (Fla. 1st DCA 1982) (There must be actual physical injury or trauma upon which to predicate workers' compensation for a neurosis). Additionally, in order for a post-traumatic neurosis to be compensable, the neurosis must be a direct and immediate result of the industrial injury and not merely remotely connected with the injury. Horse Haven v. Willit, 438 So.2d 123 (Fla. 1st DCA 1983); Franklin Manor Apartments v. Jordan, 417 So.2d 1159 (Fla. 1st DCA 1982).

Coverage was also denied in Polk Nursery Company, Inc. v. Riley, 433 So.2d 1233 (Fla. 1st DCA 1983). In Riley, the court revisited the issue of whether a neurotic disability is compensable in the absence of an actual physical injury. The deputy commissioner had awarded compensation benefits for physical and psychiatric injuries claimed to have resulted from poisoning by the pesticide Temik. The claimants had been examined by a psychiatrist who attributed their continuing symptoms and depression to a

psychological trauma produced by the fear that they had been poisoned by Temik. 433 So.2d at 1234. Extensive examination and tests revealed that the claimants' symptoms were not caused by the presence of any toxic substance, but resulted from the fear that they had been poisoned. The deputy commissioner found that, "while claimants' present depression and anxieties were not directly related to exposure to Temik, they were triggered by the 'highly-anxiety provoking experience' of the poisoning episode, . . . and that 'there was no other evidence to rebut a causal connection between the accidental poisoning and the claimants' present psychiatric problems.'" 433 So.2d at 1235. As a consequence, the deputy commissioner ordered compensation benefits and medical treatments. Id.

The First District reversed the deputy commissioner's order on the basis that it was not supported by competent, substantial evidence. The court stated:

> Although the evidence presented establishes that Riley and Lord suffered anxiety and depression as a result of their belief that they had been poisoned, a neurotic disability is not compensable unless there is an actual physical injury. . . . In order for the claimants to have sustained a compensable injury some physical trauma or organic injury, even if relatively minor, must be found to have occurred.

433 So.2d at 1236. (citations omitted) The court found that the record did not support a finding of compensability because no physical injury had been shown by the evidence, "but only a psychological trauma caused by fear and excitement which in turn produced physical symptoms consistent with the hysterical reac-

tion." Because there was no causal link between a physical trauma, even a slight trauma, and the subsequent nervous or mental injury, the court concluded that the claimants' psychological injuries were excluded from compensation under the Workers' Compensation Act. Id. See also LaFave v. Bay Consolidated Distributors, 546 So.2d 78 (Fla. 1st DCA 1989) (Where no physical impact or trauma from employment is shown to have contributed to employee's psychiatric condition, condition is not compensable).

Although a physical trauma or injury need not be disabling in order for a mental or nervous injury to be compensable, the First District has previously held that the physical trauma must be a significant causative factor in the claimant's ensuing psychiatric impairment. See, e.g., City of Tampa v. Tingler, 397 SO.2d 315 (Fla. 1st DCA 1981) (Claimant's arm severely twisted during physical struggle). In the following cases, however, the "physical trauma or injury" requirement was reduced to a mere physical impact or touching. For example, in Prahl Brothers, Inc. v. Phillips, 429 So.2d 386 (Fla. 1st DCA 1983), the First District held that a gun being placed to the claimant's head and a ring being physically removed from her finger were significant causative factors in the claimant's subsequent mental injury. Although the claimant sustained no visible contusion or immediate physical disability as a result of the incident, the court held that this factor did not preclude compensability for the ensuing mental or nervous injury. Id. at 387.

A similar result was reached in Sheppard v. City of Gainesville Police Department, 490 So.2d 972 (Fla. 1st DCA 1986). In Sheppard, a police officer sought compensation benefits for a psychiatric disability that arose when the claimant was required to take another man's life in order to save a fellow officer. The Claimant was able to return to work after the initial incident but suffered a pre-occupation with flashbacks of the incident and continually feared that he would face another situation in which he might have to shoot someone. 490 So.2d at 973. Several years after the initial incident, the claimant was dispatched to the scene of an accident involving a bicyclist. While attempting to administer aid to the victim, the victim became combative, grabbed the claimant on his right upper arm and snatched his shoulder. Sheppard experienced a flashback of the earlier incident and "wondered if he was going to have to kill this man also." Id. He broke down following the incident and felt sick. The place on the Sheppard's arm where the victim grabbed him allegedly became blue and bruised, although he did not consider the injury to his arm to be significant and sought no medical treatment. 490 So.2d at 974. Sheppard's mental state eventually deteriorated and he was subsequently diagnosed as suffering from post-traumatic stress disorder. The deputy commission determined that the claimant's injury was due to fright or excitement only and denied compensation benefits. Id. at 974.

On appeal, the claimant argued that a physical trauma need not be significant in order to trigger compensation coverage. He also

argued that "it is not the extent of the trauma that is determinative of the issue but the causal relationship between that trauma and the psychiatric injury." Sheppard, 490 So.2d at 974. The First District noted that §440.02(1), Fla. Stat. excludes from the definition of accident a mental or nervous injury due to fright or excitement only. The court also noted that there must be an actual physical injury upon which to predicate compensation to a worker suffering an neurosis. Looking at the facts before it, the court agreed with the claimant's contention that his psychiatric disability was not due to fright or excitement only, but resulted from the "combination of the fright and excitement and the trauma of being grabbed by the accident victim." 490 So.2d at 974. Based on its opinion in Prahl Brothers, Inc. v. Phillips, 429 So.2d 386 (Fla. 1st DCA 1983), the court remanded the action to the deputy commissioner for further proceedings on the compensation issue. 490 So.2d at 974.

Even when the principles from the above-cited cases are applied to the record in this case, it is clear that the Claimant's post-traumatic stress disorder is not compensable. The record simply does not support a finding of "compensable injury by accident" arising out of and in the course and scope of employment within the meaning of §440.02(1), Fla. Stat. (1985). At best, the medical evidence presented at the hearing supports a finding that the Claimant suffers from post-traumatic stress disorder. Drs. Turnbow, Kulick, and Visser opined that the Claimant suffers from a psychological disorder and Dr. Turnbow and Dr. Kulick related the

psychological disorder to the shooting incident. (R. 76, 126) The record, however, is totally devoid of any medical testimony establishing a causal link between any physical trauma and the Claimant's mental condition. Even the final compensation order does not relate the Claimant's condition to any type physical trauma. The JCC merely concluded that the post-traumatic stress disorder was related to the shooting incident. There was absolutely no finding made by the witnesses or the JCC that any physical trauma, even a non-disabling physical trauma, occurred and was a significant causative factor in the Claimant's ensuing psychiatric impairment. Although the First District states that such a causal connection was implicit in the witnesses' testimony, nevertheless, the Claimant should not be entitled to compensation for his psychiatric disability in the absence of proof that the condition is causally related to a compensable physical injury. Amoco Container Company v. Aviles, 453 So.2d 894 (Fla. 1st DCA 184).

The Claimant, as well as the First District, contend that the fact that the victim was squirming during the arrest procedure fulfills the "physical injury" requirement. This contention belies the record and ignores the established statutory requirements. In his deposition, the Claimant testified that he had control over the victim and that he had his hands on the victim's arms. Claimant made no mention of any physical struggle or assault on his person. In his written statement regarding the incident, the claimant maintained that he "was not injured as a result of the incident."

He also stated that he did not receive any bodily injuries and did not require any medical care. In fact, it was not until the final hearing that Mr. Grace mentioned that the suspect hit his arm with his elbow when he was attempting to handcuff him. This "physical contact" is simply not sufficient to turn the Claimant's psychological disorder into a compensable injury under the workers' compensation system. Section 440.02(1), Fla. Stat., requires that there be an actual physical injury upon which to predicate a claim for disability from any neurosis. To hold that any touching, even one with no or at most minor physical consequences, is sufficient to trigger coverage violates the spirit and intent of the Act. Even the First District has recognized that although a physical injury does not have to be a disabling physical trauma, there still must be a connection between the psychiatric disability and any minor non-permanent physical trauma. City of Tampa v. Tingler, 397 So.2d 315. Here, there is absolutely no medical testimony that the Claimant's psychiatric disability resulted from a combination of the fright and excitement and the trauma of being "hit" with the victim's elbow. More importantly, there is simply no medical testimony that the Claimant's psychiatric disability resulted from any physical injury or physical trauma.

In order to approve the result reached below, this Court would have to accept the argument any physical contact, even the performance of routine job duties, is sufficient to trigger coverage for an ensuing psychological condition. For example, at the hearing the Claimant argued that "handcuffing [the victim] alone is

touching." It was also argued that "if putting your knee in the back of someone and trying to handcuff them is not a touching, I don't know what a touching - - that's more than a touching." Under the Claimant's theory, any touching, even inadvertent contact could result in compensation for a neurosis. Such a position is not only contrary to §440.02(1), Fla. Stat., but also contrary to the purpose of the compensation system. There simply must be a connection between a physical injury or trauma and the claimant's psychological impairment. Here, it is absolutely clear that it was the victim and not the Claimant who suffered a physical trauma. The Claimant cannot rely upon his victim's physical trauma to support his claim for compensation.

As §440.02(1), Fla. Stat., is currently interpreted, any physical "touching" is apparently sufficient to trigger coverage for a subsequent psychiatric injury. Based on this logic, workers whose jobs routinely include some type of physical contact would be entitled to compensation for psychiatric illnesses they may develop. For example, a nurse or lab technician whose job it is to draw blood from patients subsequently develops a psychotic fear that he or she might catch the AIDS virus. According to the Claimant, the fact that the worker "touched" the patient while performing routine job duties is sufficient to trigger coverage under the workers' compensation system. Similarly, a teacher who paddles a student during the course of the school day and eventually develops some type of psychiatric disorder would be entitled to compensation benefits because the paddling constituted a

"touching." Likewise, it is not hard to imagine many other instances in which physical contacts or touching that are routine to a worker's job could be used in an attempt to justify a claim for workers' compensation benefits for a psychiatric condition. Clearly, such a result would be contrary to the spirit and intent of the Workers' Compensation Act. Where the Claimant does not show that a particular incident caused him an injury by violence to the physical structure of his body, a psychological disability resulting from the incident, however disabling, should not fall within the statutory meaning of the term accident. Without the requisite showing of some type of actual physical injury or trauma, there should be no compensation for a mental or nervous injury. Section 440.02(1), Fla. Stat. (1985).

The First District and the JCC erred in concluding that the Claimant's post-traumatic stress disorder is a compensable injury. A mental or nervous injury due to fright or excitement alone is not deemed to be an injury or accident arising out of employment. City Ice & Fuel Division v. Smith, 56 So.2d 329 (Fla. 1952). This Court should reaffirm the well-established principle that there must be an actual physical injury or trauma upon which to predicate compensation for a neurosis. City Ice & Fuel Division v. Smith, 56 So.2d 329 (Fla. 1952); Amoco Container Company v. Aviles, 453 So.2d 894 (Fla. 1st DCA 1984); Polk Nursery Company, Inc. v. Riley, 433 So.2d 1233 (Fla. 1st DCA 1983). This Court should answer the certified question to exclude from the definition of accident contained in §440.02(1), Florida Statutes, a mental or nervous

injury where the physical injury suffered by the Claimant results in only minor physical consequences. This Court should then reverse the decision of the First District and require that the action be remanded to the JCC for entry of an order denying compensability for the Claimant's psychiatric condition.

CONCLUSION

The First District's determination that the Claimant suffered a compensable psychiatric injury was error. A mental or nervous injury due to fright or excitement only is not an injury by accident in the course of employment and is not compensable. There must be an actual physical injury upon which to predicate a compensation claim for disability from a neurosis. A mere physical touching or minor physical impact should not be equated with physical injury or trauma. Here, the Claimant's post-traumatic stress syndrome developed because he removed his pistol from its holster and shot a man in the back, twice, accidently. This disorder is not compensable under the Worker's Compensation laws and falls within the statutory exclusion for fright and excitement. This Court should reverse the First District's opinion in this case, answer the certified question to exclude from the term "accident" a mental or nervous injury where the injury suffered by the Claimant results in only minor physical consequences, and require that the action be remanded for entry of an order denying compensability for the Claimant's psychiatric condition.

Respectfully submitted,

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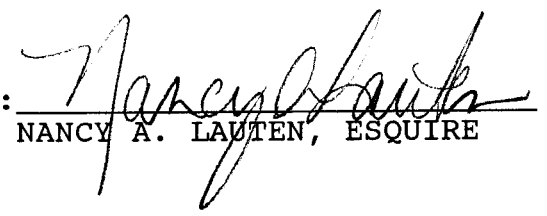
By: 
NANCY A. LAUTEN, ESQUIRE

APPENDIX

City of Holmes Beach and ISAC v. Grace
15 F.L.W D2629 (Fla. 1st DCA October 26, 1990)

We affirm.

Appellant, who was 45 years of age at the time of the hearing, testified that he has spent most of his life working primarily as an unskilled manual laborer, though he has never worked the same job for more than a year. He testified that he had worked at Florida Rock Industries for approximately three months as a laborer when, near the end of December 1987, he began to experience arm pain. Appellant testified that the pain in his right arm was more severe than in his left. On Christmas Eve, appellant went to the emergency room for bronchitis or asthma complaints, later described as "flu-like" symptoms, but made no complaint concerning arm pain. According to his testimony, appellant continued to suffer arm pain, and on February 15, 1988, suffered a shooting pain in his right arm while shoveling sand at work. However, no notice of accident was filed; and when appellant went to the emergency room that evening, he denied suffering an injury at work and made no complaint regarding pain in his left arm. An orthopedic surgeon later examined appellant on referral and found him to have a normal range of motion in the right shoulder with a questionable reduced grip strength. Approximately two months later, complaining of pain in both arms, appellant left his employment at Florida Rock.

In November 1988, at the instance of his counsel, appellant saw Dr. Raymond, a physiatrist[1], reporting that he had suffered bilateral arm pain since December 1987, and that he had hit a rock while shoveling which worsened the pain in the right arm. Dr. Raymond opined that appellant most likely suffered from "diffuse myalgias" (muscle pain).

The record reveals that in 1984, appellant had gone to the emergency room complaining of numbness in the right arm, at which time neuritis was diagnosed. The record further indicates that after leaving Florida Rock, appellant continued to suffer arm pain.

A claim was made for temporary total or temporary partial benefits from the date appellant left Florida Rock and continuing, payment of past medical bills, authorization of future care, penalties, interest, costs and attorney fees. The JCC found the appellant's testimony unreliable, and further found that even if the appellant's testimony was accepted, there was still no competent and substantial evidence to support a claim based on either specific accident or repeated trauma. The JCC also found that appellant failed to prove that his employment at Florida Rock was the logical cause of his injury. In so finding, the Judge rejected the opinion of the physiatrist, Dr. Raymond, that appellant's condition was due to overuse at Florida Rock. The JCC observed that Dr. Raymond believed other conditions could have caused the pain, so further testing needed to be done, and that the doctor knew only that appellant was involved in heavy labor, and was without knowledge of the specific nature of appellant's work at Florida Rock. The JCC also noted that the history given by appellant to Dr. Raymond differed from the histories previously given.

After reviewing the record, we are unable to agree with the appellant that the JCC erred in rejecting the appellant's testimony and in finding the medical evidence insufficient to support his claim. The JCC's rejection of appellant's testimony was adequately illustrated with references to the inconsistencies in that testimony. *Compare, Calleyro v. Mt. Sinai Hospital*, 504 So.2d 1336 (Fla. 1st DCA), *rev. denied*, 513 So.2d 1062 (Fla. 1987). Questions regarding the credibility of witnesses "are solely within the province" of the JCC and "his resolution of those questions will not be reversed unless clearly arbitrary and unreasonable." *Jones v. Citrus Central, Inc.*, 537 So.2d 1123, 1125 (Fla. 1st DCA 1989), *quoting John Caves Land Development Co. v. Suggs*, 352 So.2d 44, 45 (Fla. 1977). As for the Judge's rejection of Dr. Raymond's opinion regarding causation, it is well established that a finder of fact is not required to accept an opinion which is not supported by the facts of record. *Northwest Orient Airlines v. Gonzalez*, 500 So.2d 699 (Fla. 1st DCA 1987). Having found no cause to reverse, the order is AFFIRMED. (SMITH, WENTWORTH and WIGGINTON, JJ., CONCUR.)

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[1]Physiatry is a specialty of physical medication and rehabilitation which focuses on disabilities such as stroke, paralysis, spinal cord injuries and the like.

* * *

Workers' compensation—Compensable accidents—Post-traumatic stress disorder suffered by police officer who accidentally shot and killed a suspect after the suspect had struck claimant while claimant was attempting to handcuff the suspect—Claim properly determined to be compensable—Question certified as to whether statute defining "accident" excludes a mental or nervous injury where the injury suffered by the claimant results in only minor physical consequences

CITY OF HOLMES BEACH and ISAC, Appellants, v. MICHAEL GRACE, Appellee. 1st District. Case No. 90-306. Opinion filed October 16, 1990. An appeal from an order of Judge of Compensation Claims Joe E. Willis. Nancy A. Lauten of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, for Appellants. Alex Lancaster, P.A., Sarasota, for Appellee.

(SMITH, J.) The City of Holmes Beach and ISAC (E/C) appeal an order of the judge of compensation claims awarding claimant benefits for psychiatric injury arising out of an incident which occurred on July 17, 1985. The E/C contend that there is no evidence in the record establishing a causal relationship between the very minor physical trauma suffered by the claimant on July 17, 1985, and claimant's subsequent post-traumatic stress disorder. In essence, argue the E/C, this is essentially a "fright" case and that section 440.02(1), Florida Statutes (1985), defining "accident" excludes a mental or nervous injury due to fright or excitement only. We affirm.

On July 17, 1985, claimant, a police officer, stopped an individual who was suspected of stealing an automobile. During the arrest procedure, the claimant had the suspect facedown on the ground and was attempting to handcuff him. The suspect was unwilling to be handcuffed, a struggle ensued, and during this struggle, the suspect struck claimant several times with his elbow. Claimant withdrew his gun from his holster and pointed it in suspect's back. When claimant again attempted to handcuff the suspect, claimant's gun discharged, shooting the suspect twice in the back and killing him.

After a brief absence, claimant returned to work. However, in April 1987, claimant was involved in an altercation with a motorist and it became clear to him and others that he had to leave the police force for emotional and physical reasons. Claimant was diagnosed as suffering from post-traumatic stress disorder which the doctors causally related to the traumatic incident which occurred on July 17, 1985.

It is our view that the act of the suspect in striking claimant is inseparably interlocked with claimant's act of taking his gun out to intimidate and subdue the suspect. Accordingly, we do not agree with the E/C that the doctors were required to explicitly testify that the striking of claimant, which was an integral part of the July 17th incident, was a significant circumstance in the causal etiology of claimant's psychiatric illness. This was implicit in their testimony. Accordingly, because we find this case virtually indistinguishable from prior decisions of this court, we affirm the compensability of this claim. See *Sheppard v. City of Gainesville Police Department*, 490 So.2d 972 (Fla. 1st DCA 1986); *Prahl Brothers, Inc. v. Phillips*, 429 So.2d 386 (Fla. 1st DCA 1983); and *City of Tampa v. Tingler*, 397 So.2d 315 (Fla. 1st DCA 1981).

However, because a recent decision of the Florida Supreme

Court, *Byrd v. Richardson-Greenshield Security*, 552 So.2d 1099, 1101 n.4 (Fla. 1989), casts doubt on the continuing validity of *Sheppard*, and the line of cases upon which it relies, we certify the following question to the Florida Supreme Court:

WHETHER SECTION 440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT" EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE INJURY SUFFERED BY THE CLAIMANT RESULTS IN ONLY MINOR PHYSICAL CONSEQUENCES?

(WIGGINTON, J., CONCURS; BARFIELD, J., CONCURS WITH OPINION.)

(BARFIELD, J., concurring.) I concur with the majority because I think the present state of the law allows the judge of compensation claims to reach the determination made based upon the evidence in this case. It appears from this record that the claimant did not suffer any mental disorder producing a reticence to work because of fear of physical injury or inability to get along with people because of the results of a physical injury which are common situations where the mental problem would become compensable. There does not appear to have been any residual physical effect from claimant's scuffle with his victim which would lead to a psychiatric overlay. Rather, it appears the claimant may have caused the death of another during an excited confrontation when the claimant was struck. In this instance, the claimant is emotionally troubled because he removed his pistol from its holster and shot a man in the back, twice, accidentally. It is my judgment that such a circumstance should fall within the exclusion for fright and excitement.

I concur in certification of the question to the supreme court because this matter is deserving of resolution and direction for the judges of compensation claims.

* * *

Criminal law—Sentencing—Credit for time served—Correction of written order to conform to oral pronouncement

RAY ODIS DEES, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 89-3051. Opinion filed October 16, 1990. An appeal from the Circuit Court for Washington County; Dedee S. Costello, Judge. Barbara M. Linthicum, Public Defender; David P. Gauldin, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General; Cynthia Shaw, Assistant Attorney General, Tallahassee, for appellee.

(WOLF, J.) Dees admitted to a violation of community control and withdrew an earlier plea of not guilty to a charge of escape. The trial judge revoked community control and sentenced Dees to nine years in prison with credit for 218 days previously served in county jail. The written sentence showed credit for only 214 days. Therefore, we remand to the trial judge so that the written sentencing order may be conformed to the oral pronouncement. *See Jeffrey v. State*, 456 So.2d 1307 (Fla. 1st DCA 1984). (WIGGINTON and MINER, JJ., concur.)

* * *

Civil procedure—Summary judgment—Negligence—Breach of contract

E. CHARLES REEB, Appellant, v. CARL F. METCALF, ELIZABETH METCALF, and INEZ B. METCALF, Appellees. 1st District. Case No. 90-461. Opinion filed October 16, 1990. An Appeal from the Circuit Court for Wakulla County, George S. Reynolds, III, Judge. Robert A. Routa, Crawfordville, for appellant. Joseph R. Boyd, Joseph A. Boyd, and William H. Branch, of Boyd & Branch, P.A., Tallahassee, for appellees.

(WIGGINTON, J.) Appellant appeals a final summary judgment in favor of appellees on the issues of negligence and breach of contract. We affirm without prejudice to appellant to amend his complaint to pursue, if warranted, a claim for fraudulent misrepresentation, as contemplated by the appealed order.

AFFIRMED. (MINER and WOLF, JJ., CONCUR.)

* * *

Criminal law—Sentencing—Guidelines—Resentencing required because of improperly calculated scoresheet—Second degree murder with enhancement for use of firearm improperly calculated as first degree felony punishable by life imprisonment

DONALD R. MCDOUGALD, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-625. Opinion filed October 16, 1990. An appeal from the Circuit Court of Duval County; L. P. Haddock, Judge. William J. Sheppard of Sheppard and White, Jacksonville, for appellant. Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for appellee.

(WOLF, J.) McDougald appeals his conviction and sentence for second degree murder on several grounds, only one of which has merit.

McDougald contends that the trial judge used an incorrectly calculated scoresheet in sentencing the defendant to 17 years in prison. The scoresheet was calculated as though the defendant had been convicted of a first degree felony, punishable by life imprisonment, when actually the attempted second degree murder conviction with an enhancement for using a firearm, should have been classified as a first degree felony. The state agrees.

Since the trial judge may have imposed a different sentence had he the benefit of a properly calculated scoresheet, the defendant's sentence must be vacated. *Dawson v. State*, 532 So.2d 89 (Fla. 4th DCA 1988). *See also Davis v. State*, 493 So.2d 82 (Fla. 1st DCA 1986) (a trial court must have the benefit of a properly prepared scoresheet in order to make a fully informed decision on whether to depart from the recommended sentence). Accordingly, we reverse and remand for resentencing under a corrected guideline scoresheet. (WIGGINTON and MINER, JJ., concur.)

* * *

Jurisdiction—Circuit court has jurisdiction of prisoner's petition for writ of mandamus alleging that Florida Parole Commission improperly suspended his presumptive parole release date

SAMUEL HUNTER, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-873. Opinion filed October 16, 1990. An appeal from the Leon County Circuit Court, F. E. Steinmeyer, III, Judge. Samuel Hunter, pro se, for Appellant. Bradford L. Thomas, Assistant General Counsel, Florida Parole Commission, Tallahassee, for Appellee.

(PER CURIAM.) Samuel Hunter, a prisoner, filed a petition for writ of mandamus in the circuit court alleging that the Florida Parole Commission improperly suspended his presumptive parole release date. At the Commission's urging, the circuit court dismissed the petition on the belief that it was without jurisdiction to review a prisoner's parole status. The jurisdictional argument urged by FPC has been rejected, and this court has held that it is within the jurisdiction of the circuit court to consider mandamus challenges to presumptive parole release dates. *Florida Parole Commission v. Padovano*, 554 So.2d 1200 (Fla. 1st DCA), *rev. denied*, 564 So.2d 488 (Fla. 1990). Consequently, we reverse the circuit court's dismissal and remand for consideration of the merits. (WIGGINTON, MINER and WOLF, JJ., CONCUR.)

* * *

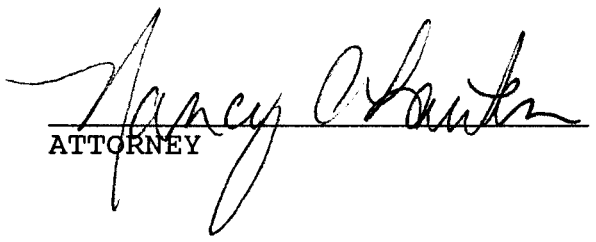
Workers' compensation—Attendant care—Error to award attendant care benefits for services provided by claimant's husband where husband was performing wholly ordinary household chores—Error to award attendant care benefits for maid hired by claimant to do household chores

BARKETT COMPUTER SERVICE and LIBERTY MUTUAL INSURANCE, Appellants, v. ISABEL SANTANA, Appellee. 1st District. Case No. 89-2843. Opinion filed October 22, 1990. Appeal from an order of Judge of Compensation Claims Alan Kuker. Sheryl S. Natelson and Wendy Ellen Marfino, of Miller, Kagan & Chait, P.A., Deerfield Beach, for appellants. Jerold Feuer, Miami, for appellee.

(BARFIELD, J.) The employer and carrier (EC) appeal a workers' compensation order which awards attendant care benefits in the nature of $200 per week for a maid employed by the

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 10th day of December, 1990, to: ALEX LANCASTER, Esquire, Post Office Drawer 4257, Sarasota, Florida 34230.



ATTORNEY