IN THE SUPREME COURT OF FLORIDA

DOMINO'S PIZZA and ALEXSIS, INC.,

Petitioners,

v.

Case No.: 85,803
District Court of Appeal,
1st District, No. 93-2526

RICHARD E. GIBSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF

MILLARD L. FRETLAND
Clark, Partington, Hart, Larry,
Bond, Stackhouse & Stone
125 West Romana Street
Suite 800
Post Office Box 13010
Pensacola, Florida 32591-3010
(904) 434-9200
Florida Bar No. 0371671
Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

ADDITIONAL AUTHORITIES:

INTRODUCTION

The Petitioners, DOMINO'S PIZZA and ALEXSIS, INC., will be referred to throughout this brief as the "E/C." Respondent, Richard E. Gibson, will be referred to throughout this brief as the "Employee." The Judge of Compensation Claims will be referred to throughout this brief as the "JCC." References to the Record on Appeal will be made by the designation "[R. ____]." References to the Appendix to this brief will be made by the designation "[A. ___]."

STATEMENT OF FACTS AND OF THE CASE

On November 23, 1991, the Employee was injured in an automobile accident while working as a pizza delivery man. **[R. 37; 112]**. When the Employee was admitted to West Florida Hospital after the accident, a blood sample was taken and the hospital staff measured the Employee's blood serum alcohol content as .293 milligrams per deciliter. **[R. 403; 405]**. This serum blood alcohol content equates to .293 grams per 100 milliliters. **[R. 405]**.

The Employee filed a claim for benefits and the E/C interposed the defense afforded by Florida Statute Section 440.09(3) (1990) that the Employee's injury was primarily occasioned by intoxication thereby precluding all compensation. **[R. 39]**. The E/C relied upon a statutory presumption in support of its intoxication defense arising out of the Employee's post-accident blood alcohol content. **[R. 2]**.

The Employee filed a motion in limine seeking to exclude all evidence of his post-accident blood alcohol content on the grounds that the blood alcohol test was performed on blood serum rather than whole blood. **[R. 462-463]**. This motion was founded upon the opinion of the First District Court of Appeal in **Florida Tile Industries v. Dozier, 561 So. 2d 654 (1990)** which held serum blood test results insufficient to support the presumption of Section 440.09(3). **[Id.]**. At the hearing on the Employee's motion in limine, the E/C relied upon the deposition testimony of Dr. Matthew Barnhill, forensic toxicologist, who had performed a mathematical conversion of the Employee's serum blood alcohol content to a percentage of whole blood. **[R. 6-7]**.

Dr. Barnhill is employed by the Alabama Department of Forensic Sciences and has worked in forensic toxicology since 1971. **[R. 393-394]**. As a forensic toxicologist, Dr. Barnhill examines body tissues and fluids to determine the presence of chemical substances such as alcohol and poisons. **[R. 394-395]**. Dr. Barnhill testified that a serum blood alcohol content could be converted downward to a whole blood percentage by application of mathematical conversion factors of between ten and thirty percent as indicated by medical studies comparing serum and whole blood alcohol levels. **[R. 406; 421]**. Dr. Barnhill testified that the conversion of serum blood alcohol readings into whole blood readings in this fashion was scientifically acceptable in the field of forensic toxicology. **[R. 412]**.

Acknowledging that conversion of serum blood alcohol levels to whole blood levels was a process of estimation, **[R. 406]**, Dr. Barnhill converted the Employee's serum blood alcohol content into a percentage of whole blood and concluded that the Employee's whole blood alcohol content was within a range of between .264 and .225 percent depending upon the conversion factor utilized. **[R. 411; 450]**. Regardless of the conversion factor applied, Dr. Barnhill testified that the Employee's whole blood alcohol content per 100 milliliters would unequivocally have been greater than .1 percent. **[R. 411]**.

Relying on **Florida Tile**, the JCC granted the Employee's motion in limine thereby rendering evidence of the Employee's blood alcohol content inadmissible for any purpose because the original blood alcohol test was performed upon blood serum and not whole

blood. **[R. 465]**. Subsequently, the JCC issued a final order ruling that the accident in question was compensable and that the E/C was liable for the payment of benefits. **[R. 477-478]**.

Upon the E/C's appeal, the First District Court of Appeal held that it was constrained by the holding of **Florida Tile** to affirm the JCC. **[A. 1]**. The First District noted, however, that it could find no support in the language of F.S. 440.09(3) for the prohibition imposed by the **Florida Tile** court against evidence of blood alcohol content founded upon serum testing. **[A. 2]**. Also, the First District noted that it found no prohibition in Section 440.09(3) against expert testimony converting serum blood alcohol content to a whole blood percentage. **Id.** Thus, the First District Court of Appeal certified the question to this court which forms the first issue in the argument portion of this brief.

On January 1, 1994, a new version of Section 440.09 became effective which specifically allows testing of blood serum as a foundation for the presumption of causation if appropriate expert testimony is also presented to show that the blood serum alcohol content is equal to or greater than the percentage of alcohol in whole blood required to trigger the presumption.

SUMMARY OF ARGUMENT

In order to invoke the presumption of causation contained within Florida Statute 440.09(3) (1990), the E/C was only required to produce evidence that the Employee's whole blood alcohol content was in excess of .10 percent. The provisions of Section 440.09 do not mandate a particular method by which evidence of whole blood alcohol content must be presented. The interpretation of Section 440.09(3) expressed by the First District Court of Appeal in **Florida Tile Industries v. Dozier** which holds that the presumption of causation can only be triggered by a test of whole blood, is incorrect and should be rejected by this court as lacking a foundation in the statute and as placing an undue restriction upon the E/C's use of expert opinion otherwise allowed by Florida Statute 90.704 (1990).

Also, the legislature's amendment of Section 440.09 in 1994 overturns **Florida Tile** and expressly provides for proof of an Employee's whole blood alcohol content founded upon a blood serum test when coupled with appropriate expert testimony. Thus, the new version of Section 440.09 allows scientific evidence of the sort presented by the E/C herein and excluded by the JCC which would convert a serum test result to a whole blood alcohol percentage.

The 1994 amendments to Section 440.09 are procedural in nature because they do not impose any new liability or burden on the parties but affect only the method of satisfying the E/C's burden of proof as to the Employee's whole blood alcohol level so as to trigger the presumption of causation. Additionally, the 1994 amendments are remedial in nature as they apparently represent the

legislature's reaction to the overly restrictive reading of Section 440.09 rendered by the **Florida Tile** court. For these reasons, the amended version of Section 440.09 is retroactively applicable to the present case.

For these reasons, the **Florida Tile** decision should be disapproved, the decision of the First District Court of Appeal in the present case reversed, and the case remanded to the JCC with instructions to admit the testimony of Dr. Barnhill and to consider the intoxication defense based upon all the evidence otherwise properly admissible.

ARGUMENT

I.

DOES FLORIDA STATUTE 440.09(3) PRECLUDE EXPERT TESTIMONY CONVERTING BLOOD ALCOHOL CONTENT FROM A PERCENTAGE OF BLOOD SERUM TO A PERCENTAGE OF WHOLE BLOOD?

Florida Statute 440.09 precludes an award of benefits to a worker compensation claimant if the claimant's injury was occasioned primarily by his intoxication. **Florida Statute 440.09(3) (1990).** If the Employee's blood alcohol content at the time of the injury was .10 or higher, it is presumed that the injury was occasioned primarily by the Employee's intoxication. **Id.** The presumption of causation may be rebutted by clear and convincing evidence that the intoxication did not contribute to the injury. **Id.**

In **Florida Tile Industries v. Dozier, 561 So. 2d 654 (Fla. 1st DCA 1990)**, the Court of Appeal held that a test of blood serum alcohol content was not sufficient to invoke the presumption of causation of Section 440.09(3). **561 So. 2d at 655.** The holding of **Florida Tile** was based upon the language of Section 440.09 which refers only to the alcohol content of the Employee's "blood" and the concern that testing of blood serum results in incorrectly high percentages of alcohol. **Id. at 655-656.** As noted in the opinion of the First District in the present case, the **Florida Tile** court also stated that Section 440.09 precluded any determination of blood alcohol content based on a test of blood serum. **Id. at 655.**

The blood alcohol analysis performed in the present case was based upon blood serum and resulted in an alcohol content of

.293. **[R. 403]**. In an attempt to invoke the Section 440.09 presumption of causation in light of the **Florida Tile** rule, the E/C proffered the expert testimony of Dr. Matthew Barnhill, forensic toxicologist.

Dr. Barnhill is employed by the Alabama Department of Forensic Sciences and has worked in forensic toxicology since 1971. **[R. 393-394]**. As a forensic toxicologist, Dr. Barnhill examines body tissues and fluids to determine the presence of chemical substances such as alcohol and poisons. **[R. 394-395]**. Dr. Barnhill testified by deposition that serum blood alcohol contents are converted to whole blood contents by application of mathematical conversion factors of between ten and thirty percent as indicated by medical studies comparing serum and whole blood alcohol levels. **[R. 406; 421]**. Dr. Barnhill testified that the conversion of serum blood alcohol contents into whole blood contents in this fashion was scientifically acceptable in the field of forensic toxicology. **[R. 412]**.

Dr. Barnhill applied the conversion factors to the results of the blood serum test and concluded unequivocally that the Employee's blood alcohol content would have exceeded .10. **[R. 411]**. In fact, when the Employee's blood serum alcohol content was appropriately reduced to a whole blood percentage, the result was between .264 and .225. **[R. 411; 450]**.

Based on **Florida Tile**, the JCC held that Dr. Barnhill's testimony regarding the Employee's whole blood alcohol content was inadmissible because it was based on a blood serum test. **[R. 471]**. Thus, the JCC took literally the language of **Florida Tile** that

evidence of the Employee's whole blood alcohol content was only permissible when a test had been performed on whole blood. **Florida Tile, supra, 561 So. 2d at 655.**

The First District in the present case correctly noted that the language of Section 440.09(3) provides no support for the **Florida Tile** blanket exclusion of any evidence of blood alcohol content unless a whole blood test has been performed. **[A. 2].**

Despite a detailed rendition of the expert testimony before the JCC in that case, the **Florida Tile** court did not address the propriety of expert testimony which converted a serum blood alcohol content to a whole blood percentage because all of the expert testimony in that case dealt with the issue of inaccurately high alcohol readings found in serum tests. **Florida Tile, supra, 561 So. 2d at 656.** Had the **Florida Tile** court attempted to restrict the use of expert opinion in this regard it would have squarely contradicted traditional Florida law pertaining to the admission of such testimony.

Florida law has long held that when an expert's testimony pertains to a subject that is beyond the common understanding of the average person and will assist in reaching a decision on a material issue in the case, exclusion of the expert testimony from evidence is reversible error. **Kerr v. Caraway, 78 So. 2d 571, 572 (Fla. 1955); Zwinge v. Hettinger, 530 So. 2d 318, 323-24 (Fla. 2d DCA 1988).** Here, the testimony of Dr. Barnhill was directly relevant to the central issue of the intoxication defense and the conversion of a blood serum alcohol content to an equivalent whole blood content was beyond the common understanding of a non-expert.

As a result, the JCC committed reversible error in excluding the testimony of Dr. Barnhill.

Also, the Florida Evidence Code does not endorse broad exclusions of expert opinion, even when the opinion is founded upon data not independently admissible into evidence. To the contrary, the legislature has specifically provided that such opinions are admissible as long as the data relied upon by the expert is of a type reasonably utilized by similar experts to support the opinion expressed. **Florida Statute 90.704 (1990).**

In this case, common sense as well as the evidence before the JCC showed that experts in toxicology who regularly perform conversions of serum to whole blood alcohol levels must rely upon a serum blood test. Dr. Barnhill testified that he has been performing conversions of serum blood alcohol levels to whole blood levels repeatedly over the past four or five years and that studies making the same conversion have been performed since at least 1935. **[R. 400-401; 408].**

The Employee may submit that the decision in **Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430 (2d DCA 1989)**, supports affirmance of the JCC's order in this case. In **Riggins**, the trial court admitted expert testimony of blood alcohol content based upon the results of an analysis of ocular vitreous fluid. **545 So. 2d at 431.** The ocular fluid test report was excluded from evidence by the trial court as hearsay. **Id.** The expert in **Riggins** reached his conclusion as to blood alcohol content after application of a mathematical conversion factor to the inadmissible result of the ocular vitreous fluid report. **Id.**

The **Riggins** court held that the expert opinion converting the inadmissible ocular fluid alcohol level to a blood alcohol content was improperly admitted despite the provisions of Florida Statute 90.704. **Id. at 431-432.** The **Riggins** holding was founded upon the fact that the opinion of the expert only served as a conduit for the otherwise inadmissible ocular fluid test report and because the opinion was based solely upon information that had not been admitted into evidence. **Id. at 432.** A review of the record herein reveals that neither of the grounds supporting the **Riggins** holding exist in this case.[1]

The E/C in this case proffered testimony from the technicians that took the blood sample from the Employee and who tested the blood serum for alcohol. **[R. 17-19].** The Employee stipulated that the machines used to test the blood serum for alcohol content were properly calibrated. **[R. 304].** Therefore, there is no question that the results of the serum blood alcohol test were admissible.

Consequently, the **Riggins** holding does not support the JCC's ruling in the present case because the result of the serum blood test in question here was independently admissible. The expert testimony converting the serum blood alcohol level to a whole blood percentage was not merely a conduit for inadmissible evidence and Dr. Barnhill's opinion was not founded upon in-

---

[1] Another distinguishing factor between **Riggins** and the present case is that the expert in **Riggins** was attempting to convert the alcohol content of two completely different bodily fluids, while Dr. Barnhill in the present case was merely performing a mathematical reduction of the admittedly inflated blood serum alcohol content. **[R. 421].**

admissible information. The **Riggins** court acknowledged that testimony such as that provided by Dr. Barnhill which applies a conversion factor found in scientific literature to admissible evidence was appropriate. **Riggins, supra, 545 So. 2d at 432 n.1.**

Even if the **Riggins** decision were not factually distinguishable from the present case, the portion of its holding precluding an expert opinion on the basis that the opinion is founded upon inadmissible information is legally suspect. **Id. at 432.** This holding is not only contrary to the express provision of Section 90.704, but also ignores a long line of Florida decisions allowing expert testimony based upon information not admitted into evidence.

In **Barber v. State, 576 So. 2d 825 (Fla. 1st DCA 1991),** the trial court excluded expert testimony as to what a criminal defendant had said about the amount of liquor the defendant had consumed the night of the crime. **576 So. 2d at 831.** Holding that the trial court's ruling was erroneous, the **Barber** court relied upon the provisions of Section 90.704 allowing expert testimony founded upon inadmissible facts. **Id.** That the court in **Barber** endorsed a broader interpretation of Section 90.704 than applied in **Riggins** is clear from the **Barber** holding that not only the expert's opinion as to the defendant's blood alcohol content but also the expert's rendition of the comments of the defendant should have been admissible. **Id., but see, Department of Corrections v. Williams, 549 So. 2d 1071, 1072 (Fla. 5th DCA 1989)** (expert opinion based upon hearsay affidavit properly admitted but contents of affidavit inadmissible).

In **Bender v. State, 472 So. 2d 1370 (Fla. 3d DCA 1985)**, the trial court had excluded the contents of a CT scan report which was relied upon by a psychiatrist as a basis for his opinion that the defendant had an organic brain injury. **472 So. 2d at 1371.** The Court of Appeal reversed, holding that the contents of the CT scan report were admissible under Section 90.704. **Id.** The **Bender** court pointed out that Section 90.704 was modeled after Federal Rule of Evidence 703 and that the Federal Advisory Committee notes to Rule 703 state that information relied upon by medical experts is generally admissible into evidence. **Id., n.1.**

A comparison of the **Riggins** holding with the line of authority represented by the **Barber** and **Bender** cases reveals **Riggins** to be unduly restrictive. This court should approve the holding of **Barber** and reject **Riggins**.

The **Florida Tile** court correctly held that only a whole blood alcohol content is sufficient to support the presumption of Section 440.09(3). The error of the **Florida Tile** opinion and of the JCC in the present case lies in the undue restriction of the method of proving an Employee's whole blood alcohol content to the solitary vehicle of a whole blood test. There is no support in Section 440.09 for such a restriction on the E/C's method of proof and indeed this restriction contradicts traditional rules allowing expert testimony.

The opinion in **Florida Tile** should be disapproved inasmuch as it purports to regulate the method of proof of an Employee's whole blood alcohol content and the opinion of the First District Court of Appeal in the present case should be reversed

with instructions that the JCC admit the testimony of Dr. Barnhill and render a decision on the full merits of the case.

II.

THE 1994 AMENDMENTS TO SECTION 440.09 APPLY RETROACTIVELY TO REQUIRE REVERSAL OF THE DISTRICT COURT IN THE PRESENT CASE.

In the legislature's 1994 revisions of Chapter 440, Section 440.09 was amended by the addition of the following language:

> Blood serum may be used for testing purposes under this chapter; however, if this test is used, the presumptions under this section do not arise unless the blood alcohol level is proved to be medically and scientifically equivalent to or greater than the comparable blood alcohol level that would have been obtained if the test were based on percent by weight of alcohol in the blood.

F.S. 440.09(7)(b) (1994 Supp.) (e.a.). The legislature's apparent intent in adopting this amendment was to overturn **Florida Tile** and also to allow the sort of expert testimony excluded by the JCC in this case.

Because the new Section 440.09 was enacted while this case was on appeal, this court must determine whether the amendments may be applied retroactively. Although the 1994 amendments are silent on the question of retroactivity, the ordinary principles of statutory retroactivity show that these amendments are retroactive and dispositive of this appeal.

Typically, acceptance of Worker Compensation laws by the employee, employer, and carrier are tantamount to a contract between them which embraces the rights and obligations provided by the governing statutes at the time of injury. **Hardware Mutual Casualty Co. v. Carlton, 9 So. 2d 359 (Fla. 1942).** A corollary to

this rule is that statutory amendments which affect only procedural issues apply in a retroactive fashion. **Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985).** In Young, this court noted that retroactive application of a statute is precluded only when a new obligation or duty is created by the legislature. **Id.**

Statutes involving matters of practice and procedure include the manner, mode or means by which a party enforces substantive rights. Alternatively, procedural statutes refer to the "machinery" of the judicial process as opposed to the end product thereof. **In Re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972)** (Adkins, J. concurring).

The 1994 revision of Section 440.09 set forth above did nothing more than to set forth the type of evidence which might be utilized by an E/C in satisfying its burden of proof as to the Employee's whole blood alcohol content. As such, the 1994 revision affected only a procedural matter and should be applied retroactively to the present case. The fact that the revision became effective while this case was on appeal does not prevent retroactive application of the new Section 440.09 in order to provide the rule of decision herein. **Fogg v. Southeast Bank, N.A., 473 So. 2d 1352, 1353 (Fla. 4th DCA 1985); Heilmann v. State, 310 So. 2d 376, 377 (Fla. 2d DCA 1975).**

The propriety of retroactive application of new Section 440.09 is illustrated by Florida authorities allowing retroactive application of statutory amendments that alter the entire burden of proof. It has long been held that burden of proof requirements are procedural in nature. **Walker & LaBerge Inc, v. Halligan, 344 So.**

2d 239, 243 (Fla. 1977). Thus, a statutory change that increased a burden of proof to a "clear and convincing" evidence standard was properly found to be procedural and applicable retroactively to cases pending on the date the new statute became effective. **Stuart L. Stein, P.A. v. Miller Industries, Inc., 564 So. 2d 539, 540 (Fla. 4th DCA 1990); Ziccardi v. Strother, 570 So. 2d 1319, 1321 (Fla. 2d DCA 1990).**

If a legislative increase of the entire burden of proof placed upon the E/C in order to trigger the Section 440.09 presumption of causation would apply retroactively under **Halligan**, **Stein**, and **Ziccardi**, then certainly the amendment in question which did nothing more than detail what type of evidence was appropriate in order to satisfy that burden of proof applies retroactively also.

An alternative basis for retroactive application of the amended Section 440.09 is that it constitutes merely a remedial measure enacted to correct the First District's overly narrow interpretation of the former version of the statute expressed in **Florida Tile**. A statute which is remedial in nature should be retroactively applied to serve its intended purpose. **City of Orlando v. Desjardins, 493 So. 2d 1027, 1028 (Fla. 1986).**

In **Desjardins**, this court considered whether an amendment to the Public Record Act which became effective during the pendency of that action applied to preclude a lower court order requiring the City of Orlando to produce litigation materials which would otherwise have been subject to the attorney-client privilege or work-product doctrines. **Id.** Holding the amended statute retro-

actively applicable to the pending litigation, the **Desjardins** court noted that the statute had been intended to alleviate the effects of opinions from the Courts of Appeal interpreting the earlier version of the statute in a manner invasive to the attorney-client privilege and work-product doctrine. **Id. at 1029**; see **Lussier v. Dugger, 904 F. 2d 661, 665-666 (11th Cir. 1990)** (retroactively applying a remedial statute intended to correct overly restrictive judicial decisions).

As in **Desjardins**, the legislature in the present case apparently enacted the 1994 version of Section 440.09 with the intent of overturning the holding of **Florida Tile** which it deemed unduly restrictive of the E/C's method of proof. The lack of support in the original Section 440.09 for the holding in **Florida Tile** was noted by the First District in the present case. **[A. 2]**.

Because the 1994 version of Section 440.09 is retroactively applicable to the present claim, and because the new language of this section reverses the statement in **Florida Tile** that only a test of whole blood alcohol is admissible as support for the presumption of causation, the JCC's order is erroneous and the decision of the First District Court of Appeal based on **Florida Tile** should be reversed.

CONCLUSION

The provisions of Florida Statute 440.09(3) (1990) do not support the holding of **Florida Tile Industries v. Dozier** that requires a test of the Employee's whole blood before the presumption of causation may be raised by the E/C and this ruling also improperly restricts the E/C's ability to utilize expert testimony provided by Florida Statute 90.704 (1990).

Additionally, the 1994 amendments to Section 440.09 effectively overturn **Florida Tile** and are procedural amendments that apply retroactively to the facts of the present case.

For both of these reasons, the **Florida Tile** decision should be disapproved by this court and the instant opinion of the First District Court of Appeal reversed with instructions that the testimony of Dr. Barnhill be admitted into evidence along with whatever other proper evidence the parties may present on the intoxication issue so that the JCC may render a ruling based on all appropriate evidence.

MILLARD L. FRETLAND
Clark, Partington, Hart, Larry,
Bond, Stackhouse & Stone
Suite 800
125 West Romana Street
P. O. Box 13010
Pensacola, Florida 32591-3010
(904) 434-9200
Florida Bar No. 371671
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished to Louis K. Rosenbloum, Esq., at P. O. Box 12308, Pensacola, FL 32581; and to Thomas F. Condon, Esq., at 130 E. Government Street, Pensacola, FL 32501, both by regular U.S. Mail, this 26th day of June, 1995.

MILLARD L. FRETLAND

APPENDIX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DOMINO'S PIZZA and ALEXSIS, INC.,

Appellants,

v.

RICHARD E. GIBSON,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 93-2526

Opinion filed May 9, 1995.

An appeal from an order of Judge of Compensation Claims Michael DeMarko.

Millard L. Fretland, of Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, Pensacola, for Appellants.

Louis K. Rosenbloum and Mark J. Proctor of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, Pensacola, for Appellee.

BARFIELD, J.

The employer and carrier appeal the decision of the judge of compensation claims which precludes expert testimony converting blood alcohol content from a percentage of blood serum to a percentage of whole blood. We are constrained by this court's opinion in Florida Tile Industries v. Dozier, 561 So. 2d 654 (Fla.

1st DCA), rev. denied, 576 So. 2d 286 (Fla. 1990), to affirm. In Florida Tile, this court construed section 440.09(3), Florida Statutes, saying:

> This statute requires a test of the employee's whole blood for alcohol content and makes no provision for testing of the employee's blood serum. . . . it does not make any provision for a determination based upon blood serum.

Id. at 655. Because we find no such limitation in section 440.09(3), and indeed find no prohibition against use of properly proved expert scientific evidence that establishes "weight of alcohol in the employee's blood" by converting from an analysis of blood serum, we certify the following question to the Florida Supreme Court:

> Does section 440.09(3), Florida Statutes, preclude expert testimony converting blood alcohol content from a percentage of blood serum to a percentage of whole blood?

ALLEN and WOLF, JJ., CONCUR.