SUPREME COURT OF FLORIDA

DOMINO'S PIZZA, et al.,

Petitioners,

vs.

RICHARD E. GIBSON,

Respondent.

CASE NO. 85,803

DISTRICT COURT OF APPEAL
FIRST DISTRICT, NO. 93-02526

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent ("employee"), Richard E. Gibson, accepts the petitioners' ("E/C's") Statement of the Case and Facts and submits the following additional facts.[1]

The motor vehicle accident giving rise to this claim occurred during the evening hours on Olive Road in Escambia County. Olive Road is a two-lane road generally running in an east-west direction and controlled by a speed limit of forty-five miles per hour (R 136, 142, 163). The employee was traveling east on Olive Road when a vehicle driven by Ann Murphey in a westerly direction crossed the center line of Olive Road and struck the employee's vehicle head-on (R 470). Evidence was received by stipulation that Murphey's serum blood alcohol level after the accident was 0.238 grams of alcohol per 100 milliliters of blood serum (R 304).

Once the Judge of Compensation Claims ("JCC") granted the employee's motion in limine, excluding the employee's serum blood alcohol test results, the E/C conceded, subject to its right of appellate review, that Murphey, not the employee, was primarily responsible for the accident that caused the employee's injuries (R 303). Consistent with the E/C's concession, the employee's accident reconstruction expert would have testified, had the employee's motion in limine been denied, that because Murphey's

[1] Respondent cannot accept any of the facts and appendix materials submitted by amicus, Wausau Insurance Companies, from the record in another case.

vehicle was on the wrong side of the road and struck the employee's vehicle in his lane of traffic, Murphey, not the employee, was primarily responsible for causing the accident (R 303).

Based upon its order in limine concerning the employee's serum blood alcohol test results and the E/C's liability stipulation, the JCC determined that the employee's injuries "were not occasioned primarily by his intoxication" and ordered the E/C to pay applicable indemnity benefits, medical bills, diagnostic and remedial care and attorney's fees and costs (R 477-78).

ISSUES PRESENTED FOR REVIEW

(as framed by the certified question)

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?

SUMMARY OF ARGUMENT

The plain, unequivocal language of section 440.09(3), Florida Statutes, precludes admission of evidence of an employee's blood alcohol content to create the statutory presumption of intoxication when the blood alcohol testing is performed on the employee's serum blood rather than his whole blood. Permitting an expert toxicologist to convert the employee's serum blood test results to a whole blood reading to create the statutory presumption of intoxication is contrary to legislative intent and should not be approved. While section 90.704, Florida Statutes, authorizes expert witnesses to express opinions based upon otherwise inadmissible facts and data, that statute does not allow an expert witness to serve merely as a conduit for the presentation of inadmissible evidence. The expert opinion proffered in this case served merely as a conduit to admit otherwise inadmissible and incompetent serum blood alcohol test results contrary to the clearly expressed terms of the intoxication statute.

The 1994 amendment to section 440.09 should not be applied retroactively to the employee's claim in this case because the amendment, authorizing conversion of blood alcohol content from a percentage of serum blood to a percentage of whole blood, is a penal measure which potentially eliminates the employee's workers' compensation benefits and should be considered a substantive change in the law.

While expert testimony converting blood alcohol content from a percentage of serum blood to a percentage of whole blood is inadmissible to create the statutory presumption of intoxication under the applicable 1991 statute, such expert testimony may be admissible to prove, unaided by statutory presumption, that the employee's intoxication, if established, was the primary cause of the accident. Apparently recognizing, however, that the employee's intoxication, if proved, was not the primary cause of the injuries in this case, petitioners have not urged admission of their expert's testimony as non-presumptive evidence of intoxication.

ARGUMENT

I.

STATUTORY CONSTRUCTION--FLORIDA TILE CONTROLS

The E/C denied all benefits based upon section 440.09(3), Florida Statutes (1991), which provides, in pertinent part, as follows:

> (3) No compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee . . . . If there was at the time of the injury 0.10 percent or more by weight of alcohol in the employee's blood . . . it shall be presumed that the injury was occasioned primarily by the intoxication of . . . the employee. In the absence of a drug-free workplace program, this presumption may be rebutted by clear and convincing evidence that the intoxication . . . did not contribute to the injury. Percent by weight of alcohol shall be based upon grams of alcohol per 100 milliliters of blood.

§ 440.09(3), Fla. Stat. (1991)(emphasis supplied).

The district below cited Florida Tile Industries v. Dozier, 561 So. 2d 654 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 286 (Fla. 1990), as controlling authority. In that case, the injured employee was admitted to a hospital emergency room where blood was drawn and a serum blood alcohol test performed which indicated an alcohol level of 0.16. Like here, the employer denied benefits based upon the "intoxication statute," section 440.09(3). The JCC found section 440.09(3) inapplicable because the statute requires a test of the employee's whole blood, not blood serum. Affirming the order of the JCC and agreeing that

section 440.09(3) requires a whole blood alcohol test, the district court stated:

> 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. The statute plainly requires a showing that there was "0.10 percent or more by weight of alcohol in the employee's *blood*," not in the employee's *blood serum*. The statute further states that "[p]ercent by weight of alcohol in the blood shall be based upon grams of alcohol per 100 milliliters of *blood*"; it does not make any provision for a determination based upon blood serum.

Florida Tile, 561 So. 2d at 655 (italics the court's; underlining supplied). The language of section 440.09(3) makes it abundantly clear that the presumption of intoxication does not arise unless the blood alcohol test results are based upon testing of the employee's whole blood, not the employee's blood serum. Because the blood test administered in the present case was performed on the employee's blood serum, the JCC properly excluded the blood alcohol test results and the E/C's proffered expert testimony based thereon.

The E/C vigorously argue that an employee's whole blood alcohol level may be established for purposes of the statutory presumption by expert conversion and estimation of that data through use of the serum blood alcohol test results. The E/C also contends that its expert's test results, when viewed in the light most favorable to the employee, yielded an estimated whole blood alcohol content in excess of 0.10 and were not subject to the same "false high" readings with which the Florida Tile court

expressed concern. Contrary to these arguments advanced by the E/C, the statutory language carefully chosen by the legislature forecloses the admissibility of an expert's opinion of the employee's whole blood alcohol content when the opinion is based upon a serum blood test, regardless of the expert's methodology or the outcome of the test. As interpreted by the court in Florida Tile, the statutory language in question clearly "requires a test of the employee's whole blood for alcohol content and makes no provision for testing of the employee's blood serum." Florida Tile, 561 So. 2d at 655.

The E/C's construction of the statute, which would allow calculation of the employee's whole blood alcohol content based upon conversion of the employee's serum blood alcohol content, requires judicial construction of section 440.09(3) contrary to the statute's clear, unambiguous language. The court's "initial responsibility when construing a statute is to give the words their plain and ordinary meaning." Silva v. Southwest Florida Blood Bank, Inc., 601 So. 2d 1184, 1185 (Fla. 1992). "[W]here the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 454 (Fla. 1992). When the language of the statute is clear and unambiguous, "the court should not search for excuses to give a different meaning to words in the statute." St. Joe Paper Co. v Department of Revenue, 460 So. 2d 399, 401 (Fla. 1st DCA 1984), rev. denied,

467 So. 2d 999 (Fla. 1985). In other words, courts are powerless to construe an unambiguous statute. Forsythe, 604 So. 2d at 455.

Section 440.09(3) is plain and unambiguous in its requirement that the employer prove a 0.10 blood alcohol reading based upon blood, not serum blood. The terms "blood" and "serum blood" are not synonymous. "Blood," also known as whole blood, is a fluid composed primarily of red blood cells and plasma with trace amounts of white blood cells, platelets, and fibrin. Roehrenbeck and Russell, The Admissibility of Blood Serum Alcohol Test Results in DUI Cases, 66 Fla. Bar J. 42 (July/August 1992). "Serum," on the other hand, is that portion of the blood that remains after the cells and the particulate matter have been removed from the whole blood, resulting in a blood product which contains a greater percentage of water per volume than does whole blood. Id. Because serum contains a higher percentage of water than whole blood, testing of serum blood yields higher percentages of blood alcohol content than whole blood testing. Id. The degree to which the percentage of alcohol in serum exceeds the percentage of alcohol in whole blood depends on the volume of red blood cells, or "hematocrit," which varies among individuals, depending upon a variety of physiological and environmental factors. Id.

The employee is fully cognizant of the scientific advancements made in the fields of serology and toxicology highlighted by the E/C and amicus which arguably support the technique of converting

serum blood alcohol test results to whole blood alcohol equivalent readings. The question, here, however, is not answered by science but by legislative intent. The recognized differences between serum and whole blood obviously prompted the legislature to insist upon a more reliable, accurate whole blood reading before depriving a worker of important benefits, and the clear language of the statute leaves no room for interpretation to allow an alternate method to determine the employee's blood alcohol content.

Even if there was an ambiguity in the statute that would arguably permit the use of serum blood test results in the manner advanced by the E/C, Florida Tile logically disposes of that argument contrary to the E/C's position:

> Even if we were to find the statute ambiguous as to the type of test results that may be used to trigger this presumption, we would have to construe the statute in favor of claimant's recovery. Where a workers' compensation statute is susceptible of disparate interpretations, the court must adopt the construction that is most favorable to the claimant. Farrens Tree Surgeons v. Winkles, 334 So. 2d 569 (Fla. 1976). We hold, therefore, that the judge of compensation claims did not err in ruling that the blood serum test employed in this case did not meet statutory requirements.

Florida Tile, 561 So. 2d at 655. See also Vore v. State, 158 Neb. 222, 63 N.W. 2d 141 (1954) (statutes creating a presumption of intoxication are in derogation of the common law and should be strictly construed); State v. Resler, 262 Wis. 285, 55 N.W. 2d 35 (1952)(same).

The legislature obviously was concerned with the reliability of serum blood alcohol testing and therefore determined that an employee's benefits could be denied based upon the statutory presumption that intoxication caused the injury only upon proof that the employee's whole blood contained an alcohol content of 0.10 percent or greater. The district court in Florida Tile shared the legislature's apparent concern and cited evidence that questioned the accuracy and reliability of serum blood alcohol testing as additional support for strict construction of section 440.09(3). Florida Tile, 561 So. 2d at 656. Those same concerns are evident in this case.

The employee's expert, William L. Marcus, Ph.D., a board certified toxicologist and toxicology advisor to the Environmental Protection Agency, described serum alcohol as an "unreliable measure" of alcohol content in the blood (R 306).[2] Dr. Marcus explained that it was not possible to reliably extrapolate serum blood alcohol levels to whole blood because the fat content of the blood varies and clot formation and retraction causes alcohol to be absorbed in an unpredictable fashion (R 306). These factors were very important in the subject case, according to Dr. Marcus, because the employee's multiple fractures released marrow and fat into the blood interfering with accurate blood alcohol measuring, especially from serum (R 307). Dr. Marcus also questioned Dr.

[2] Dr. Marcus' opinions were proffered by the employee as a "counterproffer" to the testimony of Dr. Barnhill, the E/C's expert (R 303).

Barnhill's extrapolated whole blood alcohol estimate of between 0.23 and 0.26 percent, because, according to Dr. Marcus, these results indicate that the employee would have attained earlier a blood alcohol level of between 0.40 and 0.60 (R 307). An alcohol level of 0.40 would have induced a coma, while a 0.60 level would have been lethal, neither of which occurred (R 307). Dr. Marcus felt it was "highly likely" that some of the alcohol from swabbing entered the employee's blood stream and further that Ringer's Lactate solution used during emergency procedures may have interfered with the serum blood testing (R 307).

The E/C's expert, Barnhill, testified that extrapolations of serum blood alcohol test results could yield reasonably accurate whole blood readings. But even Dr. Barnhill conceded that the studies upon which he relied to extrapolate the data were based on small statistical samples and should be considered "with a certain grain of salt" (R 422-23). While resolution of the disparity between the expert opinions is unnecessary for disposition of the issue subject to review, these divergent viewpoints advanced by seemingly well-qualified toxicologists substantiate the need for strict adherence to the legislative requirement of an actual whole blood alcohol reading before depriving the employee of his valuable benefits.

The 1994 amendment to section 440.09 further supports the employee's construction of the statute. Effective January 1, 1994, the statutory presumption of intoxication may be based upon blood

serum testing if "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." § 440.09(7)(b), Fla. Stat. (Supp. 1994). In other words, the 1994 amended version of the intoxication statute expressly allows the blood alcohol conversion procedure which the E/C advances by its strained construction of the 1991 version of the statute in effect when the employee was injured.

When a statute is amended, it is presumed that the legislature intended the amended statute to have a different meaning from that accorded to it before the amendment. Arnold v. Shumpert, 217 So. 2d 116 (Fla. 1968). The 1994 amendment to the intoxication provisions of section 440.09 represents a substantial revision of the previous version of the statute. "'In making material changes in the language of a statute, the Legislature is presumed to have intended some objective or alteration of the law, unless the contrary is clear from all the enactments on the subject.'" Carlisle v. Game & Fresh Water Fish Commission, 354 So. 2d 362, 364 (Fla. 1977). If the language of the 1991 statute means, as urged by the E/C, that the employee's whole blood alcohol content may be established by a scientifically acceptable conversion of his serum blood alcohol test results, the legislature would not have amended the statute extensively to allow that procedure. We should not assume that the legislature engaged in a useless act.

II.

FLORIDA EVIDENCE CODE

The E/C rely upon section 90.704, Florida Statutes, for admission of its expert's ultimate opinion rendered below that the alcohol content of the employee's whole blood exceeded 0.10 percent. The E/C argue that section 90.704 allows an expert to render an opinion based upon inadmissible evidence, which in this case refers to the results of the employee's serum blood alcohol test. Apart from the fact that section 440.09(3) and Florida Tile unequivocally preclude application of the intoxication presumption based upon testing of the employee's blood serum, the E/C's reliance on section 90.704 is misplaced. That section of the evidence code provides:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

§ 90.704, Fla. Stat. (1991). While section 90.704 authorizes expert witnesses to base opinions on inadmissible facts or data, Florida courts interpreting that provision have consistently cautioned that "[a] witness may not serve merely as a conduit for the presentation of inadmissible evidence." Smithson v. V.M.S. Realty, Inc., 536 So. 2d 260, 262 (Fla. 3d DCA 1988).

The E/C candidly acknowledge that Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430 (Fla. 2d DCA 1989), represents formidable authority contrary to its position. In that case, the

medical examiner took a sample of decedent's ocular vitreous fluid during autopsy to determine blood alcohol content. A written report indicating that an ethanol level of .134 percent by weight in the ocular vitreous fluid was excluded by the trial judge as hearsay. The trial judge, however, over objection, permitted defendants' expert toxicologist to render his opinion that decedent's blood alcohol level was 0.11 percent, which the expert calculated by multiplying the ocular vitreous fluid test results by a standard conversion factor. The appellate court rejected section 90.704 as a basis for allowing the expert's opinion and found the admission of his testimony reversible error. The court determined from the record that "the expert's testimony was merely used as a conduit" for the admission of the ocular vitreous fluid test report and that "the expert opinion only helped the jury to understand the inadmissible document rather than the evidence at trial." Riggins, 545 So. 2d at 432. The factual circumstances at bar are virtually identical to those in Riggins and its rationale applies here with equal force. See also Maklakiewicz v. Berton, 652 So. 2d 1208 (Fla. 3d DCA 1995)(trial court abused its discretion by admitting expert opinion of investigating officer where officer's opinion was based, in part, on inadmissible hearsay statement of eyewitness); 3-M Corporation--McGhan Medical Reports Division v. Brown, 475 So. 2d 994, 998 (Fla. 1st DCA 1985)(hearsay report related to competitor's product relied upon by expert inadmissible where

"expert served as conduit for placing inadmissible evidence before the jury").

The E/C attempts to distinguish Riggins by contending that the report of the employee's serum blood test was admissible in evidence in this case, while the excluded ocular vitreous fluid test report in Riggins was not. Petitioners' Initial Brief at 13. While the admissibility of the serum blood report in this case was not questioned based upon traditional predicate factors, such as chain of custody, calibration of instruments, etc., the serum blood report, if offered in evidence independently, would and should have been excluded from evidence on relevancy grounds because section 440.09(3) requires a whole blood test, not a serum blood test, thereby rendering the serum blood test entirely irrelevant. See Husky Industries, Inc. v. Black, 434 So. 2d 988, 993 (Fla. 4th DCA 1983)("[N]ot only must the underlying facts or data form a sufficient basis for an expert's opinion, but the underlying facts or data upon which the opinion is based must themselves be relevant.").

The section 90.704 cases relied upon by the E/C are readily distinguishable. In Barber v. State, 576 So. 2d 825 (Fla. 1st DCA 1991), the court found that the trial court committed error (albeit harmless error) by preventing defendant's expert from relating what defendant told him concerning the amount of alcohol he had consumed the night before the crime was committed. While the court cited section 90.704, it appears from the opinion that the expert, unlike

the experts in Riggins or the present case, was not serving as a mere conduit of inadmissible evidence. In fact, other testimony admitted without objection provided ample support for the expert's opinion without reliance upon inadmissible evidence. In contrast, the expert in the present case based his opinion regarding the alcohol content of the employee's whole blood based solely on the employee's inadmissible serum blood alcohol test.

Bender v. State, 472 So. 2d 1370 (Fla. 3d DCA 1985), cited in Barber and relied upon by the E/C, also can be distinguished, because it again appears that the expert medical witness in that case was not being used as a vehicle to place inadmissible evidence before the trier of fact. Also, the court's opinion in two separate places states that section 90.704 authorizes the expert to rely upon otherwise inadmissible data to formulate, "in part," expert opinions. Bender, 472 So. 2d at 1371-72 (emphasis supplied). While the emphasized language is dicta, it illustrates that section 90.704 was never intended to allow an expert to render an opinion that rests entirely on incompetent, inadmissible evidence.[3]

While section 90.704 may under some circumstances permit an expert witness to render an opinion based upon facts or data that

[3] If the expert is merely serving as a conduit to proffer otherwise inadmissible facts or data, the court also may exclude the evidence under section 90.403, if it determines that the potential for unfair prejudice outweighs the probative value of the evidence. See C. Ehrhardt, Florida Evidence § 704.1 (1995 Edition), citing Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988).

would be inadmissible if offered in evidence, section 90.705(2), Florida Statutes,[4] requires disclosure of the underlying facts or data and authorizes exclusion of the expert's opinion if the court finds the underlying facts or data insufficient. C. Ehrhardt, Florida Evidence § 705.1 (1995 Edition). In the present case, the data relied upon by the E/C's expert was flawed because it was based upon serum blood testing and, therefore, did not comply with the statutory requirements necessary to invoke the presumption of intoxication. Accordingly, the JCC correctly excluded the expert's opinion because it was based upon legally insufficient data. See Husky Industries, 434 So. 2d at 992 ("It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data.

The E/C's expert's opinion also suffered from the fundamental problem addressed by Florida Tile and confirmed by the record in this case--serum blood alcohol testing produces notoriously unreliable results. Thus, the underlying data upon which Dr. Barnhill's opinion was based, the serum blood alcohol reading, was

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[4] Section 90.705(2), Florida Statutes (1991) provides:

> Prior to the witness giving his opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

suspect both legally and factually. This was explained by the court in Florida Tile:

> The record contains a substantial amount of expert testimony that the alcohol content in claimant's blood at the same time of the injury could not be accurately and reliably determined from the serum test results. This testimony indicated that, because of the absence of red blood cells in the serum, serum tests often result in a false high reading, and that the interaction of the resuscitation fluid given claimant and an enzyme in the blood that is elevated after an injury increased the possibility of a false high reading. Evidence also showed that the subject blood was drawn for medical, rather than legal, purposes, and that among the differences between these two tests is that whole blood, as opposed to blood serum, is used for a legal blood test. These findings provide additional reasons for insisting on strict compliance with the statutory provisions.

Florida Tile, 561 So. 2d at 656 (citations omitted). At bar, evidence similar to that referenced by the court in Florida Tile was presented and supports the JCC's order (R 306-07). While the JCC's order can and should be affirmed based upon statutory construction and other grounds previously argued, the unreliability of serum blood testing affords an additional basis for excluding Dr. Barnhill's testimony and for strictly adhering to the statutory mandate.

III.

RETROACTIVE APPLICATION OF THE AMENDED STATUTE

Effective January 1, 1994, the intoxication provisions of section 440.09 were revised substantially by the 1993 legislature's overhaul of the Workers' Compensation Act to allow converted serum blood alcohol test results to establish the presumption of intoxication:

> 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.

§ 440.09(7)(b), Fla. Stat. (Supp. 1994). The amended statute was made effective January 1, 1994, without any indication from the legislation which suggests retroactive operation was intended.[5] Nonetheless, the E/C argue that section 440.09(7)(b) should be applied retroactively to this case.

In the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively. Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977). It is equally well settled that the date of the employee's injury determines the applicable law in workers' compensation cases. Garcia v. Carmar Structural, Inc., 629 So. 2d 117 (Fla. 1993);

[5] The effective date provision provides as follows: "This act shall take effect January 1, 1994, except as otherwise provided in this act." Ch. 93-415, § 112, Laws of Fla.

Simmons v. City of Coral Gables, 186 So. 2d 493 (Fla. 1966). This rule obtains because "the acceptance of the provisions of the Workmen's Compensation Law by the employer, the employee, and the insurance carrier constitutes a contract between the parties which embraces the provisions of the law as of the time of the injury." Sullivan v. Mayo, 121 So. 2d 424, 428 (Fla. 1960).

Notwithstanding these established principles, the E/C argue that the 1994 amendment should be applied retroactively as a procedural or remedial measure affecting the method of proving intoxication. "The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary but that a procedural or remedial statute is to operate retrospectively." State Farm Mutual Automobile Insurance Co. v. Laforet, 20 Fla. L. Weekly S173, S176 (Fla. April 20, 1995).

In Laforet, this court considered the retroactive application of section 627.727(10), Florida Statutes (Supp. 1992). Although the legislature included specific implementing language stating that the 1992 provision was remedial and declarative of the its original intent when it enacted the 1982 statute and should apply retroactively, this court refused to apply the amended statute to a cause of action which accrued before its effective date.

This court found "that section 627.727(10) cannot be applied retroactively because it is, in substance, a penalty [by imposing

additional compensatory damages]." Laforet, 20 Fla. L. Weekly at S176 (emphasis supplied). The 1994 amendment at bar, like the statute in Laforet, imposes a penalty because retroactive application could deprive the employee of all benefits he otherwise would have recovered under the 1991 statute. Such a severe penalty should be considered substantive and should not be applied retroactively. See Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994)(where amended statute partially eliminated plaintiff's punitive damage claim, law was considered substantive and could not be applied to cause of action which accrued before its effective date). See also City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993)(when a statute imposes a penalty, any doubt about its meaning must be resolved in favor of a strict construction); Main v. Benjamin Foster Co., 141 Fla. 91, 192 So. 602 (1939)(same). Because the 1994 amendment to section 440.09 arguably could defeat the employee's claim for compensation, it must be considered substantive, rather than procedural, requiring prospective application.

The proponents of retroactive application of section 627.727(10) in Laforet also argued that a clarifying amendment enacted soon after controversy arises over a statute's interpretation indicates a legislative interpretation of the previous statute rather than a substantive change in the law, citing Lowry v. Parole and Probation Commission, 473 So. 2d 1248

(Fla. 1985). Emphatically rejecting that argument, this court stated:

> It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 legislature substantially differed from that of the 1982 legislature. Compare Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989)(subsequent legislatures, in the guise of "clarification" cannot nullify retroactively what a prior legislature clearly intended).

Laforet, 20 Fla. L. Weekly at S176. The same rationale applies at bar. The intoxication provisions contained in section 440.09(3), Florida Statutes (1991), were added to the statute by the 1977 legislature. Ch. 77-290, Laws of Fla. It is highly unlikely that the 1993 legislature was attempting to clarify or interpret the intent of the 1977 legislature by amending the law. Moreover, Florida Tile was decided in 1990 after which the 1991 and 1992 legislatures met and declined to enact any legislation responsive to its holding. Thus, the 1994 amendment represents a substantial change in the substantive law rather than a remedial, procedural measure or an enactment clarifying previous intent.[6]

The E/C argue that the 1994 amendment should apply retroactively as a provision altering the "burden of proof." While generally "burden of proof" statutes have been applied

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[6] Although retroactivity of the 1994 amendments to section 440.09 was not involved, the First District recently applied the 1991 version of that statute to an accident which occurred on February 5, 1993. Gustafson's Dairy, Inc. v. Phillips, 20 Fla. L. Weekly D1674 (Fla. 1st DCA July 19, 1995).

retroactively as procedural enactments, none of the cases cited by the E/C involve a statute imposing a severe penalty such as the complete loss of benefits. When the amendment creates legislation that may diminish a worker's benefits, the statute is considered substantive and should not receive retroactive application. See Meek v. Layne-Western Co., 624 So. 2d 345 (Fla. 1st DCA 1993).

Additionally, the amendatory legislation under consideration did not alter the "burden of proof" as in Stuart L. Stein, P.A. v. Miller Industries, Inc., 564 So. 2d 539 (Fla. 4th DCA 1990), where a statutory amendment changed the burden of proof from "greater weight of the evidence" to "clear and convincing evidence." Under the 1991 and 1994 versions of section 440.09, the E/C bears the burden of proving that the employee's injury was occasioned primarily by the employee's intoxication. § 440.09(3), Fla. Stat. (1991); § 440.09(3), Fla. Stat. (Supp. 1994). If the E/C establishes the statutory presumption of intoxication, the burden of proof under both the 1991 and 1994 versions of the statute shifts to the employee to rebut the presumption by clear and convincing evidence that his intoxication did not contribute to the injury. § 440.09(3), Fla. Stat. (1991); § 440.09(7)(b), Fla. Stat. (Supp. 1994). Thus, contrary to the E/C's argument, the 1994 amendment did not alter the burden of proof.

IV.

SERUM BLOOD CONVERSION PROFFERED AS NON-PRESUMPTIVE EVIDENCE OF INTOXICATION

While the employee submits that the JCC correctly excluded the employee's serum blood alcohol test results for any purpose, an alternative construction of section 440.09(3), Florida Statutes (1991), which is consistent with the 1994 amendment, is suggested by a decision cited by amicus, Wausau Insurance Company. In Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994), defendant was injured in a motor vehicle accident and was admitted to a hospital reeking of alcohol. Two separate blood alcohol tests were performed at the hospital, a "medical" or serum blood test, which revealed a blood alcohol content of .196, and a "legal" or whole blood test which indicated a blood alcohol level of .110.

On appeal from his DUI conviction, defendant successfully argued that the results from the "legal" blood alcohol test were inadmissible to establish the statutory presumption of intoxication (0.10 percent) because the state failed to establish substantial compliance with HRS testing regulations. The appellate court nonetheless affirmed the DUI conviction based upon the "medical" or serum blood alcohol test results. In holding that the serum blood alcohol test result was competent evidence which established defendant's guilt, the court noted that a qualified health care provider extracted the sample, that

the sample was tested by a technician qualified and licensed to conduct and interpret serum blood tests and that, according to expert toxicologists, a serum blood alcohol test typically yields a blood alcohol content about 20 percent higher than a corresponding whole blood test. Although evidence of defendant's serum blood alcohol content supported defendant's DUI conviction, the serum blood test and conversion to whole blood were not admitted to establish the statutory presumption of intoxication under the DUI statute.

Applying the Michie rationale to the workers' compensation intoxication statute, section 440.09(3), expert conversion of an employee's serum blood alcohol reading might be proffered for two purposes: (1) to establish the statutory presumption of intoxication; or (2) as evidence that the employee's work-related injury was occasioned primarily by the employee's intoxication. This distinction is critical. The applicable statute precludes recovery of compensation "if the injury was occasioned primarily by the intoxication of the employee . . . ." § 440.09(3), Fla. Stat. (1991). The statute further provides that "[i]f there was at the time of the injury 0.10 percent or more by weight of alcohol in the employee's blood . . . it shall be presumed that the injury was occasioned primarily by the intoxication . . . ." Id. The presumption of intoxication may be rebutted by the employee, but only upon presentation of "clear and convincing evidence that the intoxication . . . did not contribute to the

injury." Id. Thus, if the presumption of intoxication is established, the burden of proof shifts to the employee to prove by clear and convincing evidence that his intoxication did not contribute to his injury. If the presumption is not established, the burden does not shift to the employee, and the employer bears the burden of proving that the employee's intoxication was the primary cause of the injury.

As previously argued, the statutory presumption of intoxication cannot be established by serum blood alcohol testing, and, accordingly, an expert's conversion of serum to whole blood is inadmissible as presumptive evidence of intoxication. Without the statutory presumption of intoxication, however, the E/C may still avoid paying compensation by proving that the employee's work-related injury was occasioned primarily by the employee's intoxication. Under this method, the serum blood alcohol test results would be admitted as non-presumptive evidence of the employee's intoxication.

This alternative interpretation of the statute is consistent with the statutory framework outlined by the 1994 amended version of the intoxication statute. Under the amended statute, serum blood alcohol may be used for testing purposes to establish the statutory presumption of intoxication only in cases where the results are proved to be medically and scientifically equivalent to comparable results obtained from whole blood testing. Otherwise, the serum blood test results are non-presumptive

evidence relevant to the question whether the employee's injury was occasioned primarily by the intoxication of the employee.

In the present case, the E/C argued to the JCC that evidence of the employee's serum blood alcohol testing results and the conversion performed by their toxicologist should have been admitted not only to establish the presumption, but, alternatively, to prove that the employee's injury was occasioned primarily by intoxication (R 8). On appeal to the district court and in their initial brief filed with this court, the E/C have abandoned that position, apparently recognizing that without the statutory presumption they cannot prove that the employee's intoxication was the primary cause of his injury.[7] Therefore, while the 1991 statute might be construed to authorize admission of serum blood testing as non-presumptive evidence of intoxication, this alternative interpretation has not been raised on review and does not afford the E/C any relief. See City of Miami v. Steckloff, 111 So. 2d 446, 447 (Fla. 1959)("It is an established rule that points covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs. An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs."); Snyder v. Volkswagen of America,

[7] The E/C's brief filed in this court states that Dr. Barnhill's expert opinion converting the employee's serum blood alcohol reading to whole blood was proffered "to invoke the section 440.09 presumption." Petitioner's Initial Brief at 8.

Inc., 574 So. 2d 1161 (Fla. 4th DCA 1991)(issue not raised in initial brief, even though properly preserved for review, will not be considered by appellate court).

CONCLUSION

This court should answer the certified question in the affirmative and approve the district court's affirmance of the JCC's order.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Millard L. Fretland, Esquire, Post Office Box 13010, Pensacola, Florida 32591-3010, Thomas F. Condon, Esquire, 130 East Government Street, Pensacola, Florida 32501 and to Jack A. Weiss, Esquire, Reflections Office Centre, Suite 600, 400 Australian Avenue South, West Palm Beach, Florida 33401 by mail this 10th day of August, 1995.

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