IN THE SUPREME COURT OF FLORIDA

CASE NO. : SC01-1127

UNITED STATES SUGAR CORP.

Petitioner,

v.

G.J. HENSON,

Respondent.

_____/

BRIEF OF *AMICUS CURIAE*
THE ACADEMY OF FLORIDA TRIAL LAWYERS
IN SUPPORT OF RESPONDENT

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INTRODUCTION

This amicus brief is submitted on behalf of The Academy of Florida Trial Lawyers. The Academy is a state-wide voluntary association with more than 3,000 attorneys whose practices emphasize litigation for the protection of the personal and property rights of individuals.

This amicus brief will address only the question certified by the First District Court of Appeal:

> IS A JUDGE OF COMPENSATION CLAIMS REQUIRED TO APPLY THE STANDARDS OF *FRYE v. UNITED STATES*, 293 F. 1013 (D.C.Cir. 1923) PRIOR TO ADMITTING EXPERT OPINIONS CONCERNING NOVEL SCIENTIFIC PRINCIPLES OR METHODOLOGIES IN A WORKERS' COMPENSATION PROCEEDING?

SUMMARY OF THE ARGUMENT

We urge this Court to answer the certified question in a negative. Costly and time consuming *Frye* hearings are antithetical to the expressed purpose of Florida's workers' compensation scheme. This Court should take this opportunity to join the majority of states which have addressed this issue by relieving the state's Judges of Compensation Claims (JCC) from the expense and effort of formal *Frye* hearings.

Frye is a vestige of the very "unwieldy" tort system which the legislature sought to replace when it established Florida's workers' compensation scheme.

ARGUMENT

COSTLY AND TIME CONSUMING *FRYE* CHALLENGES ARE FUNDAMENTALLY AT ODDS WITH THE EXPRESSED PURPOSE OF FLORIDA'S WORKERS' COMPENSATION SCHEME: THE TIMELY AND EFFICIENT PROVISION OF COMPENSATION TO INJURED FLORIDA WORKERS

As the District Court observed, the certified question is one of first impression in Florida. Although Petitioner and its many *amici* make note of this Court's discussion of *Frye* in *Dominos Pizza v. Gibson*, 668 So.2d 593 (Fla. 1996), any reliance upon that discussion is misplaced. First and foremost, *Dominos Pizza* addressed a specific ***exception*** to the expedient no-fault workers' compensation system. In that case, this Court addressed Fla. Stat.§440.09(3), which created a statutory presumption of causation by intoxication, which, in turn, precluded compensation. 668 So.2d at 594 n.1. The specific question was whether the statutory presumption of causation by intoxication could be triggered via blood *serum* test results. This Court found that there was nothing in the statute which precluded

utilizing such tests, and also acknowledged that other courts had held that blood serum alcohol tests meet the *Frye* standard of general scientific acceptance. Id. at 596.[1]

The issue of whether the *Frye* standard applied in ordinary workers' compensation claims was neither presented to nor addressed by this Court in *Dominos Pizza*. Moreover, even if the question had been addressed, there would be nothing inconsistent about applying the standard to an employer/carrier who is seeking to ***avoid*** paying a workers' compensation claim, while simultaneously observing that the standard is fundamentally at odds with the purpose of the workers' compensation scheme and, therefore, inapplicable to a *claimant's* burden of proof in the ordinary workers' compensation proceeding.

The certified question should be answered in the negative. As this Court observed in *De Ayala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So.2d 204 (Fla. 1989), one of the primary purposes of adopting the workers' compensation program was "was to replace an unwieldy tort system." 543 So.2d at 206. In the past decade, few aspects of Florida's tort system have become more unwieldy than the application of *Frye*. *Frye* has become the defense bar's weapon of choice, and a blunt and imprecise weapon at that.

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[1]One year after it decided *Dominos Pizza*, this Court declared the irrebuttable presumption created by §440.09(3) to be an unconstitutional deprivation of due process. *Recchi America, Inc. v. Hall*, 692 So.2d 153 (Fla. 1997).

In *De Ayala*, this Court acknowledged that when the legislature created the workers' compensation program, it "abolished the old tort system and replaced it with a state-mandated no-fault insurance system" that met the dual goals of assuring that workers were not deprived of reasonablely adequate and certain payment for workplace accidents and replacing the unwieldy tort system, which made it difficult for businesses to predict or insure for the cost of industrial accidents. 543 So.2d at 206. The worker sacrificed her right to a trial by jury of her peers, and her right to recover for intangible losses, such as pain and suffering. In exchange, the worker was no longer required to establish fault on the part of her employer. She merely needs to demonstrate that she sustained an accident in the work place which caused injury. Fla. Stat. §440.09.

Recently, *Frye* challenges have been raised on issues as unscientific as the adequacy of a car manufacturer's seat belt warnings, *Hyundai Motor Co. v. Ferayorni*, 2001 WL 913884 (Fla. 4th DCA August 15, 2001), (rejecting application of *Frye*) and as un-novel as medical malpractice cases. *See*, *Rodriguez v. Feinstein*, 26 Fla. L. Weekly, D1813 (Fla. 3rd DCA July 25, 2001).

Frye challenges are undeniably costly in terms of time and money. Moreover, *Frye* challenges are time consuming at both the trial and appellate level in light of the unique form of *de novo* review which is applied to *Frye*. Typically, *de novo* review

is reserved for purely legal issues, and appellate courts are not permitted to reconsider or re-weigh the evidence presented at trial. However, *de novo* review of *Frye* issues has taken on a life of its own.

The Court need look no further than the frustration expressed by the court in *Brim v. State*, 779 So.2d 427 (Fla. 2nd DCA 2000), to appreciate the magnitude of the judicial labor necessary to perform this unique form of appellate review. There, Judge Altenbernd --a thoughtful and diligent jurist by anyone's standards - openly expressed his concern about the depth and breadth of such an exercise. 779 So.2d at 435. ("[W]e have struggled for nearly a year with our authority and competence to make a *de novo* "determination" regarding the general acceptance of a very technical, complex scientific procedure within someone's specified scientific community. . . . Both due process and the limited technical competence of the judiciary require that this review take place with certain safeguards that we have not yet provided.").

Frye and *Daubert* charge the trial court with a "gatekeeping" role.[2] Indeed, the first step in the four step process outlined by this Court in *Ramirez, v. State*, 651 So.2d 1164 (Fla. 1995), is the ***trial court's*** determination that the testimony, if allowed,

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[2]*Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S.589, 113 S.Ct.2786, L.Ed.2d 489 (1993).

would ***assist the jury***. 651 So.2d at 1167. However, there is no jury to assist in workers' compensation proceedings.

The cumbersome and time consuming application of *Frye* is antithetical to the purpose of the workers' compensation program:

> It is the intent of legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The Division of Workers' Compensation shall administer the workers' compensation law in a manner which facilitates the self-execution of the system and the process of ensuring the prompt and cost effective delivery of payment.

Fla. Stat. §440.015 (1995).

The legislature has provided specific and workable guidelines for the presentation of medical testimony in workers compensation proceedings. First, all healthcare providers who provide care to injured workers under Chapter 440 must be certified by the Division of Workers' Compensation. Fla. Stat. §440(1)(3)(a). These certified physicians may conduct IMEs, Fla. Stat. §440(1)(3)(5), and, whenever there is "disagreement in the opinions of the healthcare providers," the statute provides for the appointment by the JCC of an expert medical advisor (EMA) whose opinion "is

presumed to be correct unless there is clear and convincing evidence to the contrary." Fla. Stat.§440.13(9)(c).

The individual charged with making that determination in workers' compensation proceedings is the judge of compensation claims (JCC). The JCC is both judge and jury and, as Respondent Henson points out, JCCs grapple with medical-legal issues on a daily basis, unlike the average juror or circuit court judge. After receiving all medical reports of authorized treating healthcare providers, as mandated by Fla. Stat.§440.29(4), the JCC determines whether the claimant's injury has been "established to a reasonable degree of medical certainty and by objective medical evidence." §440.09(1). Accordingly, the legislature has provided the standard for proof of injury, and has provided for an expedient and efficient method of presenting medical evidence to the JCC. There is, as Respondent Henson observes, simply no room for the unwieldy and time consuming *Frye* test.

Three of the four states which have squarely addressed this issue have rejected the application of *Frye* or *Daubert* to workers' compensation proceedings. Each of those workers' compensation claims --like the present claim --involved allegations of on-the-job injuries via chemical exposure. See *Sheridan v. Catering Management, Inc.*, 558 N.W. 2d 319 (Neb. App.1997); *Armstrong v. City of Wichita*, 907 P.2d 923 (Kan. App. 1995); *Fuyat v. Los Alamos Nat. Laboratory*, 811 P.2d 1313 (N.M. App.

1991). By contrast, only one court has expressly held either *Frye* or *Daubert* applicable in a workers' compensation case. See, *K-Mart Corp. v. Morrison*, 609 N.E. 2d 17 (Ind. App. 1993).[3]

In *Armstrong v. City of Wichita*, a Kansas court held that there is "no scientific standard of any kind to be applied to the admission of scientific evidence in workers' compensation cases" 907 P.2d at 929. That decision was based, in part, upon the fact that neither the ALJ, nor the reviewing Board in Kansas' workers' compensation proceeding, are bound by "technical rules of procedure" or "the rules of evidence." Id.

However, in contrast to Petitioner's argument, the decision was not based exclusively or even primarily upon the fact that Kansas' rules of evidence are not applicable in Kansas' workers' compensation proceedings:

> Given the relative equality that exists in compensation cases between lay testimony and expert testimony, it does not appear that claimant has any burden to show that his medical evidence meets any particular standard. The claimant's burden of proof in a

[3]In the following decisions, the issue was acknowledged but not decided: *City of Aurora v. Vaughn*, 824 P.2d 825 (Col. App. 1991); *State v. Steen*, 1999 W.L. 743326 (Del. Super. 1999); *Green v. Texas Workers' Compensation Insurance Facility*, 993 S.W. 2d 839 (Tex. App. 1999); *America West Airlines v. Tope*, 935 SW. 2d 908 (Tex. App. 1996); *Norfolk Southern Railway Co. v. Baker*, 514 SE.2d. 448 (Ga. App. 1999); *Bryant v. Tidy Bldg. Services*, 678 So.2d 48 (La. App. 1996).

> workers' compensation case is to prove that it is more probably true than not true that he or she suffers from a disabling physical condition which is the result of his or her work. To require a claimant to also prove that a diagnosis is one universally recognized by and agreed upon in the medical community is above and beyond the scope and nature of the Workers' Compensation Act. To apply the *Daubert* or the *Frye* standard to a workers' compensation case, would be to apply technical rules of procedure to which neither the ALJ nor the Board are subject. It would also require us to apply our rules of evidence to those proceedings and those rules of evidence that were held specifically and are not applicable.

Id. at 929.

U.S. Sugar contends that *Armstrong* should be rejected because the *Armstrong* court acknowledged in Kansas' rules of evidence do not apply in Kansas' workers' compensation proceedings, whereas the First District has on several occasions acknowledged that the rules of evidence in Florida do apply in workers' compensation proceedings. *See, e.g.*, *Alford v. G. Pierce Woods Memorial Hospital*, 621 So.2d 1380 (Fla. 1st DCA 1993). That argument may have some superficial appeal, but it should be rejected for several reasons. First, *Frye* is a common law rule, and therefore, the evidence code is not brought into play. Second, as Judge Ervin discussed in his dissent in the *Alford* case, previous cases in which the First District held that the

evidence code applied in workers' compensation proceedings "hold only that the portion of the evidence code which precludes the admission of hearsay of evidence applies to workers' compensation proceedings." 621 So.2d at 1385. (Ervin, J, dissenting).

Nebraska, like Florida, applies its evidence code to workers' compensation proceedings. Nevertheless, the Nebraska court acknowledged that requiring a workers' compensation claimant to comply with *Frye* or *Daubert* would "impose an onerous burden upon the claimant in the context of workers' compensation litigation." *Sheridan v Catering Management, Inc.*, 558 N.W. 2d 319, 328 (Neb. App. 1997).

In *Fuyat v. Los Alamos Nat. Laboratory*, 811 P.2d 1313 (N.M. App. 1991), a case involving the cruel irony of a chemist who suffered from multiple chemical sensitivity, the court held that licensed physicians who had examined and treated the claimant and who were experienced with similar patients in the past, were qualified to give expert testimony concerning the claimant's symptoms and that such testimony did not have to meet the requirements of *Frye*. 811 P.2d at 1317.

U.S. Sugar and it *amici* complain that a double standard would exist if this Court were to answer the certified question in the negative. However, a double standard only exists where different rules are applied to similar or equal systems. That

is not the case here. Florida's workers' compensation scheme was intended to be - ***and is*** - different from the adversarial civil tort system.

Florida's legislature created the workers' compensation system precisely because of the costly and time consuming nature of Florida's "unwieldy" tort system. *De Ayala*, *supra*. *Frye* has become the poster child for that unwieldy system.

U.S. Sugar also complains that it would be unfair to allow a JCC to admit evidence that no other judge would admit into evidence. This argument proves both too much and too little.

First, it presumes that the absence of *Frye* from the evidentiary landscape in workers' compensation proceedings will result in some form of scientific lawlessness in workers' compensation proceedings. This argument overlooks the fact that the legislature has already established a workable and efficient burden of proof which workers' compensation claimants must satisfy. Claimants must establish causation to "a reasonable degree of medical certainty and by objective medical findings." Fla. Stat. §440.09. In other words, the absence of *Frye* from workers' compensation proceedings does not equate to the absence of any and all standards of scientific or medical certainty.

U.S. Sugar also asserts that there is nothing in the legislative history of Florida's workers' compensation statute to suggest that it was intended to supplant

Frye. However, this argument overlooks the fact that the application of *Frye* to workers' compensation proceedings had not even been discussed until 1996, in *Dominos Pizza*, and that the issue of whether *Frye* should or must be applied in a workers' compensation proceeding was never addressed until the case *sub judice*. There was no need for the legislature to express an intent on a subject that had never been raised.

More specifically, U.S. Sugar argues that EMAs were established merely for "cost control purposes." (U.S. Sugar Brief, pg. 34) That is precisely the point. The entire workers' compensation scheme was designed for the dual purpose of speedy no-fault compensation to injured workers and containment of costs for Florida businesses. The introduction of costly and time consuming *Frye* challenges is fundamentally at odds with the express purpose of the workers' compensation scheme.

Moreover, this Court has previously acknowledged that Florida's workers' compensation scheme ***is*** distinct from Florida's tort system and that different rules do apply in workers' compensation proceedings. *See, e.g., Lee v. Wells Fargo Armored Services*, 707 So.2d 700 (Fla. 1998) (prejudgment interest on attorney's fees rule announced in *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So.2d 929 (Fla. 1996) does not apply to attorney's fee awards in workers' compensation proceedings); *Zundell v. Dade County School Board*, 636 So.2d 8 (Fla. 1994)

("Workers' compensation is an administrative remedy designed to speed an employee's compensation while insulating both employer and employee from the costs and delays inherent in purely judicial adversarial proceedings."); and *Mahoney v. Sears, Roebuck & Co.*, 440 So.2d 1285 (Fla. 1983) (workers' compensation law is "reasonable litigation alternative").

The Differential Diagnosis Method Is an Accepted
Method For Establishing Medical Causation

Because physicians uniformly testify concerning medical causation in the context of workers' compensation proceedings it is appropriate to acknowledge that the differential diagnosis method has been universally recognized as an accepted method for establishing causation of medical conditions. In addition to Florida courts, the vast majority of Federal Circuit Courts of Appeal have also recognized the "differential diagnosis" method as scientifically acceptable under the federal standard *Daubert. See, e.g.*, *David v. National Railroad Passenger Corp.*, 2001 WL 930110 (Fla. 2nd DCA August 17, 2001); *Berry v. CSX Transp., Inc.*, 709 So.2d 552, 571 (Fla. 1st DCA 1998). In *David*, the Second District Court of Appeal cited *Hardyman v. Norfolk and W.Ry Co.*, 243 F.3d 255 (6th Cir. 2001) for this proposition as well. There the court noted:

> One appropriate method for making a determination of causation for an individual instance of disease is known as "differential

> diagnosis" which is the method employed by plaintiff's experts in this case. "Differential diagnosis" is defined as:
>
> > The method by which a physician determines what disease process caused the patient's symptoms. The physician considers all relevant potential causes of the symptoms, then he eliminates alternative causes based on a physical examination, a clinical test, and a thorough case history.
>
> FEDERAL JUDICIAL CENTER, *Reference Manual on Scientific Evidence* 214 (1994).

Hardyman, 243 F.3d at 260. Accord *Baker v. Dalkon Shield Claims Trust*, 156 F.3d 248 (1st Cir. 1998); *Westberry v. Gisleved Gummi A.B.,* 178 F.3d 257 (4th Cir. 1999); *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (9th Cir. 1998), cert den. 526 US 1099 (1999); *Zuchowicz v. United States*, 140 F.3d 381 (2nd Cir. 1998); and *In re: Paoli v. R.R.Yard PCB Litig.*, 35 F.3d 717 (3rd Cir. 1994).

The differential diagnosis method will be used overwhelmingly, if not exclusively, to support causation in workers' compensation proceedings. The legislature has charged the Judges of Compensation Claims with the task of assessing whether duly authorized physicians employing this methodology have established causation "to a reasonable degree of medical certainty and by objective findings."

Frye need not and should not be applied to Florida's workers' compensation proceedings.

CONCLUSION

For the reasons expressed by the Respondent in his Answer Brief, and expressed herein, the Academy of Florida Trial Lawyers respectfully requests that this Court answer the certified question in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded via U.S. mail on June 6, 2002 to:

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CERTIFICATE OF STYLE AND TYPE SIZE

In accordance with Florida Rules of Appellate Procedure, Rule 9.210(a)(2), as amended effective January 1, 2001, undersigned counsel hereby certifies that this Brief complies with the font requirements of the Rule: Times New Roman, 14-point font.

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