IN THE SUPREME COURT
STATE OF FLORIDA

United States Sugar Corp.,	*	CASE NO.:	SC01-1127
Petitioner,	*	CLAIM NO.:	430-72-5580
v.	*	D/A:	02/01/1996
G. J. Henson,	*		
Respondent.	*		
	*		
______________________________	/		

AMENDED BRIEF OF *AMICI CURIAE* FLORIDA FRUIT & VEGETABLE ASSOCIATION; FLORIDA CITRUS MUTUAL; AMERICAN CHEMISTRY COUNCIL; FLORIDA FERTILIZER & AGRICHEMICAL ASSOCIATION; GULF CITRUS GROWERS IN SUPPORT OF PETITIONER

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
CASE NO. 1D99-2798
DIVISION OF WORKERS' COMPENSATION CLAIMS

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STATEMENT OF THE CASE AND FACTS

Florida Fruit & Vegetable Association; Florida Citrus Mutual; Chemical Manufacturers Association; Florida Fertilizer and Agrichemical Association; and Gulf Citrus Growers Association (referred to in this Brief as “Amici Curiae”), file this their Brief Amici Curiae in support of the position and Brief of the Petitioner, United States Sugar Corporation (specifically, Petitioner’s argument designated “A”).

The Statement of the Case and of the Facts found in Petitioner’s Initial Brief is accepted and incorporated by reference herein.

SUMMARY OF THE ARGUMENT

This Court has long stated that Frye delineates the appropriate test for determination of the admissibility of novel scientific evidence in Florida. The certified question from the district court seeks to carve out an exception to Frye for workers' compensation proceedings. The court does not suggest that Frye should not be followed in Florida, but simply not in workers' compensation proceedings. This Court has consistently required novel scientific evidence to meet the Frye standard to ensure reliability. There is no legitimate basis for suggesting parties involved in workers' compensation proceedings should be exempted from establishing that novel scientific theories must be generally accepted in the relevant community. To be competent, evidence must be reliable. The standard of reliability should not vary depending on the forum in which the novel scientific theory is raised.

Additionally, of the other states which have addressed the issue, all but two apply Frye or Daubert in workers' compensation proceedings. The two states which do not apply either standard also do not apply the rules of evidence to workers' compensation proceedings. In Florida, the rules of evidence apply to workers' compensation proceedings.

It is vitally important to employers in Florida's vast agricultural industry and the innumerable others involved in application directly, or indirectly, of chemical compounds, that well validated Florida standards for reliability of novel scientific evidence continue to be deemed applicable to workers' compensation proceedings. Your amici hope to show the reasons for the applicability of Frye standard to the workers' compensation setting are varied and strong. In response to concerns expressed by the district court, notwithstanding its holding, your amici hope to persuade this Honorable Court not a single fundamental tenet of the workers' compensation law is jeopardized by adherence to the Frye standard in cases involving novel scientific evidence. Furthermore, while the Legislature has stated that medical records of all treating physicians are admissible "upon proper motion," there is no statement suggesting those records--alone--can establish the necessary causal relationship between an alleged workplace injury and a particular condition, injury, or illness. Supposed delay and complexity as is feared might accompany adherence to Frye in the workers' compensation setting will apply to a very slender minority of cases-- and those to which it does apply (e.g.. the cause *sub judice*) very well justify proceeding with a modicum of caution.

ARGUMENT

ISSUE

A JUDGE OF COMPENSATION CLAIMS IS REQUIRED TO APPLY THE STANDARDS OF FRYE V. UNITED STATES PRIOR TO ADMITTING EXPERT OPINIONS CONCERNING NOVEL SCIENTIFIC PRINCIPLES OR METHODOLOGIES IN A WORKERS' COMPENSATION PROCEEDING.

A. FRYE DOES APPLY

In determining to certify it's question of great public importance, the District Court first allowed it had easily concluded, objectively, the applicable law; that is not why the question was certified. Rather, the Court expressly predicated certification on a subjective belief that perhaps the law should not apply, at least not here, that is; to Florida workers' compensation proceedings. In the resulting and somewhat anomalous certification, the District Court correctly ruled Frye v. United States, 93 F. 1013(D.C. Cir. 1923) applies to workers' compensation proceedings, but it has effectively attached a "virus" to the ruling, so to speak, one by which this Honorable Court might "unapply", or delete, Frye!

Your undersigned Amici Curiae seek to help persuade this Court the law which now indisputably *does* apply -- also *should* apply, and, that the proper means by which to address the District Court's stated concerns, valid or not, are found within very the text of its opinion;

> "…(W)e suggest that the Legislature consider how issues of novel scientific evidence should best be addressed in workers' compensation proceedings." United States Sugar Corp. v. Henson, 26 FLW D62, ___ (Fla. 1st DCA April 5, 2001).

B. FRYE ALSO SHOULD APPLY

The primary issue addressed in this brief is whether this Court should, as the District Court suggests, carve out an exception to the rule of law requiring novel scientific evidence to satisfy the Frye standard to be admissible in workers' compensation proceedings.

Because the "general law of evidence" was applicable to workers' compensation proceedings prior to the effective date of the Florida Evidence Code (Chapter 90, Florida Statutes), the Evidence Code is applicable to such proceedings by virtue of the provisions of Section 90.103(1) of the Code. Workers' compensation proceedings are regarded, sometimes interchangeably, as either quasi judicial or administrative but in essence they are far more judicial than administrative. The JCC is able to compel, with the authority of the sovereign, payment of both money damages and other tangible benefits, sometimes very substantial money and benefits (e.g., the cause *sub judice*), from one private party to another. The reliability of evidence capable of persuading the JCC to accept or reject a claim is an issue of both paramount and fundamental importance.

Amici curiae urge this Court to require continued adherence to the governing standard because it is necessary to assure reliability. Perhaps more importantly, the standard should not vary depending on the Florida forum in which similar issues of causation and the like are litigated. Accordingly, amici curiae request this Court affirm the *holding* of the First District Court of Appeal wherein it reiterated the Frye standard *is* applicable in workers' compensation proceedings.

Just four years ago, in Hadden v. State, 690 So. 2d 573 (Fla. 1997), this court explicitly reaffirmed its unwavering "…intent to use the Frye test as the proper standard for admitting novel scientific evidence in Florida" (emphasis added). Hadden, supra at Page 578 This Court emphasized the following compelling bases for continuing universal adherence, in Florida, to the Frye test: (1) a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments; and (2) if the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use. Hadden, supra, at 577-578.

Revisiting this court's stated grounds for adherence to Frye (in response to some of the critical challenges to same as have arisen over the years) takes us well along the way toward

demonstrating the compelling grounds for adherence to it in the workers' compensation setting;

> The reasons for our adherence to the *Frye* test announced in *Stokes* continue today. Moreover, we firmly hold to the principle that it is the **function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence**. It is this fundamental concept which similarly forms the rules dealing with the admissibility of hearsay evidence. As a rule, hearsay evidence is considered not sufficiently reliable to be admissible, and its admission is predicated on a showing of reliability by reason of something other than the hearsay itself. See, § 90.802, Fla. Stat. (1995)("Except as provided by statute, hearsay evidence is inadmissible."). This same premise underlies why novel scientific evidence is to be *Frye* tested. Novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion. In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

Hadden, supra, at 577-578. This Court adheres to a firm conviction that of paramount concern to the determination of legal issues in Florida is reliability. The sine quo non of competency is reliability. To allow workers' compensation proceedings an exemption from the Frye standard invites uncertain (and as will be shown, unnecessary), deviation from Florida's *Rosetta stone* for the determination of evidential reliability.

Such a departure would undermine confidence in the vital, quasi-judicial, workers' compensation forum. Parties involved in workers' compensation proceedings are also entitled to, and expect, reliability -- especially given the risk of potentially "staggering[1]" awards there, just as in the Courts of general jurisdiction.

Different standards represents less, not more, of a good thing. Hypothetically, let us assume an employer requires all of its employees to pick up paychecks in person at a designated location. Employee Jane Doe brings her son with her to pick up her check on her day off. Later, Jane and son allege exposure through means of having walked through certain fumes while picking up her paycheck and that these chemical fumes later caused nerve disorders. Because the son is not an employee, he files suit in circuit court while Jane must file a claim for workers' compensation benefits. The same experts and supporting data are relied upon to establish causation by Jane and her son in the different proceedings. At trial the experts' testimony is ruled inadmissible in the circuit court proceeding because it does not meet the Frye standard. Thereafter, that same testimony is admitted and relied on in the workers' compensation proceeding

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[1] Above All Drywall v. Shearer, 651 So. 2d 195, 197 (Fla. 1st DCA 1995)

because it is not subjected to the Frye standard. Can such a result be reliable? Clearly it cannot.

A sampling of recent decisions from Florida's district courts makes a clear case for continuing adherence to the rule of law compelling novel scientific evidence to satisfy the Frye standard. For example, in Kaelbel Wholesale, Inc. v. Soderstrom, 26 Fla. L. Weekly D544 (Fla. 4th DCA February 21, 2001), Judge Warner examined the trial court's admission of novel scientific evidence which purported to establish that Guillaine-Barre Syndrome[2] was caused by ciguatera which came from a fish supplier. While the trial court, in fact, conducted the Frye hearing, from a reading of the decision, it was clear there was no general acceptance of the experts' opinion in the relevant scientific community. The court wrote:

> Appellee's brief states as to both her experts, '[t]he opinions were rendered based upon underlying medical principles that have been established and accepted by physicians with knowledge in the respective fields.' For this proposition, appellee cites to the testimony of Dr. Lange and Dr. Lopes themselves. This is tantamount to saying that because the court qualifies a witness as an expert, and the expert testifies to the methodology and opinion, it therefore is accepted in the field. Of course, such a proposition is nowhere supported in the law and is completely contrary to Frye.

Soderstrom, supra, at ____. Without a reviewable Frye hearing at the trial level in workers' compensation proceedings, the First District is deprived of any reliable basis to assess the

[2] This is commonly believed to be autoimmune condition.

competency of the experts' testimony regarding causation. Competency and substantiality cannot be satisfactorily shown where the evidence is not first shown to be reliable.

One month after Soderstrom, the Fifth District released its opinion in Poulin v. Fleming, 782 So. 2d 452 (Fla. 5th DCA 2001). On review from the granting of summary judgment, the court considered whether there was general acceptance in the scientific community that radiation, alone or in combination with other factors could account for their son's rare brain disorder, schizencephaly. In rejecting the Poulin's position, the court recognized that Florida continues, with justification, to adhere to a high standard of reliability:

> The higher standard of reliability in Frye requires the determination by the judge that the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community.

Poulin, supra, at 455. The court noted that of the three expert opinions sought to be admitted, one doctor candidly admitted she was unaware of any scientific literature in support of her position and that she was otherwise relying upon the testimony of one of the plaintiff's other experts to establish general acceptance of the position. Id. at 455-456. The court evaluated the testimony of the Poulin's other experts and the opinion makes clear there was no general acceptance in the scientific community

for propositions they asserted. The court further observed that the one short, purportedly scientific "article" allegedly supportive of the expert's propositions not only failed to indicate its having been subjected to peer review; the author's qualifications were not even stated! The district court affirmed the summary judgment. Id. at 458.

Currently pending before this Court is the Castillo[3] case, wherein chemical exposure issues are also involved. The Castillo's argued their minor son's rare birth defect was caused by the mother's exposure to an agricultural fungicide (Benlate) during her pregnancy. Judge Sorondo provided an excellent description of the type of scientific issues raised as well as the types of studies generally recognized as appropriate methodology. Castillo, supra, at 1116-18. Dupont and Pine Island maintained, and the district court agreed, that the methodology employed by Castillo's expert, e.g., extrapolation from rat gavage studies, was not generally acceptable in the scientific community as being applicable to the human condition. Thus, while there was evidence that Castillo's expert was qualified to render an opinion, the Third District, applying all of the components of the Frye standard, determined there was no general acceptance in the scientific community that Benlate caused the particular birth defect in question! Id. at 1120.

[3] E.I. Dupont De Nemours & Co. v. Castillo, 748 So. 2d 1108 (Fla. 3rd DCA), rev. granted, No. SC00-490 (Fla. 2000).

While the district court's opinion below noted that Texas, Colorado and Indiana courts apply Frye or Daubert[4] in their workers' compensation proceedings, it should also be noted Tennessee and Massachusetts also apply Frye or Daubert in workers' compensation proceedings. See generally, Miller v. Nissan Motor Manufacturing Co., 2001 WL 650371 (Tenn. Sp. Workers Comp. June 13, 2001)(The trial court did not find sufficient proof to show that the **evidence** had been generally accepted in the **scientific** community). Case of Canavan, 733 N.E.2d 1042 (Mass. 2000)[Daubert standard (known as Lanigan analysis) applied to workers' compensation proceeding]. Although Nebraska and Kansas do not require novel scientific theories be generally accepted in the relevant scientific community, most states that have addressed the issue certainly do. Significantly, however; in Nebraska and Kansas, governing rules of evidence applicable in their courts of general jurisdiction are not applicable to their workers' compensation proceedings (whereas in Florida, they are). Henson supra, at ___

As will be demonstrated under the next subheading, there is no compelling basis for suggesting (it is not disrespectful to describe the District Court's concerns as little more than that) worker's compensation proceedings should not be furnished the

[4] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993).

same tools for determining reliability as have proven efficacious in courts of general jurisdiction governed by the evidence code. Ensuring reliable evidence is considered only enhances the appellate courts' ability to review the record on appeal to assess whether there is competent, substantial evidence to support the JCC's ultimate determination. Litigants in quasi judicial and even in many administrative proceedings are entitled to the same assurance that novel scientific techniques, urged as a basis upon which to rest potentially momentous liability, are, at a minimum, reliable. See, Kmart v. Morrison, 609 N.E.2d 17 (Ind. App. 1993). The Judge of Compensation Claims (JCC) should not be called on to resolve the conflict in the scientific community concerning the validity of a new scientific process on a case by case basis. Id. If the experts cannot agree about the reliability of a scientific technique, the courts should restrain its introduction because of potential harm and prejudice to the parties involved. Id.

Cleaving workers' compensation from the main body of other fundamentally judicial Florida proceedings would, using the hypothetical discussed earlier, make it possible for the employer/carrier to become responsible for potentially millions of dollars in medical and other benefits while the general liability carrier would have no liability, based on precisely the

same evidence. By what compelling exigency should such a risk of onerous liability be thrust upon the workers' compensation insurers? We have already signaled the answer; the reasons advanced by the Court and likely to be advanced by the Respondent are unavailing. Applying Frye in workers' compensation proceedings serves the purpose of ensuring reliability by helping to make certain that workers' compensation judges are not "misled by the aura of infallibility" that may surround unproven scientific methods, via decisions unverifiable under the otherwise applicable standard of *de novo* review.

The hypothetical presented earlier highlights the clear and present danger of unreliability and resultant unfairness which would follow a ruling that workers' compensation proceedings should be exempted from the Frye standard. Such a ruling would undermine confidence in this vital state program at a time when our general jurisdiction courts are bursting at the seams (and when caustic reforms continually threaten the workers' compensation program). Basic due process concerns of fairness arise when unreliable evidence is considered as substantive evidence. This Court has readily acknowledged that the injured flock to the courts for justice. Justice is not arbitrary and capricious -- either for or against any party.

In deciding, effectively, whether Frye should apply to workers' compensation proceedings, this Court should consider whether the results of certain well-known kinds of novel scientific evidence might be deemed admissible, even where such testimony has been ruled inadmissible in circuit courts i.e., hypnotically refreshed testimony; results of polygraph examinations, etc. To discourage such tendencies, other jurisdictions have in fact applied Frye to purely administrative fora. In Department of Public Safety and Correctional Services v. Scruggs, 566 A.2d 736 (Court of Sp. App. MD 1989), the court was called upon to decide whether its prohibition of polygraph evidence in judicial proceedings applied in the "relaxed" administrative forum. The case involved the dismissal of a correctional officer for allegedly having sexual relations with female inmates. The Department subjected the female inmates to polygraph examinations during the course of the investigation. At Scruggs' personnel hearing, the department received into evidence the results of those tests "showing" that the inmates were being truthful. Scruggs was terminated based on those results and other evidence. The dismissal was upheld on review to the Secretary of Personnel. On appeal to the circuit court, the dismissal was reversed because the fact-finder had relied on the results of the polygraph examinations as substantive

evidence. On appeal to the Court of Special Appeals, Scruggs argued that the polygraph evidence is so unreliable that it was incompetent. In finding the results unreliable, the Court noted that polygraph evidence did not satisfy the Frye standard, and thus, was not competent. See also, Seering v. Department of Social Services, 194 Cal. App.3d 298, 310, 239 Cal. Rptr. 422 (1987)(Daubert standard [a.k.a. Kelly] applies in administrative proceedings).

As can be gleaned, without Frye, workers' compensation proceedings are ripe for the admission of scientific evidence which this Court has already determined is not reliable. Exempting workers' compensation proceedings (from ensuring that only reliable novel scientific principles form the basis of expert opinion testimony accepted as substantive evidence) exposes litigants effectively involved in Florida's justice system to arbitrary and capricious rulings.

C. NO COMPELLING BASIS FOR NOT APPLYING FRYE

In urging an exemption from applicability of Frye in workers' compensation proceedings, the District Court seemed to tout as a substantive equivalent the requirements of §440.015 Fla. Stat. (1995) that the

> "…occupational cause of a workers' compensation injury is proven by "objective

> medical findings," "established to a reasonable degree of medical certainty" "§440.09(1), Fla. Stat. (1995)." Original emphasis.

Henson supra, at ___. This is a little like the chicken and the egg conundrum; with self-authenticating experts issuing self-authenticated opinions, the JCC may in good faith believe evidence submitted conforms to the above cited, controlling standards. "Objective" evidence will be the disease itself -- coupled with the allegedly offending workplace exposure – all fused together by the opinion. As the litany of appellate determinations makes painfully clear, the more questionable the expertise, the more "certain" the expert. With all due respect, the district court's highlighted, purported workers' compensation system safeguards, vis-à-vis the issue of reliability, are simply unreliable as safeguards.

The district court also noted Respondent/appellee's assertion that conducting a Frye hearing will undermine the comparatively streamlined "self-executing nature" of workers' compensation proceedings, causing complexity and delay. Henson supra, at ___. Just as there is an express legislative desire to expedite worker's compensation proceedings, there is a constitutional right to a speedy trial in criminal cases; yet the right to a speedy trial has managed to peacefully coexist in

Florida for decades with the Frye test, applied repeatedly if not predominately in criminal proceedings.

While employers and carriers in this state generally appreciate the Legislature's desire for a speedy, self-executing workers' compensation system without undue complexity, there is sometimes a time and a place to proceed with caution. Frye will rarely come into play in a broken arm case; it is essential, however, in cases of frenetic nerve damage. Employer/carrier appreciation for expediency evaporates if attained at the expense of the right to demand novel scientific principles be generally accepted in the relevant scientific community prior to use as substantive evidence against them in appropriate cases -- and in inappropriate cases, which is to say the vast majority of cases -- it is not and will not be an issue.

In its decision, the First District opined that adherence to Frye in workers' compensation proceedings will increase cost and thereby serve as a deterrent to employees' ability to obtain counsel. On the one hand, as indicated above, in the appropriate cases, both the stakes -- and the rewards are high.[5] Again, the worker with the injured arm will likely not encounter a Frye proceeding, whereas the worker whose attorney accepts and prosecutes a case involving

[5] Consider the 1.75 million dollar attorney's fee awarded over ten years ago in What An Idea, Inc. v. Sitko 505 So. 2d 497 (Fla. 1st DCA 1987)

frenetic nerve damage understands, going in, the likelihood she cannot escape one[6]. On the other hand, counterbalancing such possible dilemmas as were discussed below must be the recognition that insurance carriers who write workers' compensation and general liability policies in Florida may curtail issuance of workers' compensation policies when they learn the forum does not require scientific evidence to meet the same standards as those employed in courts of general jurisdiction in face of potentially "staggering" liability Shearer supra, at 197. Such a predicament is not difficult to foresee given the home insurance crisis which occurred after Hurricane Andrew. The claims of multiple claimants, filed either separately or in a consolidated action on the basis of some alleged chemical exposure is no small concern vis-à-vis a self-insured employer as is the Petitioner, or a carrier. Indications for maintaining proven, indeed presently applicable safeguards of reliability are acute.

Moreover, the judges of compensation claims are not actually called on to determine whether various principles and procedures are "reliable" from a scientific perspective under Frye. Instead, their role is to guarantee at least minimal legitimate acceptance of new scientific evidence, a role no different from that of county and circuit court judges. See generally, Brim v.

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[6] See generally, section 440.01, Fla. Stat. (1995)([I]t is the intent of the Legislature that the facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer).

State, 779 So. 2d 427 (Fla. 2d DCA 2000). Furthermore, unlike the Daubert standard, the Frye standard does not call upon the trial judge to read the scientific literature to understand or assess the scientific reliability or validity of a principle or procedure. As stated by Judge Alterbendt in Brim;

> The trial judge reviews this literature merely to determine whether there is quantitative and qualitative acceptance of the science. The trial judge is determining legal reliability, as a threshold test of legal relevance, by judging--as an objective outsider--the level of acceptance that a principle or procedure has achieved within a scientific community.

Id. at 434. (In this regard, it is worth noting the minimum legal requirements for appointment to serve as a judge of compensation claims parallels those applicable to circuit and county judges.) This Court has clearly stated the scientific evidence which may be considered by the trial judge is confined to that which is presented by the parties during the proceedings. Id. at 435. Thus, although the judge must develop at least a solid, layperson's understanding of the science, she is not expected to transform herself into an expert among members of the relevant scientific community. Rather, she must simply position herself to determine the level of agreement or dissension within that community. Id. at 434.

Respondent pursued his workers' compensation claim under both the occupational exposure and disease theories of causation.

While the district court quoted from one of the relevant sections, it made no reference to the other section, that which requires reliable evidence of causation. Section 440.151 (1)(a), Fla. Stat. (1995), provides, in pertinent part:

> In no case shall an employer be liable for compensation under the provisions of this section unless such disease has resulted from the nature of the employment in which the employee was so engaged, meaning by "nature of the employment" that to the occupation in which the employee was so engaged there is attached a particularized hazard of such disease that distinguishes it from the usual run of occupations.

This standard[7] clearly evinces a requirement to establish, based on reliable evidence, a causal relationship between the specific condition and the workplace.

In light of Florida's dependence on the viability of its large and vital agricultural industry, it is highly improbable the Legislature would subject agricultural (and innumerable other employers dependent on the application of chemical compounds) to nearly limitless liability for conditions on which there is no demonstrably reliable basis within the scientific community to connect alleged "causes" (be it pesticide, herbicide, fungicide or organophophate) with possibly wholly unrelated "effects".

D. THE WORKERS' COMPENSATION STATUTORY EXPERT MEDICAL ADVISER (EMA) IS NEITHER THE SUBSTANTIVE EQUIVALENT TO FRYE NOR AN EFFECTIVE MEANS OF ASSURING RELIABILITY OF NOVEL SCIENTIFIC EVIDENCE

[7] See also, 440.151 (2), Fla. Stat.

In an important comment which seemed to embody the principal arguments of the employee below, the District Court observed "finally, we believe the present workers' compensation system allows the JCC to evaluate competing medical testimony and make a determination on causation." Henson, supra, at ___. In anticipation of a similar argument to this Court as had been made below by the employee, the "system" was described by the employee, in his efforts to set workers' compensation proceedings apart, as being comprised of pre-qualified (with the Division of Workers' Compensation) medical provider-experts. See §440.29(4), Fla. Stat. (1995); and §440.13(9), Fla. Stat. (1995). The EMA especially was touted as either a perfect substitute for – or an entity whose role is inimicable with -- application of Frye. This argument in distinction begs the following question: expert in what? The answer, assuredly, is not "all things" "all the time".

Of course it might be conceivable to empanel such a cadre of experts as would assuage the concerns of all, but it will be shown that highly unlikely thing has not yet occurred in Florida's workers' compensation "system." First let us say it is not that such division approved experts are incapable of informing themselves and their opinions through various means of research and even additional training. Rather, the basis for

determining whether or not they have done so, in a given case, must be verifiable -- and the means of doing that is Frye. (The presumptively correct opinion of an EMA may be overridden.)

The institution of the "EMA" in workers' compensation proceedings fails, utterly, to give perforce assurance of reliability as to the kinds of questions most often giving rise to "Frye" challenges. For example, in Berry v. CSX Transportation, 709 So. 2d 552, 554 (Fla. 1st DCA 1998), the plaintiff had alleged organic solvents caused them to suffer toxic encephalopathy. Id. at 554. Judge Van Nortwick, in writing for the district court in Berry, recognized the significance of the scientific evidence involving epidemiology and toxicology.

> The evidence and testimony in these cases span several fields, most notably epidemiology and toxicology.
> …
> "Epidemiology" is a branch of science and medicine which uses studies to "observe the effect of exposure to a single factor upon the incidence of disease in two otherwise identical populations."
> …
> Epidemiology focuses on the question of general causation, that is, whether a substance is capable of causing a particular disease, rather than specific causation, that is whether the substance did cause the disease in a specific individual.

Id. at 557. He further noted, however, that "association" is not the same as "causation." Id., at 558. After the discussion of

epidemiology, there followed a discussion regarding toxicology. Id. at 559.

Toxicology was defined in Berry as the study of adverse effects of chemical agents on biological systems. Id. A toxicologist attempts to determine at what doses foreign agents produce their effects, explaining a dose-response relationship in which "a change in amount, intensity or exposure" is associated with a change in the risk of disease. Id. at 560. This level of detail convincingly underscores what is intuitively known; not just any doctor can qualify as an expert in chemical exposure cases.

As of June 26, 2001, the published list of EMAs certified by the Division of Workers' Compensation does not list a single toxicologist or epidemiologist. (See Exhibit A)[8]. In fact, those specialties are not even listed in the physician category section[9].

Also intuitively understood by all is the observation; "That a person qualifies as an expert does not endow his testimony with

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[8] This information was current as of June 26, 2001, according to the website (myflorida.com). This data was derived by simply submitting the query without specifying any names or specialties so that all expert medical advisers are listed.

[9] This Court may take judicial notice, §90.202, Fla. Stat. (1999), of the ruling of a JCC from District I-South holding EMAs cannot be appointed to determine the issue of medical causation, an issue pending before the First District in Horticulture Plus, Inc. v. Ash, case no. 1D00-611.

magic qualities." Boston Gas Co. v. Assessors of Boston, 334 Mass. 549, 579, 137 N.E.2d 462 (1956). The idea that an appointment of an EMA will resolve the dispute as to whether an exposure to chemicals, organophosphates, pesticides, herbicides, or fungicides, caused a particular condition is to urge a distinction based on either an implicit belief in magic or the suspension of rational belief.

Respondent further argued, below, that because the medical records of authorized treating physicians are statutorily deemed to be admissible per sé, §440.29(4) Fla. Stat. (1995), there is no room for Frye. Such argument sheds little additional light in support of the argued-for exemption. An authorized treating physician's records will very rarely include the kinds of *opinions,* much less the scientific support for same, regarding causation which must be established under Frye. While the Legislature has determined that those records are admissible, there has been no determination that they are admissible to determine causation. Amici curiae acknowledge that such records should be admitted to document the complaints, symptoms and results of diagnostic tests. They might also be admitted to determine the physician's diagnosis. However, there is no language in the statute indicating such records are admissible for every purpose, much less to establish causation, and least of all,

a self-authenticating basis of acceptance within the relevant scientific community. Thus, the statute does not automatically admit such records but states they are admissible "upon proper motion." In this regard it was further argued below that Frye-testing medical testimony in workers' compensation cases would be contrary to Section 440.29 Florida Statues (1995), in which the legislature has provided that, **upon proper motion,** "[a]ll medical reports of authorized treating health care providers relating to the claimant and subject accident shall be received into evidence by the [JCC]." Henson, supra, at ___. Thus, where records contain opinions regarding causation, there exists the opportunity for the non moving party to challenge their admissibility. To elucidate the basis for most report-based opinions, depositions of the physicians are usually taken in workers' compensation proceedings. It bears repeating; Frye concerns reliability. Thus, while the treating physician records are almost automatically admissible in workers' compensation proceedings, the opinions establishing causation are usually developed in depositions where they are subject to cross-examination and objection.

The indications for Frye in workers' compensation proceedings are strong; they are in fact a given. The reasons against applicability of Frye in the workers' compensation setting are wholly insufficient as a basis on which to decree separate and

unequal standards for reliability for novel scientific evidence in judicial fora governed by the evidence code. The certified question should be answered in the affirmative.

CONCLUSION

Based on the foregoing reasons and authorities, your Amici Curiae respectfully requests this Honorable Court answer in the affirmative the certified question before it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Randy Ellison, Esquire, Rosenthal & Weissman, P.A., 1645 Palm Beach Lakes Boulevard, Suite 350, West Palm Beach, FL 33401-2289, Counsel for Respondent, G. J. Henson and Carol Licko, Esquire, Thomson Muraro Razook & Hart, P.A., One S.E. Third Avenue, Suite 1700, Miami, Florida 33131, Counsel for Petitioner, U.S. Sugar Corporation, this 3rd day of July, 2001.

BY:______________________________________

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief was typed in Courier New 12 point typeface.

BY:______________________________________
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HGK/pc