E. Earle Zehmer
National Moot Court Competition

Finals: Monday, August 12, 2019
Palms Ballroom – Canary
1:00 PM – 2:00 PM

First and Second Place Teams Will Present Their Oral Arguments Before The

State of Florida
First District Court of Appeal

Honorable Stephanie W. Ray, Chief Judge
Honorable Thomas D. Winokur
Honorable Harvey L. Jay

2019 WORKERS' COMPENSATION EDUCATIONAL CONFERENCE
MOOT COURT PROBLEM

The claimant, Paul Speh, was a 40-year old male employed by the Noble Destruction and Demolition Company, Inc., a Florida corporation having a regular payroll of27 employees headquartered in Sarasota, Florida. The employer's workers compensation carrier is Le Phare Mutual Casualty Co.

The sole owner of Noble Destruction and Demolition Company, Inc., is Bob "Knock 'Em Down" Ray. While serving in the military, Ray learned all about explosives and demolition. After his military service, he started in business in Sarasota where a number of older buildings were being removed for construction of newer and bigger projects. This included older houses that were being replaced by modern mansions. Ray even joked that he was not in the construction business, but in the destruction business. This included an interesting sideline, a salvage business of architectural pieces from the elegant Sarasota mansions that were being demolished. He literally had a warehouse full of stuff left over from houses and buildings set for destruction. Indeed, he even appeared on "American Pickers" with Mike and Frank who bought a large amount of iron decorations that they found in his warehouse.

Paul Speh was the superintendent of Crew #2 and had been with Ray for many years, having served with him in the military. Paul suffered from severe diabetes for many years and was insulin dependent requiring shots every four hours. Ray was well aware of Paul's diabetes having seen Paul give himself injections and he knew from after-work gatherings that Paul could not drink alcohol because of his diabetes. The question of whether Paul's diabetes was a handicap never occurred to Ray because Paul was a real go-getter and his diabetes never interfered with his blowing up buildings and demolishing houses.

However, on October 16, 2018, Noble Destruction and Demolition Co., had its first severe accident after many years in business.

Felix Adler, the famous Ringling Bros. clown, had a magnificent Italian Renaissance mansion on Sarasota Bay. However, it had long since fallen into serious disrepair. The heirs of heirs had now sold the property to Minorca Corp. which was going to build a multi-story condominium apartment on the property. Ray got the destruction contract from Minorca and was being allowed to remove any architectural fittings that he wanted.

On October 16, 2018, Paul Speh was in the process of removing the elaborate double staircase that ran from the foyer to the mezzanine since Ray was sure that it was really worth something.

As the top of the staircase was being removed by Crew #2, the upper stairs collapsed below Paul Speh's feet so that he fell to the floor 20 feet below. Strangely, the rest of the staircase was so inter-connected that it fell in a heap on top of him burying Paul in a wooden rubble. Fortunately, the other crew members did not fall. They called out to Paul and heard a muffled reply from below beneath the rubble. He was alive! 911 w.as called and Sarasota Fire Rescue arrived on the scene. The first thing that had to be done was

remove the debris piled on top of Paul. This took a considerable amount of time as they had to be careful not to break any additional rubble that could fall on top of Paul. When he was finally removed from beneath the fallen staircase, Paul did not appear to be severely injured. Strangely, his right shoe had come off when he fell. The only apparent injury was a puncture wound of his right foot from a protruding nail sticking out of a board. The paramedics administered first aid after pulling the nail out of his foot. They then transported Paul to the Sarasota Memorial Hospital. In the ER, Paul was given a shot of insulin because of his blood sugar reading as it had been so long since he had gotten a shot. Also, the puncture wound was treated. Paul was discharged from the ER to follow up with the "wound care facility" at the hospital. Paul did this but the puncture wound resisted healing. Indeed, before long, it worsened so that gangrene set in. He was admitted to the hospital and eventually Paul had to have surgery to have his morbid foot amputated. While in the hospital, an adjuster from Le Phare Casualty came to see Paul and took a recorded statement. Paul was quite frank about his pre- existing condition of diabetes. He believed that his situation with his foot was because he had gotten low on insulin while lying for hours under the rubble of the staircase.

The employer/carrier's (E/C) adjuster conferred with the authorized treating surgeon, Dr. David Redstone, in the hospital about why Paul's foot did not heal from a simple wound. "Was it because he was diabetic," she asked, "because ifso, we are not going to cover it."

Dr. Redstone bristled: "You've got to be kidding, lady! He's lucky he wasn't killed. I understand that he fell 20 feet and was buried in rubble. As far as I'm concerned, that accounts for everything and more?" (Dr. Redstone did not mention that he and Bob Ray were golfing buddies and that he had promised Ray that he would make sure that the insurance covered all expenses so that Ray would not have to worry that Paul would not be properly taken care of.)

Feeling that she had been brushed off by Dr. Redstone, the adjuster conferred with the carrier's attorney, Frank Gamer, and they decided to request an Independent Medical Exam (IME) because of the claimant's prolonged recovery.

Once out of the hospital, Paul underwent the carrier's IME by Dr. Baxter Swing. He reviewed the medical records of Paul's long history of treatment for diabetes as well as the current medical records of treatment for the initial injury and the hospital records of Paul's surgery. After conducting a medical exam of Paul as well, he rendered a report that stated the cause of the need for amputation of Paul's right foot was his pre-existing longstanding diabetes. In his opinion, without the pre-existing severe diabetes, the injury would have been a simple puncture wound requiring little more than first aid. Based on Dr. Swing's report, La Phare filed a notice of denial of responsibility for further medical care and disability.

Paul consulted with attorney Pat Mears, a Florida Bar Board Certified Workers' Compensation attorney who represented employees. After submitting a good faith letter, Mr. Mears filed a Petition for Benefits (PFB) for medical care and temporary total disability accompanied by a note from Dr. Redstone that supported the need for further

care and temporary total disability. The note clearly stated that these were fully related to the fall at work on October 16, 2018.

At this point, the employer/carrier requested the Judge of Compensation Claims (JCC) to appoint an Expert Medical Advisor (EMA) based on the conflict between the opinions of Dr. Redstone and Dr. Swing per Sec. 440.13(9), Fla. Stat.

JCC Walter Lightsey appointed Dr. Donald Harrington as the EMA and provided him with the following question: "What is the major contributing cause of the claimant's need for further treatment and disability?"

After reviewing the medical records, and examining the claimant, Dr. Harrington sent the JCC his report stating:

"The question of what is the major contributing cause of the claimant's need for treatment and disability cannot be answered as a medical question. It is a legal question." As far as Dr. Harrington was concerned, the puncture wound and the pre-existing severe diabetes were equally responsible for the claimant's need for treatment and disability in the past and continued to be so. Each one considered by itself is equally responsible for the claimant's amputation.

Prior to the final hearing, the JCC conducted a Daubert Hearing at the request of the E/C. The E/C's motion argued that the claimant would have to prove that the accident at work was the major contributing cause of his injury and need for any treatment and disability in accordance with Sec. 440.09(1), Fla. Stat. To establish this, the claimant's medical opinion proof would have to meet the standard of Sec. 90.702, Fla. Stat., as amended in 2013. *Daubert v. Merrell Dow Pharm., Inc.,* 509 US 579 (1993).

The E/C argued that *Delisle v. Crane Co.,* 258 So. 3d 1219 (Fla. 2018), does not apply to workers' compensation cases as workers' compensation is a statutory remedy and the Legislature alone can determine rules of evidence for such cases.

The claimant argued that Sec. 90.702, Fla. Stat., and thus *Daubert,* does not apply to workers compensation cases because workers compensation is a substituted reasonable alternative remedy for common law cases, so that the evidence rules should be the same. Furthermore, workers' compensation is intended to be a self- executing law, not a jury system, so technical rules of evidence should not apply. The test should be as it has always been, the test of *Frye v. United States,* 293 F. 103 (D.C. Cir. 1923).

In a separate order, the JCC did not accept either the Daubert test or the Frye test. Instead, he reasoned that most industrial injuries are of common knowledge and experience, including the present case. There is no jury involved to be swayed by so-called experts in "weird science." He noted the total absence of *Frye/Daubert* issues in the long history of Florida's workers' compensation law.

At the final hearing, Dr. Redstone testified in person. He admitted his friendship with Ray and his desire to help the claimant. He stated that the puncture wound was I 00% responsible for the claimant's amputation and continuing need for treatment and disability.

Dr. Baxter Swing, the employer/carrier's IME testified by deposition. He stated that in his opinion, the claimant's pre-existing severe diabetes was 100% responsible for the claimant's amputation and continuing need for treatment and disability. He acknowledged that there are virtually no scientific or medical studies concerning causation of on the job accidents and various medical conditions, including the one in the present case. He stated that his opinion was simply based on his own experience.

Dr. Donald Harrington, the EMA, testified by deposition in accordance with his report that causal relationship is a legal question, not a medical one. All he could say in that regard was that the puncture wound and the claimant's pre-existing diabetes were equally responsible for the amputation and the need for further treatment and disability.

In his order, the JCC accepted the opinion of the EMA as it was presumed correct per Sec. 440.13(9), Fla. Stat.

He determined that Dr. Redstone was excessively biased in favor of the claimant and that his opinion of 100% relationship was not clear and convincing evidence to rebut the opinion of the EMA for this reason.

He also determined that the opinion of the employer/carrier's IME, Dr. Baxter Swing, was rejected as totally devoid of logic or reason. The idea that the fall and resulting puncture wound had nothing to do with the amputation was completely absurd.

Instead, the JCC ruled that notwithstanding the medical opinion evidence, which is only just opinion, he found as fact that "but for" the fall at work on the collapsing staircase resulting in a puncture wound to the claimant's right foot, the claimant would not have required amputation of his foot. Therefore, further medical care and disability is the responsibility of the employer/carrier and was awarded accordingly.

The employer/carrier appealed the JCC's order to the Florida First District Court of Appeal.

The issues:

1. Whether the JCC erred in failing to apply the *Daubert* standard to the expert testimony in this case; and

2. Whether the JCC erred in failing to apply the major contributing cause standard in finding the E/C responsible for claimant's disability and need for medical care related to his foot amputation.

By Richard A. Sicking, Esq.
April 23, 2019

2018 Florida Statutes

Title XXXILABOR

Chapter 440WORKERS' COMPENSATION Entire Chapter

SECTION 09
Coverage.

440.09 Coverage.—

(1) The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment. The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries. For purposes of this section, "major contributing cause" means the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought. In cases involving occupational disease or repetitive exposure, both causation and sufficient exposure to support causation must be proven by clear and convincing evidence. Pain or other subjective complaints alone, in the absence of objective relevant medical findings, are not compensable. For purposes of this section, "objective relevant medical findings" are those objective findings that correlate to the subjective complaints of the injured employee and are confirmed by physical examination findings or diagnostic testing. Establishment of the causal relationship between a compensable accident and injuries for conditions that are not readily observable must be by medical evidence only, as demonstrated by physical examination findings or diagnostic testing. Major contributing cause must be demonstrated by medical evidence only.