

Spring 2015

Equitable Estoppel & Workers' Compensation Immunity: Why Litigants and the Courts Are Getting Ahead of Themselves

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Recommended Citation

Neil A. Ambekar, *Equitable Estoppel & Workers' Compensation Immunity: Why Litigants and the Courts Are Getting Ahead of Themselves*, 10 Fla. A&M U. L. Rev. (2015).

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Equitable Estoppel & Workers' Compensation Immunity: Why Litigants and the Courts Are Getting Ahead of Themselves

Cover Page Footnote

The author would like to thank Jesse D. Rowe, Esquire, who supplied the topic and cured a severe case of writer's block; Dean Darryl K. Jones, who agreed to read this article when nobody else would; James B. Birmingham, Esquire, who introduced the author to workers' compensation law; and, Kim Lindquist, without whose love, support, and grammatical advice the author would never have finished law school – or this article.

EQUITABLE ESTOPPEL & WORKERS’ COMPENSATION IMMUNITY: WHY LITIGANTS AND THE COURTS ARE GETTING AHEAD OF THEMSELVES

Neil A. Ambekar^A

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INTRODUCTION

Every U.S. jurisdiction has created a separate body of law to address workplace injuries - the workers’ compensation scheme. These no-fault systems provide employees injured on the job lost wages and medical benefits. It also immunizes employers from negligence claims arising out of most workplace accidents. This article discusses a grow-

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ing phenomenon in Florida's workers' compensation scheme, the use of estoppel to negate employer immunity.

In some instances, employers have attempted to avail themselves of tort immunity while simultaneously refusing to acknowledge that an accident is covered under workers' compensation. Employees could thereby have been denied any recovery, contrary to a legislative intent to internalize the cost of doing business. In these instances, Florida courts have applied the doctrine of estoppel, holding that employers may not assert workers' compensation immunity while simultaneously denying workers' compensation liability.

Unfortunately, some Florida courts have ignored or misinterpreted precedent and allowed estoppel-based claims to go forward without the required showings. This has weakened the protection offered by workers' compensation immunity, contrary to another legislative mandate: to avoid litigation of work injuries in the circuit courts.

This article lays out the various theories of estoppel—primarily judicial and equitable—that may be asserted in the context of on-the-job injury litigation. This article goes on to explain why Florida courts should refrain from application of equitable estoppel in employee tort actions. Instead, workers' compensation litigation should be allowed to take its course and judicial estoppel applied when injuries are held to be non-compensable.

I. WORKERS' COMPENSATION: A PRIMER

In Florida, injuries sustained in the course of employment are governed not under the law of torts, but under a separate body of law known as "workers' compensation." Similar schemes have been adopted in every U.S. state. Some states, including Florida, rely on variations of the traditional private insurance model. Other states have chosen to adopt a government-administered scheme, generally funded by employer contributions like unemployment benefit funds.¹ Professor Larson lays out the general theory of workers' compensation law as follows:

[T]he basic operating principle is that an employee is automatically entitled to certain benefits whenever [the employee] suffers a "personal injury by accident arising out of and in the course of

1. These are sometimes referred to as "monopolistic" jurisdictions. *See, e.g., Monopolistic State Funds: Glossary of Insurance and Risk Management Terms*, INT'L RISK MGMT. INST., INC., <http://www.irmi.com/online/insurance-glossary/terms/m/monopolistic-state-funds.aspx> (last visited Aug. 23, 2015).

employment” or an occupational disease . . . [n]egligence and fault are largely immaterial, both in the sense that the employee’s contributory negligence does not lessen his or her rights and in the sense that the employer’s complete freedom from fault does not lessen its liability . . . [t]he employee and his or her dependents, in exchange for these modest but assured benefits, give up their common-law right to sue the employer for damages for any injury covered by the [workers’ compensation] act²

The underlying purpose of such programs is to ensure that the industry bears the burden of providing for injured workers without the cost and complexity of tort litigation.³ To this end, the employer is immune from suit in tort for covered injuries, while the employee need not prove fault to receive medical and lost wage benefits.⁴ This *quid pro quo*, sometimes called the “workers’ compensation bargain,”⁵ is the basis of all American workers’ compensation systems.⁶ The U.S. Supreme Court resolved the constitutionality of such enactments for federal purposes in 1917.⁷

Florida’s workers’ compensation scheme was first enacted in 1935, and is codified today at Chapter 440 of the Florida Statutes—“the Florida Workers’ Compensation Law.”⁸ Notwithstanding the statutory designation, the chapter is often styled as the “Workers’

2. LEX K. LARSON & ARTHUR LARSON, WORKERS’ COMPENSATION LAW: CASES, MATERIALS, AND TEXT 3-5 (4th ed. 2008).

3. See, e.g., *C.F. Wheeler Co. v. Pullins*, 11 So. 2d 303, 305 (Fla. 1942).

4. See *Lee v. Fla. Pine & Cypress*, 157 So. 2d 513, 516 (Fla. 1963). Workers’ compensation legislation also generally provides for death and dependency benefits, as well as rehabilitation and vocational benefits. E.g., FLA. STAT. § 440.16 (death and dependency benefits); FLA. STAT. § 440.491(6)(b) (retraining benefits).

5. See, e.g., *Laidlow v. Hariton Mach. Co.*, 790 A.2d 884, 887 (N.J. 2002); *Mo. Alliance for Retired Ams. v. Dep’t of Labor & Indus. Relations*, 277 S.W.3d 670, 675 (Mo. 2009); *Shoemaker v. Myers*, 801 P.2d 1054, 1062 (Cal. 1990); *Yuille v. Bridgeport Hosp.*, 874 A.2d 844, 846 (Conn. 2005). Curiously, the phrase “workers’ compensation bargain” is never used by Florida courts, which favor the less descriptive *quid pro quo*. E.g., *Bruno v. Destiny Transp., Inc.*, 921 So. 2d 836, 841 (Fla. Dist. Ct. App. 2006) (heard in the Second District).

6. One notable exception to mandatory workers’ compensation schemes is the state of Texas, where workers’ compensation is a permissive system. Private employers “may elect” workers’ compensation coverage. “Nonsubscribing” employers do not enjoy the benefit of the bargain; that is, they are liable to employees in tort under ordinary negligence principles. TEX. LABOR CODE ANN. § 406.002 (1993); See, e.g., *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 239 (Tex. 1955).

7. In *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), and *N.Y. Cent. R.R. v. White*, 243 U.S. 188 (1917), the U.S. Supreme Court found that New York and Washington’s workers’ compensation laws were reasonable exercises of state police powers.

8. FLA. STAT. § 440.01 (2012). This gender-neutral terminology was adopted in 1979, in favor of the previously favored “Workmen’s Compensation Law.” See 1979 Fla. Laws c. 79-40, § 1.

Compensation Act” by courts and practitioners.⁹ The legislative intent is to provide for “the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer.”¹⁰ The legislature also provided that “[t]he workers’ compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike.”¹¹ The constitutionality of the Workers’ Compensation Act in terms of the Florida Constitution has been litigated several times, but has not been seriously questioned by an appellate court since 1978.¹²

A. *The Florida Workers’ Compensation System*

An employee who sustains a workplace injury must request medical care and lost wage benefits from his employer.¹³ The majority of workers’ compensation claims are never litigated,¹⁴ as the system is designed to be “self-executing,” meaning employers are expected to pro-

9. *E.g.*, “[u]nder Florida’s Worker’s Compensation Act (“the Act”), an employer who secures worker’s compensation coverage for his employees receives extensive immunity from suit” *Byers v. Ritz*, 890 So. 2d 343, 346 (Fla. Dist. Ct. App. 2004) (heard in the Third District). All Florida District Court of Appeal decisions cited herein are from the First District, except as otherwise noted.

10. FLA. STAT. § 440.015 (2012). *See also* *Blount v. State Rd. Dept.*, 87 So. 2d 507, 512 (Fla. 1956) (“The [Workers’ Compensation Act] is designed to afford a speedy and summary disposition of claims and we know the working man ordinarily cannot afford to wait indefinitely to receive compensation for himself and his family when he has been injured and forced to quit work.”).

11. FLA. STAT. § 440.015 (2012).

12. *See* *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427, 428 (Fla. 1978). Specific provisions of the Act have been challenged on constitutional grounds many times since, most notably the fee shifting provisions discussed *infra* note 29. Most recently, the First District Court of Appeal struck down a 104-week limitation on temporary lost wage benefits in *Westphal v. City of St. Petersburg*, 122 So. 3d 440 (Fla. Dist. Ct. App. 2013). A trial court in Florida’s Eleventh Circuit struck down the Workers’ Compensation Act in its entirety in *Fla. Workers’ Advocates v. State of Florida*, No. 11-13661 CA 25 (Fla. Cir. Ct. Aug. 13, 2014). However, the employee-challenger who argued that the act was unconstitutional was essentially unopposed in that proceeding. The decision is now on appeal in the Third District Court of Appeal, with various intervenors set to argue for the act’s constitutionality. *See* *State of Florida v. Fla. Workers’ Advocates*, 167 So. 3d 500 (Fla. Dist. Ct. App. 2015).

13. FLA. STAT. § 440.09. Most Florida employers are required to obtain workers’ compensation insurance coverage. The scope of this mandate is defined at FLA. STAT. § 440.02 (2015).

14. There is not an exact correlation between attorney representation and litigation, as some unrepresented claimants litigate and some represented claimants do not. However, a recent study by the Workers’ Compensation Research Institute found that 23% of injured workers in Florida retained attorneys. *See* Denise Johnson, *Why Workers’ Comp Claimants Hire Attorneys*, CLAIMS J. (May 17, 2012), <http://www.claimsjournal.com/news/national/2012/05/17/207003.htm>.

vide workers' compensation benefits without the need for litigation.¹⁵ This self-executing system places the initial burden of determining compensability on employers and their insurance carriers.¹⁶ "Compensability" refers to the determination of whether an accident was work-related (that is, whether an "employment relationship" existed, and whether the accident arose within the course and scope of that relationship).¹⁷ Assuming the employer/carrier determines a compensable accident has occurred,¹⁸ it must then determine if medical or indemnity (wage loss) benefits are due. As a general matter, such determinations are made by an adjuster assigned to the case, with or without supervisory input. The processes involved are informal and few procedures are mandated.¹⁹ At any given stage, an aggrieved em-

15. See *O'Neil v. Dep't of Transp.*, 468 So. 2d 904, 906 (Fla. 1985).

16. "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." FLA. STAT. § 440.09. The majority of workers' compensation claims in this state are administered by workers' compensation carriers or their third party administrators. Even self-insured employers largely farm out claim administration to third party administrators. As a result, in workers' compensation litigation, the parties are generally styled as the "employee" or "claimant," and "the employer/carrier" or "employer/carrier/servicing agent." For the purposes of this article, the parties are generally referred to as the employee and the employer/carrier. Most cited references herein follow this convention, or customary abbreviations such as "E/C." See *Carroll v. Zurich Ins. Co.*, 286 So. 2d 21, 22 (Fla. Dist. Ct. App. 1973) ("From the beginning our courts have, so far as immunity in the sense used here is concerned, considered 'employer and insurer', 'employer-carrier' in the same context. The courts, the administrative agencies under the Act, and members of the bar have consistently and constantly considered them as interchangeable words . . .").

17. "In failing to deny compensability, the E/C only admits that there was an industrial accident resulting in some injury to the worker." *Checkers Rest. v. Wiethoff*, 925 So. 2d 348, 349 (Fla. Dist. Ct. App. 2006). See also *N. River Ins. Co. v. Wuelling*, 683 So. 2d 1090, 1092 (Fla. Dist. Ct. App. 1996) ("'[C]ompensability' in the context of sections 440.192 and 440.20 is limited to a determination of whether the injury for which benefits are claimed arose out of, and occurred within the course and scope of, the claimant's employment."). Confusingly, compensability is often used in reference to the employer's liability for a certain benefit, but it does not have this meaning under the Act. See, e.g., *Babahmetovic v. Scan Design Fla., Inc.*, No. 1D14-2986, 2015 Fla. App. LEXIS 6493 (Fla. Dist. Ct. App. May 1, 2015) ("This error came about by the JCC's conflating the existence and cause of the injury—compensability—with the existence and cause of the need for treatment.").

18. Although the vast majority of workers' compensation cases involve discrete "accidents," such as falls, occupational disease cases and repetitive trauma injuries are also subsumed within the body of workers' compensation law. See, e.g., *Festa v. Teleflex, Inc.*, 382 So. 2d 122, 124 (Fla. Dist. Ct. App. 1980) (explaining methods of proving exposure theory of accident).

19. Most required procedures involve the filing of reports. For example, if an employer/carrier denies compensability or "entitlement to any benefit," it must file a form entitled "DWC-12," or "Notice of Denial," with the Division of Workers' Compensation. See FLA. ADMIN. CODE r. 69L-3.012 (2014). Because the Notice of Denial generally sets forth the grounds on which an employer/carrier is denying a claim, it may be sufficient in and of itself to support an assertion of estoppel. This will be discussed in greater detail below.

ployee may informally raise a dispute with his employer or the insurer; seek assistance from the Bureau of Employee Assistance and Ombudsman (“EAO”);²⁰ or, initiate litigation.²¹

Litigation of workers’ compensation claims occurs in an administrative setting before specialist administrative hearing officers, the Judges of Compensation Claims (JCCs).²² No jury is involved, and the JCC acts as both fact finder and arbiter of questions of law.²³ Proceedings before JCCs are less formal than conventional civil trials, and while rules of procedure and the Florida Evidence Code²⁴ apply,²⁵ their application is somewhat relaxed:

In making an investigation or inquiry or conducting a hearing, the judge of compensation claims shall not be bound by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct such hearing, in such manner as to best ascertain the rights of the parties.²⁶

20. The EAO is an entity established under FLA. STAT. § 440.191 (2002), to assist employees pursuing formal or informal remedies. It does not function as a “gatekeeper” like the Equal Employment Opportunity Commission, and it may not represent employees in formal adversarial proceedings.

21. “Any employee may, for any benefit that is ripe, due, and owing, file with the Office of the Judges of Compensation Claims a petition for benefits which meets the requirements of this section” FLA. STAT. § 440.192(1).

22. The Office of the Judges of Compensation Claims has original jurisdiction over all workers’ compensation claims arising in the state of Florida, or under an employment contract made within the state. The Office of the Judges of Compensation Claims is a sub-office of the Division of Administrative Hearings within the Department of Management Services. FLA. STAT. § 440.45 (2012).

23. “[T]his court has fashioned the correct rule by which the JCC, as finder of fact, is to be guided.” *Ullman v. City of Tampa Parks Dep’t*, 625 So. 2d 868, 872 (Fla. Dist. Ct. App. 1993).

24. The Florida Evidence Code is outlined in Chapter 90 of the Florida Statutes.

25. Workers’ compensation proceedings are governed by the Rules of Procedure for Workers’ Compensation Adjudications, which are codified at FLA. ADMIN. CODE r. 60Q-6.101 (2006). *See, e.g.*, *Tutor Time Child Care/Learning Ctrs. v. Patterson*, 91 So. 3d 264, 265 (Fla. Dist. Ct. App. 2012) (explaining that FLA. STAT. § 440.29(4) (2011) exempts certain medical records from hearsay and authenticity requirements of the evidence code).

26. The language in FLA. STAT. § 440.29(1) (2011) appears to vest JCCs with certain inquisitorial powers akin to those of a judge in a civil law jurisdiction, beyond the inherent power of all trial judges to conduct independent legal research. *See Carmack v. State Dep’t of Agric.*, 31 So. 3d 798, 799 (Fla. Dist. Ct. App. 2009). In at least one case, the First District Court of Appeal has interpreted the section as not merely a description of the JCC’s authority, but a mandate requiring its exercise. *See CVS Caremark Corp. v. Latour*, 109 So. 3d 1232 (Fla. Dist. Ct. App. 2013) (holding that employer/carrier’s failure to cite supporting authority did not justify denial of its otherwise meritorious motion as the JCC had “an independent obligation to research and be familiar with the law governing the issues presented”).

Parties may choose to be represented by counsel.²⁷ Fee shifting provisions allow employees to recover attorney's fees from employers if they prevail in litigation.²⁸

Discovery in workers' compensation proceedings is largely similar to discovery in civil actions.²⁹ The primary differences are the prohibition of certain discovery vehicles³⁰ and the JCC's authority to compel discovery even where no claims are pending.³¹

Workers' compensation litigation is scalable. There are three "levels" of dispute in workers' compensation matters, whether or not a matter is in litigation: first, whether the workplace accident occurred at all, including the determination of whether the injured party was an employee; second, whether the employer is liable for any benefits, notwithstanding the occurrence of an injury; and third, whether the employer is liable for a particular benefit.³² Thus, a JCC may be called on to adjudicate the compensability of an entire accident, to determine whether benefits are due generally, or merely to rule on whether an employee is entitled to an individual benefit. In any event, a final merits hearing before a JCC is almost invariably a shorter affair than a civil trial.³³ The genesis of any workers' compensation litigation is the filing of a *petition for benefits*, which is the equivalent of a civil com-

27. See FLA. ADMIN. CODE r. 60Q-6.104.

28. The fee shifting provision is codified at FLA. STAT. § 440.34.

29. The workers' compensation rules incorporate the Florida Rules of Civil Procedure pertaining to most discovery matters. For example, per FLA. ADMIN. CODE r. 60Q-6.114(2)(a) (2014), "[d]epositions of witnesses or parties may be taken and used in the same manner and for the same purposes as provided in the Florida Rules of Civil Procedure."

30. By rule, workers' compensation litigants may utilize depositions, issuance of subpoenas, and requests for production. See FLA. ADMIN. CODE r. 60Q-6.114(1) (2014). However, parties may not propound interrogatories or undertake discovery by any other method not "specifically authorized by statute." See *Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 77 (Fla. Dist. Ct. App. 2010).

31. "[A] JCC has jurisdiction to compel the production of documentary evidence, even before the filing of a [formal claim]." *Covell v. Cracker Barrel Old Country Store, Inc.*, 118 So. 3d 991, 991 (Fla. Dist. Ct. App. 2013). FLA. STAT. § 440.30 (2015) also specifically authorizes the taking of depositions "prior to the institution of a claim."

32. At all three levels, the JCC may find that one or more affirmative defenses applies that limits or eliminates the employer's liability. For example, a claimant who is found to have committed workers' compensation fraud is not entitled to workers' compensation benefits regardless of compensability. *Leggett v. Barnett Marine, Inc.*, No. 1D14-4432, 2015 Fla. App. LEXIS 8562, at *1 (Fla. Dist. Ct. App. June 4, 2015).

33. See *infra* text accompanying notes 199-202.

plaint.³⁴ The petition lists the specific benefits to which the employee claims entitlement and which are alleged to be in dispute.³⁵

For several reasons, there is a tendency on the part of employers/carriers—the “defendants”—to stipulate to certain matters that the plaintiff would be required to prove in the context of a civil action.³⁶ A statutory twenty percent penalty on late payments of indemnity benefits and the desire to avoid excessive attorney’s fees or sanctions are the most obvious reasons to stipulate to facts not in dispute.³⁷ Another is to ensure defenses are narrowly tailored to the facts, for reasons that will be made clear below.³⁸ The parties will almost invariably stipulate to the date and place of accident (at least for ministerial purposes), and to the jurisdiction of the tribunal.

The workers’ compensation “trial” is called a *final merits hearing*.³⁹ The nature of workers’ compensation claims more or less limits the number of parties at a hearing to two.⁴⁰ Thus, there are likely to be no more than three party witnesses: the employee, a representative of the employer, and a representative of the insurer. Due to the short

34. “An employee or claimant seeking an award of benefits commences a new case by filing a petition for benefits pursuant to Section 440.192, F.S., when there is not an existing case pertaining to the same employee and date of accident When the employee and date of accident are the same as in an existing case, any subsequent petition for benefits or claim relating to that employee and date of accident shall be filed in the existing case. FLA. ADMIN. CODE r. 60Q-6.105(1).

35. FLA. STAT. § 440.192 (2011).

36. “[I]t is the policy of law to encourage and uphold stipulations in order to minimize litigation and expedite the resolution of disputes.” *Citrus World, Inc. v. Mullins*, 704 So. 2d 128, 128 Fla. Dist. Ct. App. 1997). Under FLA. ADMIN. CODE r. 60Q-6.113 (2014), the parties are required to “[s]tipulate to such facts and the admissibility of documentary evidence as will avoid unnecessary proof” in the form of a joint pretrial statement. Alternatively, the parties may attend a pretrial conference for the same purpose.

37. See FLA. STAT. § 440.20(6)(a) (2013). A victorious employee’s attorney will be entitled to a larger employer/carrier paid fee, since time spent proving facts that should not have been at issue will be chargeable. The defense attorney’s fees will also be increased if the employer requires strict proof of collateral matters, since the defense attorney will need to attend additional depositions and the like. FLA. ADMIN. CODE r. 60Q-6.125 (2012) allows JCCs to impose sanctions, including fees and costs, for frivolous claims and defenses.

38. See discussion *infra* Part II.A.1.

39. FLA. STAT. § 440.25(4)(b) (2011) refers to the trial as a *final hearing*. However, practitioners, JCCs, and the appellate courts almost invariably refer to the hearing as a final merits hearing. *E.g.*, “[b]ecause these claims were ripe at the time of the first final merits hearing, they are barred by the doctrine of res judicata.” *U.S. Block Windows v. Dixon*, 943 So. 2d 852, 855 (Fla. Dist. Ct. App. 2006). On appeal, a JCC’s summary final order is reviewed according to the same standard as a summary judgment. *Id.*

40. Circumstances in which three or more parties may appear include cases involving subcontractors, as well as coverage disputes between employers and carriers. *E.g.*, *Gomez Lawn Serv., Inc. v. Hartford*, 98 So. 3d 212 (Fla. Dist. Ct. App. 2012). Such situations are rare, constituting perhaps one percent of all litigated cases.

statutory time frames in which litigation must occur, expert witnesses almost always testify by deposition under Florida Rule of Civil Procedure 1.330(a)(3).⁴¹ After hearing testimony and argument, and considering documentary evidence, the JCC enters a *compensation order* disposing of the claims and defenses.⁴² This order sets forth the judge's determination on compensability, if applicable, and on entitlement to any claimed benefits.⁴³ Issues may also be disposed of via summary final order, which is akin to summary judgment in a civil action.⁴⁴ Perhaps the most unique feature of workers' compensation litigation is that entry of an order on the merits may not end litigation even if no appeal is taken. That is, unless the JCC's order denies compensability or finds that no benefits will be due in the future, the employee is free to file new claims as they mature.

[W]orker's compensation cases are, of necessity, taken up piecemeal. Such cases require this treatment because the various entitlements of the claim mature at different times as the course of recovery progresses. The import of this principle is that claims for various benefits may be treated as they mature, while determination of immature claims is necessarily postponed until they are ripe.⁴⁵

The doctrines of *res judicata* and *law of the case* will not bar such subsequently filed claims so long as they were not ripe at the time of the prior adjudication, and are not based on the same questions of fact or law.⁴⁶

Prior to 1979, workers' compensation trial proceedings were heard by judges of industrial claims, and the first avenue of appeal for

41. These time frames are prescribed by law, though they may be waived. See FLA. STAT. § 440.25(4) (2011).

42. FLA. STAT. § 440.25(4)(d) (2011).

43. *Id.*

44. "Florida Administrative Code Rule 60Q-6.120(1) permits a JCC to enter a summary final order when the order would be dispositive of the issues raised by the petition, and there are no genuine issues of material fact." *Thomas v. Eckerd Drugs*, 987 So. 2d 1262, 1263 (Fla. Dist. Ct. App. 2008).

45. *Fla. Frozen Foods, Inc. v. Parks*, 475 So. 2d 1348, 1349 (Fla. Dist. Ct. App. 1985).

46. *M.D. Transp. v. Paschen*, 996 So. 2d 902, 904 (Fla. Dist. Ct. App. 2008). The sequential nature of workers' compensation proceedings somewhat blurs the line between the two doctrines and confuses even experienced judges. See also *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001) ("[T]he doctrines of the law of the case and *res judicata* differ in two important ways. First, law of the case applies only to proceedings within the same case, while *res judicata* applies to proceedings in different cases. Second, the law of the case doctrine is narrower in application in that it bars consideration only of those legal issues that were actually considered and decided in a former [trial or] appeal, . . . while *res judicata* bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised.") (internal citations and formatting omitted).

workers' compensation matters was to the Industrial Relations Commission.⁴⁷ In the meantime, JICs were renamed deputy commissioners, and then Judges of Compensation Claims upon the creation of the Office of the Judge of Compensation Claims (OJCC).⁴⁸ The legislature subsequently abolished the Commission, and jurisdiction over all workers' compensation appeals vested in the First District Court of Appeal in Tallahassee, regardless of the trial venue.⁴⁹

B. Workers' Compensation Immunity

Employers enjoy limited immunity to employee tort actions under Section 440.11 of Florida's Workers' Compensation Act, which reads, in relevant part, as follows:

Exclusiveness of liability.—

(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except as follows:

(a) If an employer fails to secure payment of compensation as required by this chapter . . .

(b) When an employer commits an intentional tort that causes the injury or death of the employee . . .⁵⁰

The result is that an employee generally cannot maintain a tort action against his employer, outside the enumerated exceptions.⁵¹ In addition to the statutory exceptions, the legislature and courts have created or recognized other exceptions. Some exceptions are obvious, such as claims arising under unrelated statutes;⁵² others are more nuanced,

47. See Florida Industrial Relations Commission, *Industrial Relations Commission Record Group, Number 000394*, FLA. DEP'T OF STATE, <http://dliis.dos.state.fl.us/barm/rediscovery/default.asp?IDCFile=/fsa/DETAILSG.IDC,SPECIFIC%3D979,DATABASE%3DGROUP> (last visited Aug. 23, 2015).

48. Jack A. Weiss, *A Primer on Workers' Compensation Appeals*, 80 FLA. B.J. 63 (2006).

49. See FLA. STAT. § 440.271 (2002). For this reason, virtually all appellate decisions cited to this point are decisions of the First District Court of Appeal.

50. FLA. STAT. § 440.11 (2013).

51. Under FLA. STAT. § 440.38 (2004), "secur[ing] payment of compensation" means obtaining insurance or authorization from the Division of Workers' Compensation to act as a self-insurer. See *Limerock Indus. v. Pidgeon*, 743 So. 2d 176, 177 (Fla. Dist. Ct. App. 1999).

52. For example, the Florida Supreme Court has held that civil actions based on workplace sexual harassment are not barred by the exclusive immunity provision. *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1104 (Fla. 1989).

such as the “dual persona” doctrine.⁵³ Barring an exception, the employee’s recovery against the employer is limited to the benefits specified in Chapter 440.⁵⁴ In practical terms, this means a negligence suit filed against an employer may not survive the summary judgment stage if the employee’s proper recovery is in the workers’ compensation arena. However, when employers have taken the position that no workers’ compensation claim exists, courts have rejected the immunity defense on estoppel grounds, as discussed below.

II. EQUITABLE ESTOPPEL

Lord Coke defined an estoppel as “where a man is concluded, by his own act or acceptance, to say the truth.”⁵⁵ Today, we might say estoppel is found where justice requires that a party be bound by its own representations. The Florida Supreme Court has defined estoppel generally as “(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.”⁵⁶ Estoppel is deemed an *avoidance*, because its purpose is to *avoid* or negate an affirmative defense.⁵⁷

A. Case Studies

The following fact patterns illustrate how estoppel might arise in a disputed workers’ compensation claim.

X v. Y & Z - X, a forklift driver, contracted a severe lung disease after he was allegedly exposed to toxic dust at work. X filed a workers’ compensation claim against Y, his employer, asserting entitlement to various benefits under the Workers’ Compensation Act. Z, Y’s insurer, denied the workers’ compensation claim on the grounds that the lung condition was preexisting and unrelated to X’s employment. X then voluntarily dismissed his workers’ compen-

53. See, e.g., *Percy v. Falcon Fabricators, Inc.*, 584 So. 2d 17, 18 (Fla. Dist. Ct. App. 1991) (heard in the Third District).

54. FLA. STAT. § 440.09.

55. 352 Co. Litt. a (SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR COKE UPON LITTLETON* (1823)), as quoted in *Root v. Crock*, 7 Pa. 378, 380 (1847) and elsewhere.

56. *Dep’t of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981).

57. See, e.g., *Moore Meats, Inc. v. Strawn In and For Seminole Cnty.*, 313 So. 2d 660, 661 (Fla. 1975) (“In pleading, avoidance means an allegation of new matter in opposition to a former pleading that admits the facts alleged in the former pleading and shows cause why they should not have their ordinary legal effect.” (internal quotation marks omitted)).

sation claim and sued Y for negligently causing him to be exposed to toxic dust. Y moved for summary judgment on the grounds that workers' compensation immunity precluded X's suit. X responded that Y was estopped from asserting workers' compensation immunity, on the grounds that it had denied any causal connection between the incident and X's employment.

A v. B & C - A, a printing clerk, received permission from B, her employer, to take home some empty boxes. She put the boxes on a loading dock to pick up at the end of her workday. After clocking out, she left B's building and walked around the outside to the loading dock. On the way, she tripped on a sidewalk and suffered numerous injuries in the ensuing fall. She then filed a workers' compensation claim against B. C, B's insurer, denied her claim on the ground that her injury did not arise out of the course and scope of her employment. A then filed suit against B in tort. B moved for summary judgment, asserting that A's sole remedy was in the workers' compensation arena. A demurred, arguing that B was estopped from asserting immunity since it had denied that the incident at issue arose from employment.

What factors determine whether either, neither, or both of these estoppel arguments will succeed? As discussed above, equitable estoppel requires *a representation* by the estopped party, *reliance*, and *change in position* by the adverse party.

Both B and Y took positions in the workers' compensation claims, which were inconsistent with those taken in the tort claims. Both A and X changed their positions based on their employers' representations. Both ensuing tort actions involved the same parties as the preceding workers' compensation claims. The voluntary dismissals arguably evidence the employees' reliance. In fact, in the cases below, we see that courts have assumed that voluntary dismissals constitute detrimental reliance without undertaking any analysis at all. Instead, they have focused on the degree of inconsistency in employers' positions.

The first fact pattern (XYZ) is taken from *Tractor Supply Co. v. Kent*, in which X is the employee, Francis Kent.⁵⁸ The *Kent* court refused to find the employer estopped, after undertaking the following analysis:

Kent essentially maintains that he was being "whipsawed" out of any remedy for his injury/illness when TSC denied his claim for [workers' compensation] benefits and then subsequently took the position that Kent's exclusive remedy was worker's compensation. The short answer to this is that Kent could and should have liti-

58. *Tractor Supply Co. v. Kent*, 966 So. 2d 978, 981-82 (Fla. Dist. Ct. App. 2007) (heard in the Fifth District).

gated the defense of pre-existing injury/illness in the comp action. A pre-existing injury or illness is a recognized defense to a claim for comp benefits, section 440.09(1)(b), Florida Statutes, and should have been litigated in the comp action.

Kent notes that under Florida law, where injuries are not encompassed within our Worker's Compensation Act, the employee is free to pursue his or her common law remedies. However, in *Williams*, an adjudication of non-compensability had been issued by a judge of compensation claims. The plaintiff obtained a decision that his claim was outside the Worker's Compensation Act and thus, he was free to pursue his common law remedies.⁵⁹

The court also held that the denial of workers' compensation benefits was not inconsistent with its assertion of immunity: "[t]he carrier did not assert that no employment relationship existed or that the incident occurred outside the scope of employment. Rather, the denial asserts that under the terms of the Worker's Compensation Act, the injury is one which is not deemed to be compensable."⁶⁰ In other words, the employer/carrier admitted that Kent sustained a covered accident, but denied that benefits were due, as Kent's condition was the result of a preexisting condition. According to the Fifth District, this type of denial, the second "level" of dispute,⁶¹ did not take Kent's claims outside the scope of the Workers' Compensation Act.

The second fact pattern (ABC) is taken from an earlier Fifth District case, *Byerley v. Citrus Pub., Inc.*⁶² Though its facts seem functionally indistinguishable from *Kent*, the outcome was quite different:

The employer created a Hobson's choice for Byerley: the employer, through its insurance carrier, denied her claim for workers' compensation, and then, when Byerley elected to proceed in a tort action, argued that she could not sue because her exclusive remedy was the Workers' Compensation Act We think it would be inequitable for an employer to deny worker's compensation coverage on the ground that the employee's injury did not arise out of the course and scope of employment, then later claim immunity from a tort suit on the ground that the injury did arise out of the course and scope of employment. This argument, if accepted, would eviscerate the Workers' Compensation Act and allow employers to avoid all liability for employee job related injuries

Byerley accepted and relied on the denial, bore her medical expenses, then sued the employer in tort as permitted by the statute. Here, the elements of estoppel are shown, and therefore, the em-

59. *Id.* (internal citations omitted).

60. *Id.* at 981.

61. *See supra* text accompanying notes 32-53 (discussing the second "level" of dispute).

62. *Byerley v. Citrus Pub., Inc.*, 725 So. 2d 1230 (Fla. Dist. Ct. App. 1999).

ployer is not entitled to summary judgment on the basis of the Workers' Compensation Act.⁶³

It seems the *Byerley* court applied the test for equitable estoppel ("Byerley accepted and relied on the denial, bore her medical expenses, then sued the employer in tort . . .").⁶⁴ It is unclear from the record whether Byerley's workers' compensation claim was litigated on its merits. All that is known is that the tort action was filed after the employer/carrier denied the claim. The *Kent* court in fact distinguished *Byerley* at some length in its own opinion:

The question presented in this appeal is whether *Byerley* and *Elliott* establish that an employer such as TSC, who, through its comp carrier, denies a worker's compensation claim on the basis that the injury or illness was pre-existing, is then estopped from asserting worker's compensation immunity and exclusivity in defending against a civil tort action

The trial court erroneously took the narrow holding in *Byerley* and expanded it beyond its supporting rationale. *Byerley* does not support application of estoppel principles against an employer who has raised in the comp proceeding a medical causation defense that the employee's medical condition is pre-existing and unrelated to his current employment.

An essential requisite for invoking equitable estoppel is a representation by the party sought to be estopped to the other party as to some material fact, which representation is contrary to the condition of affairs later asserted by the party sought to be estopped [citation omitted]. There is no irreconcilable conflict in the employer here raising a pre-existing medical condition defense to a comp claim, but asserting it is, nevertheless, insulated from a civil suit

Kent's position is that whenever a comp claim is defended on the basis that the injury or illness did not result from the claimant's employment, the employer is thereafter estopped from asserting in a civil action the worker's compensation immunity and exclusivity defense. Acceptance of this position would force employers and their carriers to either concede the validity of a comp claim where a pre-existing condition may be implicated or open themselves up to an immediate civil action. *Byerley* does not so hold. Rather, it is only in taking clearly irreconcilable positions such as in claiming the incident occurred outside the employment relationship but later claiming otherwise that an employer runs the risk of being estopped to assert comp immunity as a defense to a civil suit.⁶⁵

63. *Id.* at 1232-33 (citing *Elliott v. Dugger*, 542 So. 2d 392 (Fla. Dist. Ct. App. 1989)).

64. *Id.* at 1232. As discussed above, reliance is an element of other forms of estoppel, but is not required for judicial estoppel.

65. *Kent*, 966 So. 2d at 980-81.

Thus, for the Fifth District, the difference was all in the language of the denials of the workers' compensation claims—an analysis which has largely been approved by its sister courts in the cases discussed below. In so saying, the wording of the denial in *Kent* appears to have been interpreted rather generously to the employer:

TSC's comp carrier denied Kent's claim by stating as follows: "[E]ntire claim denied, as the condition complained of is the result of a pre-existing medical condition that is not the result of employment with Tractor Supply."

This denial was inartfully drafted which likely led the trial court to focus on the last phrase ("not the result of employment with Tractor Supply") when it ruled that the worker's compensation carrier "denied an industrial accident occurred while in the course and scope of the Plaintiff's employment with the Defendant." However, the intent of the denial is evident. The carrier did not assert that no employment relationship existed or that the incident occurred outside the scope of employment. Rather, the denial asserts that under the terms of the Worker's Compensation Act, the injury is one which is not deemed to be compensable.⁶⁶

Given the procedural posture of the case (i.e., the summary judgment stage, when all inferences should have been taken in favor of the non-moving plaintiff), it was probably not for the court to interpret the plain meaning of the language of the denial.⁶⁷

In any event, these two cases broadly illustrate the rule governing such estoppel: it is warranted when the employer denies the occurrence of an industrial accident, but not when an employer has merely denied benefits. Although the *Kent* court referenced the assertion of "a recognized defense to a claim for comp benefits,"⁶⁸ this language is not particularly helpful. Asserting that no employment relationship exists is *also* a "recognized defense" to a claim for workers' compensation benefits (as workers' compensation benefits are payable only by an "employer" on behalf of an "employee," as defined in Sections 440.02(15) and (16) of the Florida Statutes, respectively).⁶⁹ However, it is clear that an assertion that no employment relationship existed would justify estoppel, as set forth in *Byerley*.⁷⁰

66. *Id.* at 981.

67. *See* *Schroeder v. Peoplease Corp.*, 18 So. 3d 1165, 1170 (Fla. Dist. Ct. App. 2009), discussed at *infra* note 97.

68. *Kent*, 966 So. 2d at 981.

69. Conversely, an independent contractor arrangement is not governed by the Workers' Compensation Act.

70. "The employer argues that *Byerley* . . . was not an employee at the time the injury occurred." *Byerley*, 725 So. 2d at 1231.

The Florida Supreme Court has yet to approve or disapprove the holdings of *Byerley* or *Kent*. However, the holdings of the other four District Courts of Florida are largely consistent, as evidenced by the cases that follow.

1. The First District Court of Appeal

As noted above, the First District Court of Appeal has exclusive jurisdiction of workers' compensation appeals.⁷¹ Thus, its interpretation of Chapter 440 is arguably entitled to some deference from its sister courts.

The First District appears to have been the first to consider the argument that estoppel could bar an employer's immunity defense.⁷² In *Quality Shell Homes & Supply v. Roley*, the injured worker was the employee of a contractor on a construction project.⁷³ The worker fell from the roof of the building under construction and sustained "serious" injuries.⁷⁴ The developer initially indicated that workers' compensation coverage was available to Roley.⁷⁵ However, two weeks later, it recanted and asserted that Roley's direct employer, the contractor, was responsible.⁷⁶ The contractor/employer had, in fact, not obtained insurance because it had relied on the developer's contractual agreement to do so.⁷⁷ Roley then filed suit against the developer, Quality Shell, and others.⁷⁸ Rather than disposing of the estoppel issue at summary judgment, the trial court submitted it to the jury with the following instruction:

[I]f you find that Workmen's Compensation Insurance actually existed, in order for the plaintiff to recover it is necessary that the evidence establish by a preponderance of it that the plaintiff changed his position to his detriment by not filing a claim for compensation, as a result of the alleged statement that there was no such workmen's compensation coverage, and if the preponderance

71. See *supra* note 49 and accompanying text.

72. *Quality Shell Homes & Supply Co. v. Roley*, 186 So. 2d 837, 840-41 (Fla. Dist. Ct. App. 1966).

73. *Id.* at 839.

74. *Id.*

75. *Id.*

76. *Id.* *Roley* is an example of the contractor/subcontractor disputes referenced in *supra* note 40.

77. *Id.*

78. *Roley*, 186 So. 2d at 839. The other defendants are not identified in the opinion. Thus, it is unclear whether Roley's direct employer (who did not change position, but apparently did not have coverage) was also estopped from asserting workers' compensation immunity.

of the evidence does not establish that he did so change his position as a result of the alleged statement, then he cannot recover in this suit.⁷⁹

The First District upheld a subsequent jury verdict in favor of the plaintiff, noting that the jury could reasonably have inferred that the defendants were estopped from asserting immunity.⁸⁰ *Roley* is somewhat distinguishable because it appears that the estoppel stemmed from the denial of coverage, rather than the denial of the claim.

The First District was also the first Florida court to formulate the rule applied in *Byerley/Kent*. This rule was described by the court in sequential appeals stemming from a single workplace incident.⁸¹ Elliott, a corrections officer, was employed by the Florida Department of Corrections at its Reception and Medical Center in Lake Butler.⁸² He alleged that inmates at the facility “spiked” his coffee with a blood sample containing the AIDS virus.⁸³ Thereafter, Elliott reported ingestion of the coffee as a work injury.⁸⁴ A blood test revealed no evidence of infection,⁸⁵ but the incident was reported as a workers’ compensation claim, and subsequently denied. Elliott then filed suit against the Department of Corrections, a vendor that provided medical services to the prison facility, and individuals associated with both.⁸⁶ The Department defended on the ground that Elliott’s sole remedy was workers’ compensation, and moved for summary judgment.⁸⁷ Elliott argued that he was entitled to proceed in tort because the employer had denied his claim for workers’ compensation benefits.⁸⁸ The specific document denying his claim was not in evidence, but Elliott testified that he received a letter indicating “no [workers’ compensation] benefits were

79. *Id.* at 841. The appellate court found this to be a fair statement of the elements of equitable estoppel. The evidence apparently showed that Quality Shell did have workers’ compensation coverage and merely determined that it did not extend to the accident at issue. *Id.*

80. *Id.*

81. Elliott v. Dugger, 542 So. 2d 392 (Fla. Dist. Ct. App. 1989) [hereinafter *Elliott I*]; Elliott v. Dugger, 579 So. 2d 827 (Fla. Dist. Ct. App. 1991) [hereinafter *Elliott II*].

82. *Elliott I*, 542 So. 2d at 392.

83. *Id.* at 393. As an aside, it appears that the risk of primary HIV infection (the precursor to AIDS) from ingesting contaminated foods is vanishingly small. The only documented cases of oral HIV transmission from food involved infants ingesting food that was “pre-chewed” by infected caregivers. See, e.g., *Pepsi Contaminated with HIV*, SNOPEs, <http://www.snopes.com/food/tainted/pepsihiv.asp> (last updated May 15, 2014).

84. *Elliott I*, 542 So. 2d at 393.

85. *Elliott II*, 579 So. 2d at 829.

86. *Id.* at 828. The style of the case refers to the first named appellee, Richard Dugger, then Secretary of Corrections.

87. *Elliott I*, 542 So. 2d at 392.

88. *Id.*

due” to him.⁸⁹ The trial court granted summary judgment, refusing to consider Elliott’s testimony.⁹⁰ On appeal, the First District Court of Appeal reversed, noting that the lack of evidence as to the content of the letter precluded summary judgment:

We are not at this point attempting to construe the meaning of the alleged representation made by appellee that no benefits were due claimant, which representation could have meant, for instance, either that the Department of Corrections was of the opinion that there had yet been no injury shown, or that it had taken the position that Elliott had no right to claim benefits because the injury was not a covered injury. That latter interpretation is suggested in paragraph 19 of the Elliotts’ complaint as above referenced and, for purposes of a motion for summary judgment, must be taken as true. Moreover, if appellee denied workers’ compensation coverage on the basis that Robert Elliott’s alleged injury was not encompassed within the Act or on the basis that he was injured under other situations not covered by the Act, the Elliotts were free to pursue common law remedies. Based on the foregoing, we hold that the trial court erred in granting appellee’s motion for summary judgment on the basis that there exist genuine issues of material fact concerning the issue of estoppel.⁹¹

Elliott apparently did institute workers’ compensation litigation during the pendency of the first appeal.⁹² The deputy commissioner ruled that he sustained a compensable accident.⁹³ However, the deputy commissioner held that no benefits were due other than payment for the prior blood testing.⁹⁴ Thereafter, the employer again moved for summary judgment in the civil action (which was again before the trial court on remand).⁹⁵ This time, summary judgment was granted, and the First District upheld, relying on the deputy commissioner’s holding, that Elliott had sustained a covered accident but no benefits were due.⁹⁶

The court subsequently derived a clearer rule from its *Elliott* holdings in *Schroeder v. Peoplease Corp.*⁹⁷ *Schroeder* is now arguably the leading case on point, because it establishes the proposition that

89. *Id.* at 393.

90. *Id.*

91. *Elliott I*, 542 So. 2d at 394 (internal citations omitted).

92. *Elliott II*, 579 So. 2d at 829.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Schroeder v. Peoplease Corp.*, 18 So. 3d 1165 (Fla. Dist. Ct. App. 2009).

mere ambiguity in the language of a denial precludes summary judgment for the employer/defendant:

Here, as in *Elliott*, there remain disputed issues of material fact as to the meaning of the language employed in the notice of denial. Summary judgment is inappropriate where the wording of a document is ambiguous and its interpretation involves questions of fact. Whether estoppel is appropriate in this case and whether the employer took irreconcilable positions is dependent upon the meaning to be accorded the notice of denial.⁹⁸

2. Other Florida District Courts

The Second District Court of Appeal adopted the rules laid down in *Byerley, Kent*, and *Elliott in Coca-Cola Enters. v. Montiel*:⁹⁹

Aquilino J. Montiel suffered a back injury while unloading Coca-Cola products at a Tampa Kash N' Karry store. Unquestionably, the injury occurred in the course and scope of Mr. Montiel's employment. Mr. Montiel's deposition testimony also establishes that Coca-Cola paid workers' compensation benefits to him for about twelve weeks. Thereafter, Coca-Cola denied further workers' compensation benefits. The medical evidence indicated that Mr. Montiel's condition no longer related to his work injury, but to a degenerative condition. Mr. Montiel did not claim further benefits under the workers' compensation statute.¹⁰⁰ Instead, he sued Coca-Cola and Kash N' Karry for negligence, alleging that improper shelving design caused his injury. Coca-Cola sought summary judgment based on workers' compensation exclusivity

Neither *Byerley* nor *Elliott* presents facts similar to those before us. Mr. Montiel's injury was work-related. Coca-Cola never contended otherwise. Coca-Cola paid benefits for approximately three months. Indeed, Coca-Cola denied further benefits only when medical evidence indicated that Mr. Montiel's condition no longer related to his work injury. Had Mr. Montiel thought himself entitled to further benefits, the statute provided a vehicle to seek relief.¹⁰¹ We are aware of no statutory provision that, under these circumstances, strips the employer of the exclusivity defense. To read such a result into the statute would be contrary to the purpose of the law.¹⁰²

98. *Id.* at 1170 (internal citations omitted).

99. *Coca-Cola Enters. v. Montiel*, 985 So. 2d 19, 19-20 (Fla. Dist. Ct. App. 2008) (internal citations omitted).

100. *See* FLA. STAT. § 440.192.

101. *Id.*

102. *Coca-Cola Enters.*, 985 So. 2d at 19-20.

Montiel is significant because it makes reference to a particular defense (“Mr. Montiel’s condition no longer related to his work injury . . .”), and held that the defense was not inconsistent with the later assertion of immunity. Essentially, this was the same holding reached by the Fifth District in *Kent*, but more elegantly phrased. Rather than deeming the defense to be “a recognized defense to a claim for comp benefits,” the *Montiel* Court distinguished it from denying that a work-related injury had occurred. *Montiel* essentially applied a logical bright-line rule that the employer’s position on compensability was the determining factor in whether it could later assert immunity.¹⁰³

The leading case on point in the Third District is *Coastal Masonry, Inc. v. Gutierrez*.¹⁰⁴ Gutierrez allegedly suffered a lifting injury to his lower back at work, and filed a petition for benefits.¹⁰⁵ The employer’s insurer filed a response denying the claim, and asserting, *inter alia*, that:

The carrier has denied the claim in its entirety The present condition of the claimant is not the result of an injury by accident arising out of and in the course and scope of employment. There is no accident or occupational disease. The condition complained of is not the result of an injury, as defined by Florida Statute § 440.02(1).¹⁰⁶

Gutierrez dismissed his workers’ compensation claim and proceeded against the employer in tort.¹⁰⁷ Predictably, the employer defended on immunity grounds, and moved for summary judgment.¹⁰⁸ The Third District first held that the employer’s positions were patently inconsistent:

Coastal denied Gutierrez’s claim for workers’ compensation benefits, stating that “[t]he present condition of the claimant is not the result of an injury by accident arising out of and in the course and scope of employment.” In this case, however, Coastal asserted as an affirmative defense that it was entitled to the exclusivity defense

103. Recall, as set forth in *supra* note 17, that compensability merely refers to the question of whether a work-related accident occurred.

104. *Coastal Masonry, Inc. v. Gutierrez*, 30 So. 3d 545 (Fla. Dist. Ct. App. 2010).

105. *Id.* at 547.

106. *Id.* *Gutierrez* is thus distinguishable from most of the cases discussed above because the plaintiff had actually instituted litigation of his workers’ compensation claim, rather than relying on a pre-litigation denial.

107. *Id.*

108. *Id.*

because the accident arose in the course and scope of Gutierrez's employment.¹⁰⁹

The court then applied the three-element test for equitable estoppel, and held that Gutierrez' voluntary dismissal of the workers' compensation action satisfied the detrimental reliance requirement.¹¹⁰ The denial of summary judgment was affirmed.¹¹¹ The court also noted, consistent with *Kent*, et al., that mere denial of a workers' compensation claim was not sufficient to invoke estoppel.¹¹²

The leading Fourth District case is *Mena v. J.I.L. Const. Group Corp.*¹¹³ *Mena* serves as a handy summary of the preceding decisions:

[U]nder Florida law, where injuries are not encompassed within our Worker's Compensation Act, the employee is free to pursue his or her common law remedies. Further, where an employer denies a claim for worker's compensation benefits on the basis that the injury did not occur in the course and scope of employment, or that there was no employment relationship, the employer may be estopped from asserting in a later tort action that the worker's exclusive remedy was worker's compensation, provided that the employee can satisfy the elements of estoppel. For the possibility of estoppel to arise, however, the employer's assertion of worker's compensation immunity must be "clearly irreconcilable" with the reason for its initial denial. If the language employed in the notice of denial could give rise to more than one interpretation, such that it cannot be fairly determined whether the employer's positions are inconsistent, summary judgment is inappropriate.

In *Schroeder*, the employer's notice of denial listed six different reasons. Two of the reasons stated, "The present condition of claimant is not the result of injury arising out of and in the course of his or her employment," and "The condition complained of is not the result of an injury within the meaning of the term as used in the Florida Compensation Act." The other four reasons suggested that the denial was based on a preexisting condition of the employee. The First District reversed the trial court's entry of summary judgment, holding "[w]hether estoppel is appropriate in this case and whether the employer took irreconcilable positions is dependent upon the meaning to be accorded the notice of denial."¹¹⁴

109. *Id.* at 548. The court also noted that the employer had taken inconsistent positions *within* the negligence proceeding, as it had denied that Gutierrez was its employee in its answer to Gutierrez' complaint.

110. *Gutierrez*, 30 So. 3d at 548.

111. *Id.* at 549.

112. *Id.* at 547. *Accord* *Fly & Form, Inc. v. Marquez*, 19 So. 3d 403 (Fla. Dist. Ct. App. 2009) (heard in the Third District).

113. *Mena v. J.I.L. Const. Group Corp.*, 79 So. 3d 219 (Fla. Dist. Ct. App. 2012).

114. *Id.* at 222-23 (internal citations omitted).

3. Federal Cases

The decisions of federal courts in this area are of questionable value and sparse (in fact, there are just three of note). This is perhaps unsurprising, given that Florida's own courts have rendered relatively little relevant decisional law.

In *Ashby v. Nat'l Freight, Inc.*, the plaintiff reported a work-related injury to his employer.¹¹⁵ The claims administrator, citing lack of timely notice, denied the claim.¹¹⁶ The plaintiff then proceeded against the employer in tort.¹¹⁷ In granting summary judgment for the employer, the court noted that the employer was not estopped from asserting immunity because it did not take inconsistent positions.¹¹⁸ It had denied his claim only on the notice defense, and never disputed that an industrial injury occurred.¹¹⁹

More problematic is the recent decision by the U.S. Court of Appeals for the Eleventh Circuit in *Picon v. Gallagher Bassett Servs.*¹²⁰ In *Picon*, the employee/plaintiff reported a repetitive motion injury to her employer, which authorized benefits including medical care.¹²¹ After six months of conservative care, the authorized treating physician recommended surgery.¹²² The employer exercised its right to an evaluation by another doctor,¹²³ who opined that the injury was not causally related to the employee's job duties, and that no further treatment was necessary "under the workers' compensation accident."¹²⁴ The employer denied authorization for the proposed operation and all

115. *Ashby v. Nat'l Freight, Inc.*, No. 809-CV-582-T-30MAP, 2009 WL 1767620, at *1 (M.D. Fla. June 23, 2009).

116. *Id.*; FLA. STAT. § 440.185(1) provides that claims are barred if not reported to employers within thirty days, absent certain enumerated exceptions.

117. *Ashby*, 2009 WL 1767620, at *3.

118. *Id.*

119. *Id.* Though consistent with the Florida appellate decisions, *Ashby* is curious because it makes repeated references to judicial estoppel. The facts of the case clearly raised the issue of ordinary estoppel, since the workers' compensation claim was not litigated to conclusion. Furthermore, the court cited and applied the estoppel test from *Kent*. The Third District has cited *Ashby* on two occasions, including an erroneous reference to judicial estoppel. Judicial estoppel will be discussed further below as an alternative remedy.

120. 548 Fed. Appx. 561 (11th Cir. 2013).

121. *Id.* at 563.

122. *Id.*

123. FLA. STAT. § 440.13(5) allows the employee or employer to have an independent medical examination ("IME") performed by a physician of the party's choice if it disputes the opinion of the authorized treating physician. The term IME is somewhat misleading, because the IME physician is deemed the party's expert.

124. *Picon*, 548 Fed. Appx. at 564.

further benefits, relying on the second doctor's opinion.¹²⁵ The employee filed a petition for workers' compensation benefits.¹²⁶ The employer did not file a Notice of Denial or response to the petition.¹²⁷ However, its attorney advised the employee's attorney of the IME physician's opinion, and the employer's intent to rely on the opinion.¹²⁸ The employee then dismissed the petition, citing the employer's alleged position that her injury was "not related to her employment," and filed suit against the employer in tort.¹²⁹ The civil action was removed to federal court by the employer, which then successfully moved for summary judgment in the trial court.¹³⁰ The employee/plaintiff then appealed to the United States Court of Appeals for the Eleventh Circuit.

That court first undertook an exhaustive review of the case law, including the cases discussed above and *Ocean Reef Club, Inc. v. Wilczewski*.¹³¹ It then focused on the ambiguity issue discussed in *Schroeder*, noting that "[w]hen the record reveals multiple possible explanations for the denial, or the language in the denial document is ambiguous and gives rise to more than one interpretation, issues of material fact exist [precluding summary judgment]."¹³² The court went on to reverse, holding as follows:

Gallagher's [attorney's] emails, viewed in the light most favorable to Picon, can be construed as denying the existence of an incident occurring in the course and scope of employment. For example, Gallagher's attorney wrote that Picon's "shoulder condition is unrelated to her work activities." Likewise, Gallagher's senior claims representative Roth wrote that "no further shoulder treatment will be authorized as Dr. Blinn did not feel her shoulder complaints were related to her job duties." Dr. Blinn himself wrote "it is not reasonable to state that using a mouse or computer at a workstation in a repetitive fashion is the reason for this persons [sic] right shoulder problem." We do not conclude that estoppel applies here as a matter of law. We determine only that there were genuine issues of material fact as to what were Gallagher's reason or reasons for the denial of Picon's request for workers' compensation benefits. Accordingly, the district court erred in granting summary judgment to the defendant Gallagher as a matter of law

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Picon*, 548 Fed. Appx. at 564.

131. *Id.* at 572 (citing *Ocean Reef Club, Inc. v. Wilczewski*, 99 So. 3d 1 (Fla. Dist. Ct. App. 2012) (heard in the Third District)).

132. *Id.*

based on its workers' compensation exclusivity affirmative defense.¹³³

Essentially, the court seems to have inferred that a dispute over causal connection was tantamount to ambiguity regarding compensability. This was questionable for two reasons. First, the employer never took the position that the claim was not compensable (even if the physician's words are directly imputed to it.) Dr. Blinn's finding could either mean that the employee's condition was preexisting, or that it was the result of a subsequent accident. It was not reasonable to infer that the employer/carrier might be claiming that no compensable accident had occurred. Second, when the claim was denied, the employer no longer had the right to contest compensability. Under Section 440.20(4) of the Florida Statutes, an employer that does not deny compensability within 120 days of its first payment of benefits waives its right to dispute compensability at a later date.¹³⁴ Having paid benefits to the employee for six months, the employer could no longer contest that she sustained an accident arising out of the course and scope of employment, "unless [it could] establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period."¹³⁵ Thus, while the *Picon* court teased out the correct rule of law, it seemingly misapplied it.

In *Rush v. BellSouth Telecommunications, Inc.*,¹³⁶ the employee/plaintiff filed a workers' compensation claim based on "sick building syndrome."¹³⁷ She then filed another claim alleging the same conditions, with a different date of accident and/or disablement date.¹³⁸ The employer/defendant denied her workers' compensation claims, asserting in part that "Claimant's alleged exposure . . . did not occur in the course and scope of her employment and Claimant did not suffer an injury by accident . . . Claimant's conditions are personal in nature and longstanding and unrelated to her employment."¹³⁹ The employee

133. *Id.* at 573.

134. FLA. STAT. § 440.20 (2013) ("A carrier that fails to deny compensability within 120 days after the initial provision of benefits . . . waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period.")

135. *Id.* Accordingly, there is no competent substantial evidence supporting the JCC's findings and the determination that the e/c was not estopped to deny the compensability of appellant's claims.

136. 773 F. Supp. 2d 1261 (N.D. Fla. 2011).

137. Sick building syndrome generally refers to conditions arising in building occupants as a result of indoor air quality issues, both chemical and organic. *See, e.g.*, Lesley King O'Neal et al., *Sick Building Claims*, 20 CONSTR. LAWYER 16, 16-17 (2000).

138. *Rush*, 773 F. Supp. 2d at 1262.

139. *Id.*

then dismissed the workers' compensation claims and proceeded in tort.¹⁴⁰ The employer moved for summary judgment, but not on the basis of workers' compensation immunity (though it did assert immunity as an affirmative defense).¹⁴¹ Instead, it primarily argued that policy considerations mandated that the workers' compensation claim be litigated to conclusion before the JCC prior to the filing of a civil action.¹⁴² The District Court rejected this argument, holding that the facts of the case fit squarely within the requirements for estoppel.¹⁴³ "Here, BellSouth—in the workers' compensation setting—denied that the claim was within the course and scope of Rush's employment. In so doing, BellSouth took the position that the Workers' Compensation Law was inapplicable to the plaintiff's claim."¹⁴⁴ The District Court also rejected the underlying policy argument.¹⁴⁵

Other federal courts have discussed Section 440.11 of the Florida Statutes, but none of the other cases directly touch on the immunity issue.¹⁴⁶

B. A Bright-Line Rule?

So, what conclusions may we draw from the foregoing cases? *Kent*, notwithstanding the mere fact that a defense is "recognized" under the Workers' Compensation Act, does not insulate the employer from claims of estoppel. As noted above, both the lack of an employment relationship and the absence of an accident are recognized defenses.¹⁴⁷ However, the assertion of either of these defenses explicitly conflicts with a subsequent claim that an injury falls within the scope of the Act. In other words, if the employer does not admit that *an accident occurred*, and that it occurred *at work*, it cannot be immune from suit.

140. *Id.*

141. *Id.* at 1262.

142. *Id.* at 1263. This argument was based on certain legislative policy statements referenced in the *Kent* decision (*see supra* note 59).

143. *Id.* at 1264.

144. *Rush*, 773 F. Supp. 2d at 1264.

145. "Policy decisions, however, are for the legislature, not the courts." *Id.*

146. *See, e.g.*, *Sinni v. Scottsdale Ins. Co.*, 676 F. Supp. 2d 1319, 1330 (M.D. Fla. 2009) (discussing application of FLA. STAT. § 440.11 in context of purported breach of liability insurer's duty to defend). Other cases generally relate to the intentional tort exception.

147. *E.g.*, *Jenks v. Bynum Transp., Inc.*, 104 So. 3d 1217 (Fla. Dist. Ct. App. 2012) (holding that a truck driver receiving unpaid training prior to hire was an "employee" for workers' compensation purposes); *Vigliotti v. K-mart Corp.*, 680 So. 2d 466 (Fla. Dist. Ct. App. 1996) (holding that an accident sustained by an employee who had clocked out but not left employer's premises arose out of employment).

What distinguishes these two defenses from all others available under the Act? The answer is simple: compensability.¹⁴⁸ How is compensability determined? The Act itself offers little direct guidance.

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.¹⁴⁹

Despite setting forth definitions for nearly all terms of art used in the Act, neither Section 440.02 of the Florida Statutes nor any other section explicitly defines compensability. The definition can be found only by reference to case law.

As to the question of what the legislature intended by the term “compensability” in the context of sections 440.192 and 440.20 [of the Florida Statutes], we note that section 440.20(1) refers to “compensability or entitlement to benefits,” indicating that they are separate concepts, and that the last sentence of section 440.20(4) refers to “the issue of compensability,” indicating a distinction from other issues. Having reviewed the uses of the terms “compensability” and “compensable” in the various sections of chapter 440, we conclude that “compensability” in the context of sections 440.192 and 440.20 is limited to a determination of whether the injury for which benefits are claimed arose out of, and occurred within the course and scope of, the claimant’s employment.¹⁵⁰

The determination of whether or not compensability has been denied is generally an easy one, since it will be reflected in writing in the records of the workers’ compensation claim. Helpfully, denials typically track the language of the statute.¹⁵¹

148. See *supra* note 17 and accompanying text.

149. FLA. STAT. § 440.09(1).

150. *N. River Ins. Co. v. Wuelling*, 683 So. 2d 1090, 1092 (Fla. Dist. Ct. App. 1996).

151. As discussed above, an employer that denies either compensability or entitlement to a specific benefit must file a “Notice of Denial.” See *supra* note 19. It is irrelevant whether the claim is in litigation. In most of the cases discussed above, the estoppel argument rested on the grounds for denial listed in that document. In others, such as *Kent* and *Gutierrez*, the estoppel argument was based on language taken from responses to petitions for benefits. Unlike the Notice of Denial, the response—as the name suggests—is filed only to dispute the claims in a petition, and is therefore only seen during litigation.

III. OTHER ELEMENTS OF EQUITABLE ESTOPPEL

The foregoing discussion has been devoted to just one element of equitable estoppel, inconsistent defensive positions taken by employers. We have not discussed the other three elements of equitable estoppel. Are those elements as crystallized in the case law as they appear?

Outside the workers' compensation setting, the courts of Florida are unanimous in the view that equitable estoppel arises only in extraordinary circumstances. "[A] party may successfully maintain a suit under the theory of equitable estoppel only where there is proof of fraud, misrepresentation, or other affirmative deception."¹⁵² "Equitable estoppel differs from other legal theories that may operate upon the statutes of limitation in that equitable estoppel presupposes an act of wrongdoing—such as fraud and concealment—that prejudices a party's case"¹⁵³ "Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct."¹⁵⁴ "Estoppel is an equitable doctrine which is applied only where to refuse its application would be virtually to sanction the perpetration of a fraud."¹⁵⁵

In other words, the adverse party's representation must have been *misleading* rather than merely incorrect. There was no evidence of deception in any of the cases discussed in Section II. Strangely, there was not even any discussion of deception as a condition precedent for estoppel. It could hardly be said that a defendant asserting inconsistent defenses is guilty of "misconduct," much less fraud or concealment. If so, nearly every injured worker would find himself estopped when he asserted alternative claims for lost wage benefits.¹⁵⁶

152. *Rinker Materials Corp. v. Palmer First Nat'l Bank & Trust Co. of Sarasota*, 361 So. 2d 156, 159 (Fla. 1978).

153. *Fla. Dep't of Health & Rehab. Servs. v. S.A.P.*, 835 So. 2d 1091, 1097 (Fla. 2002).

154. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001).

155. *Brickell Bay Club Condo. Ass'n v. Hernstadt*, 512 So. 2d 994, 996 (Fla. Dist. Ct. App. 1987) (heard in the Third District); *accord Pelican Island Prop. Owners Ass'n v. Murphy*, 554 So. 2d 1179, 1181 (Fla. Dist. Ct. App. 1989) (heard in the Second District).

156. Broadly speaking, Florida workers' compensation law recognizes four categories of indemnity or lost wage benefits: temporary partial disability benefits, temporary total disability benefits, permanent impairment benefits, and permanent total disability benefits. FLA. STAT. § 440.13 (2015). Under no circumstances can an employee receive more than one form of lost wage benefits for any given period of lost time. However, nearly every wage-loss petition for benefits filed seeks both temporary partial and temporary total benefits, and petitions may even request all four benefit types, with the specific benefit periods further defined as litigation continues.

As an equitable doctrine, a court may find that fairness or policy considerations justify relaxing the predicate for estoppel in certain circumstances. Assuming, *arguendo*, that the unique nature of workers' compensation claims is such a consideration, the misconduct requirement could be excused. However, the reliance requirement is also more complex than the cases above might indicate. "Estoppel . . . cannot exist where the parties have equal knowledge of the facts or the same means of ascertaining that knowledge."¹⁵⁷ "A claim of reliance [as an element of an estoppel] must fail where both parties have equal knowledge of the truth."¹⁵⁸ In almost any employment litigation, the employer is likely to have superior knowledge of the facts (like any institutional party). However, where the issue is merely whether a compensable accident occurred, the employee has at least as much information as the employer. The employee is the only party who will almost always have been an eyewitness to an accident.¹⁵⁹ Moreover, the employee will certainly have all the facts necessary to determine compensability.¹⁶⁰ Thus, there is no reason to credit a claim of reliance.

A third consideration is that the party claiming estoppel must have relied on the representation in *changing position to its detriment*.¹⁶¹ When an employer denies compensability, the employee has not immediately suffered a detriment. The employee is free to file (or refile) a workers' compensation claim regardless of the employer's position.¹⁶² So long as the incident is reported to the employer within thirty days,¹⁶³ the employee may bring an action any time up to two years from the accident date.¹⁶⁴ Arguably, equitable estoppel might act to extend this statute of limitations, but it is difficult to see why it is a

157. *Murphy*, 554 So. 2d at 1181.

158. *Watson Clinic, LLP v. Verzosa*, 816 So. 2d 832, 834 (Fla. Dist. Ct. App. 2002) (heard in the Second District).

159. It is possible to conceive of circumstances where this might not be true, as in cases where the employee loses consciousness before or during a workplace accident, or suffers memory loss after one. Needless to say, such circumstances should be considered separately, if at all.

160. For example, the mechanism of injury, what job duties were being performed at the time of the accident, and where the accident occurred.

161. *Anderson*, 403 So. 2d at 400.

162. FLA. ADMIN. CODE r. 60Q-6.116(2) (2015) allows a party to dismiss any claim without prejudice once, as a matter of right. A second voluntary dismissal operates as an adjudication on the merits.

163. See FLA. STAT. § 440.185(1) (2015) ("An employee who suffers an injury arising out of and in the course of employment shall advise his or her employer of the injury within thirty days after the date of or initial manifestation of the injury. Failure to so advise the employer shall bar a petition under this chapter . . .").

164. The statute of limitations is extended by an additional year by the provision of any benefits under the Workers' Compensation Act. The section also provides for another statu-

detriment otherwise. Nor is an employee's decision to seek medical care outside the workers' compensation system a detriment. Section 440.13(2)(c) of the Florida Statutes specifically provides that an employee may obtain her own care at the employer's expense provided that "she has requested the employer to furnish that initial treatment or service and the employer has failed, refused, or neglected to do so within a reasonable time" Once a claim is found compensable by a JCC, the employee is no longer responsible for payment of any such medical care.¹⁶⁵

This arguably brings us full circle to *Byerley*. Recall that the *Byerley* court asserted that the employer created a "Hobson's choice" for the employee.¹⁶⁶ At first blush, this seems like a compelling rationale. The reader is invited to believe that the employee was "damned if she did, and damned if she did not." In fact, however, the employee was simply being forced to litigate her workers' compensation claim like any other claimant that is denied benefits.

Returning to the facts,¹⁶⁷ it is hard to escape the conclusion that *Byerley*'s workers' compensation claim would have been meritorious. She was injured on a sidewalk while leaving the employer's premises at the end of her workday. Ordinarily, accidents which occur while traveling to or from work are not compensable under the "going and coming" rule.¹⁶⁸ However, the rule does not apply to most accidents which occur on the employer's premises.¹⁶⁹ The sidewalk where *Byerley* was injured was on the employer's premises.¹⁷⁰ Although she was engaged in a personal activity at the time of the accident (picking up some empty boxes), this was a *de minimis* departure from her ordinary route home.¹⁷¹ Had she pursued her workers' compensation claim, she

tory estoppel if the employer fails to advise the employee of his rights under the Act, including the two years statute of limitations. See FLA. STAT. § 440.19(1) (2015).

165. FLA. STAT. § 440.13(13)(a) (2015) provides that "[a] health care provider may not collect or receive a fee from an injured employee within this state, except as otherwise provided by this chapter. Such providers have recourse against the employer or carrier for payment for services rendered in accordance with this chapter."

166. *Byerley*, 725 So. 2d at 1232. Similarly, in *Kent*, the employee argued (albeit unsuccessfully) that he was being "whipsawed" out of any remedy. *Kent*, 966 So. 2d at 981-82.

167. See "A v. B & C" *supra* Part II.A.

168. See, e.g., *Doctor's Bus. Serv. v. Clark*, 498 So. 2d 659, 661 (Fla. Dist. Ct. App. 1986).

169. *Carnegie Gardens Nursing Ctr. v. Banyai*, 852 So. 2d 374, 376 (Fla. Dist. Ct. App. 2003) (heard in the Fifth District) ("An injury is deemed to have occurred in the course and scope of employment if it is sustained by a worker, on the employer's premises, while preparing to begin a day's work or while doing other acts which are preparatory or incidental to performance of his or her duties, and which are reasonably necessary for such purpose.").

170. *Byerley*, 725 So. 2d at 1231.

171. *Id. E.g.*, *Johns v. State Dep't of Health & Rehab. Servs.*, 485 So. 2d 857 (Fla. Dist. Ct. App. 1986) (deciding that a hospital employee who arrived twenty minutes early to work

would most likely have been awarded benefits. "If this were a workers' compensation proceeding and the deputy commissioner were to deny benefits by finding that the appellant was not within the course and scope of her employment, we would be compelled to reverse."¹⁷² Not only that, but fully litigating the case before a JCC would ensure that there was no ambiguity in the position taken by the employer/carrier, and would provide clarity of fact.

In the absence of detrimental reliance, a finding of estoppel is inappropriate. Thus, the employee should be required to litigate the merits of the workers' compensation claim. That litigation should itself supply the necessary preclusive effect under the doctrine of *judicial estoppel*.

IV. JUDICIAL ESTOPPEL

As we have seen, equitable estoppel prevents a party from taking inconsistent positions when the adverse party has relied on the original representation. The closely related doctrine of judicial estoppel prevents a party from taking inconsistent positions in judicial proceedings.¹⁷³ Florida follows the *Corpus Juris* formulation of the doctrine:

In order to work and estoppel the position assumed in the former trial must have been successfully maintained. In proceedings terminating in a judgment, the positions must be clearly inconsistent, the parties must be the same and the same questions must be involved. So, the party claiming the estoppel must have been misled and have changed his position; and an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it unjust to him to allow the first party to [subsequently] change his position.¹⁷⁴

This version differs from that adopted in some jurisdictions in that it only applies *between* proceedings; no estoppel is wrought by a party's inconsistent positions taken *within* a proceeding (for example, conflicting statements made in a deposition and at a subsequent trial).¹⁷⁵

and was assaulted was in the course and scope of employment and not entitled to sue her employer in tort; arriving early was "reasonably incident to her employment."); accord *Perez v. Publix Supermarkets, Inc.*, 673 So. 2d 938 (Fla. Dist. Ct. App. 1996) (reasoning that an employee who "had clocked out" and was injured "while on her way out of the store" was within the course and scope of her employment.). See also *Vigliotti v. K-mart Corp.*, 680 So. 2d 466 (Fla. Dist. Ct. App. 1996).

172. *Johns*, 485 So. 2d at 859.

173. See Rand G. Boyers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. REV. 1244, 1244 (1986).

174. *Chase & Co. v. Little*, 156 So. 609, 610-11 (Fla. 1934).

175. See Boyers, *supra* note 173, at 1265.

Other jurisdictions may also differ in whether they apply the “prior success” rule; that is, the requirement that the estopped party has “successfully maintained” its position at the earlier proceeding.¹⁷⁶ We can draw out the following elements: (1) successful maintenance of (2) a clearly inconsistent position (3) in a prior case involving the same parties and questions, (4) which causes the adverse party to change position.¹⁷⁷

The leading Florida Supreme Court decision on judicial estoppel is instructive. In *Blumberg v. USAA Casualty Insurance Company*, storeowner Blumberg closed his business and stored leftover stock at his home.¹⁷⁸ Fearing theft, he contacted his insurance agent to confirm that his homeowner’s insurance policy covered the additional items (valuable collectible trading cards).¹⁷⁹ His agent confirmed that the policy would cover such a loss.¹⁸⁰ The same day, thieves broke into the home and the cards were taken.¹⁸¹ The insurer denied the resulting homeowners’ policy claim and litigation ensued.¹⁸² Blumberg asserted that the insurer was estopped from denying coverage because Blumberg had orally relied on the agent’s representation; he would have stored the cards elsewhere or obtained additional coverage but for the agent’s declaration.¹⁸³ Blumberg prevailed at the ensuing jury trial, but the jury awarded him less than a pretrial settlement offer.¹⁸⁴ Under Florida’s “offer of judgment” rule, the insurer, thereby, became entitled to recover its attorney fees.¹⁸⁵ The parties entered into a mutual stipulation dismissing their claims against one another, leaving

176. *Id.* at 1246 *et seq.*

177. The Fourth District Court of Appeal offers the following alternative formulation:

A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions.

JSZ Fin. Co. v. Whipple, 939 So. 2d 1189, 1191 (Fla. Dist. Ct. App. 2006) (quoting *Grau v. Provident Life & Accident Ins. Co.*, 899 So. 2d 396, 400 (Fla. Dist. Ct. App. 2005)).

178. 790 So. 2d 1061, 1062 (Fla. 2001).

179. *Id.*

180. *Id.* at 1063.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Blumberg*, 790 So. 2d at 1066.

185. A defendant which tenders an offer to settle a civil action, and whose offer is denied, is entitled to recover attorney’s fees and costs expended after that date if the plaintiff is ultimately awarded 25% less than the offer. Similarly, a plaintiff whose demand is rejected is entitled to fees and costs if the final award is 25% more than the demand. FLA. STAT. §§ 768.79(6)(a)-(b) (2015).

them *status quo* (other than Blumberg's uncompensated loss).¹⁸⁶ Blumberg then filed a new suit against the insurance agent on the ground that the agent negligently failed to obtain adequate homeowners' coverage.¹⁸⁷ The trial court granted summary judgment in favor of the agent on estoppel grounds.¹⁸⁸ The Fourth Circuit Court of Appeal affirmed.¹⁸⁹

On appeal, the Florida Supreme Court noted that Blumberg had taken clearly incompatible positions in the two proceedings. In the first suit, he asserted that insurance coverage existed and he was entitled to recover under it.¹⁹⁰ In the second, he asserted that *no* coverage existed due to the agent's negligence.¹⁹¹ The court then discussed policy considerations for the judicial estoppel doctrine:

Blumberg is attempting "to make a mockery out of justice" by asserting inconsistent positions in the St. Paul suit (where he claimed that coverage existed and prevailed) and the Bruner suit (where he claimed that coverage did not exist)

The courthouse should not be viewed as an all-you-can-sue buffet, in which litigants can pick and choose which verdicts they want and which they do not. Blumberg certainly had the option to voluntarily dismiss the promissory estoppel claim after he received a successful jury verdict. But after receiving that successful verdict, he did not have the option of pursuing an entirely inconsistent position in a subsequent suit.¹⁹²

In holding that judicial estoppel barred Blumberg's second suit, the court noted that he litigated the first claim to a successful conclusion on the merits.¹⁹³ The subsequent voluntary dismissal of his claim did not "erase" the jury's verdict.¹⁹⁴ The court noted that mutuality of parties was not a strict requirement for judicial estoppel, and that "special

186. *Blumberg*, 790 So. 2d at 1063.

187. *Id.* The homeowners' insurance carrier Blumberg sued was St. Paul Fire & Marine, not USAA. USAA was the liability carrier for Bruner Insurance Agency, the direct defendant in the second suit.

188. *Blumberg v. USAA Cas. Ins. Co.*, No. 96-13505, 1998 WL 35231332, at *1 (Fla. Cir. Ct. Apr. 3, 1998). The trial court also found for the defendant on the basis of a statute of limitations issue not relevant here.

189. *Blumberg v. USAA Cas. Ins. Co.*, 729 So. 2d 460, 462 (Fla. Dist. Ct. App. 1999) (heard in the Fourth District).

190. *Blumberg*, 790 So. 2d at 1063.

191. *Blumberg*, 729 So. 2d at 461.

192. *Blumberg*, 790 So. 2d at 1066-67.

193. *Id.* at 1067.

194. *Id.*

fairness and policy considerations” dictated that it was not required in the instant case.¹⁹⁵

Federal courts have taken a similar view of the purposes of the doctrine to those espoused by the *Blumberg* court:

To protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment . . . Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process . . . and the essential integrity of the judicial process . . . [and] prevents parties from playing “fast and loose with the courts.”¹⁹⁶

The primary distinction between judicial estoppel and generic equitable estoppel is the reliance element. For judicial estoppel to apply, the party claiming estoppel need not have relied on the estopped party’s position. Instead, the position must have been successfully maintained; we might say that the *court* must have relied on it, rather than the adverse party. This is consistent with the different policies underlying the two doctrines: while judicial estoppel “protects the integrity of the judicial process,” equitable estoppel “protects litigants from less than scrupulous opponents.”¹⁹⁷

A. Instead of Equitable Estoppel, Courts Should Find Judicial Estoppel when the Facts Warrant

In construing any provision of the workers’ compensation scheme, it is important to remember the underlying purpose of the Act: “quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer.”¹⁹⁸ Put another way, the underlying policy goal is speedy delivery of benefits, returning employees to work, and low cost.

The workers’ compensation system operates much more quickly than traditional courts, a fact borne out both by the law and statistics. By statutory mandate, the OJCC is required to conduct a merits hearing no later than 210 days from the filing of a petition for benefits.¹⁹⁹

195. *Id.* The court did not elaborate on the specific considerations at issue, but it can be inferred that the court was referring to the agency relationship. That is, the insurance agent that stood in the shoes of the insurer to bind it to coverage (in the original suit) must also have stood in the insurer’s shoes when defending the second suit.

196. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal citations omitted).

197. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982).

198. FLA. STAT. § 440.015 (2015). *See* discussion *supra* notes 10-11.

199. FLA. STAT. § 440.25(4)(d) (“The final hearing shall be held within 210 days after receipt of the petition for benefits. . . .”). This requirement may be waived by the parties only

No such mandate exists for civil actions, but the Florida Supreme Court has adopted twelve months as a “presumptively reasonable” time for resolution of a non-jury civil trial.²⁰⁰ In 2013, the average length of time between the filing of a petition and a merits hearing was 162 days.²⁰¹ The Florida circuit courts do not keep comparable statistics, but nationwide, the average tort action took over two years to reach disposition as of 2001.²⁰²

The quick resolution of disputes operates to return employees to “gainful employment” more quickly and more often. The odds of a given individual returning to work after a period of disability decrease sharply with the length of the disability.²⁰³ Without workers’ compensation benefits, injured workers are likely to have no or limited access to remedial care. Moreover, an employer being sued in tort is highly unlikely to allow the employee to return to work. Conversely, an employer/carrier, which is providing workers’ compensation benefits, has a strong incentive to offer modified duty work—if only to reduce its liability for temporary partial disability benefits.²⁰⁴ It should also be noted that injured workers are more likely to prevail in workers’ com-

for good cause, though in this author’s experience, the good cause requirement is interpreted liberally.

200. FLA. R. JUD. ADMIN. 2.250(a)(1)(B). A presumptively reasonable time to conclude a jury trial is eighteen months. Given the lack of a jury in workers’ compensation proceedings, it seems reasonable to use the non-jury period as the primary basis for comparison.

201. OFFICE OF THE JUDGES OF COMPENSATION CLAIMS, 2012-2013 ANNUAL REPORT 40, available at <http://www.fljcc.org/jcc/files/reports/2013AnnualReport/files/assets/common/downloads/OJCC%202013%20Annual%20Report.pdf> [hereinafter OJCC ANNUAL REPORT].

202. THOMAS H. COHEN & STEVEN K. SMITH, U.S. DEP’T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001 8 (2004), available at <http://www.bjs.gov/content/pub/pdf/ctcvlc01.pdf> (“Tort trials reached a verdict or judgment in an average of 25.6 months compared to 21.7 months for real property cases and 21.5 months for contract cases.”).

203. See, e.g., *Preventing Needless Work Disability by Helping People Stay Employed*, 48 J. ENVTL. MED. 972, 976 (2006), available at <http://www.acoem.org/PreventingNeedless-WorkDisability.aspx> (“[T]he odds for return to full employment drop to 50/50 after 6 months of absence. Even less encouraging is the finding that the odds of a worker ever returning to work drop 50% by just the 12th week. The current practice of focusing disability management effort on those who are already out of work rarely succeeds.”). See also Joan Crook & Harvey Moldofsky, *The Probability of Recovery and Return to Work from Work Disability as a Function of Time*, 3 QUALITY OF LIFE RES. S97 (1994) (“[[W]orkers in Canada with industrial injuries] who remained absent from work after three months had a strong tendency to remain absent for more extended periods.”).

204. FLA. STAT. § 440.15(4) (2015) provides that workers who are not totally disabled but have medical restrictions receive wage loss benefits equal to 80% of the difference between their pre- and post-injury earnings.

pensation proceedings as the standard of proof in most cases is lower than the preponderance requirement found in tort actions.²⁰⁵

The last policy consideration (cost) also favors litigation in the workers' compensation arena. One survey indicates that nationwide, the median hourly fee for a senior defense attorney practicing in civil litigation is \$275.00.²⁰⁶ Defense fees in workers' compensation claims are substantially lower. The fee paid to a claimant's attorney may be much higher than this figure,²⁰⁷ but this is solely a function of the contingent nature of claimants' attorneys' fees.²⁰⁸ Generally, a claimant's attorney will be awarded no more than \$300.00 per hour. Civil litigants may call as many expert witnesses as the trial court will allow, whereas workers' compensation litigants are generally constrained to calling a single expert, in addition to any treating physicians and possibly a court-appointed medical expert.²⁰⁹

Thus, all three policy goals of the Workers' Compensation Act are served by keeping litigation of "work accidents" within the purview of the Office of the Judges of Compensation Claims. It is important to note that the District Courts have roundly rejected this argument (though, as noted above, without reference to otherwise well-established precedent).²¹⁰ However, at least one Florida Supreme Court Justice has followed the same line of reasoning:

205. The standard of proof on causation applied in workers' compensation matters is normally "a reasonable degree of medical certainty." *Stokes v. Schindler Elevator Corp./Broadspire*, 60 So. 3d 1110, 1112 (Fla. Dist. Ct. App. 2011). Other issues may be proven merely by "competent, substantial evidence." *Schafrath v. Marco Bay Resort, Ltd.*, 608 So. 2d 97, 102 (Fla. Dist. Ct. App. 1992). The meaning of this phrase is ambiguous at the trial level, as it is normally a standard of review reserved for appellate proceedings. However, it is unquestionably lower than the preponderance standard. *Id.* However, in occupational exposure cases, the standard of proof of causation is clear and convincing evidence, a higher standard than preponderance. See FLA. STAT. §440.151(1) (2015).

206. See Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 CT. STATS. PROJECT 1, 5 (2013), available at http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx.

207. In *What An Idea, Inc. v. Sitko*, 505 So. 2d 497, 498 (Fla. Dist. Ct. App. 1987), the court upheld an award of a fee equivalent to \$2,700.00 per hour.

208. See, e.g., *Spaulding v. Albertson's, Inc.*, 610 So. 2d 721, 724 (Fla. Dist. Ct. App. 1992) ("[W]e reject the suggestion that an award of fees to a claimant's attorney should be influenced or controlled by evidence of the hourly rate charged by defense lawyers. The practice of the defense bar, with their fixed hourly rates, repetitive employment, and virtual guaranteed payment by solvent insurance companies, cannot be compared to the risk assumed by claimants' attorneys in handling the appeals of workers' compensation claimants. For defense work, fees are usually paid when billed and deferred billing and collection is not ordinarily a problem. Defense counsel also may recover costs the claimant's attorney cannot, and is paid for the time necessary to litigate the amount of the fee.").

209. See discussion of IME statutory provision *supra* note 123.

210. E.g., *Schroeder*, 18 So. 3d at 1169 ("Peoplease and L & S argue that when the facts make it clear that the employee suffered a workplace incident, then estoppel will never

In order to give effect to the legislatively mandated workers' compensation immunity, the legal existence and applicability of that immunity in individual cases should be able to be tested pretrial in appellate review. Such a procedure is necessary to prevent workers' compensation immunity from being seriously depreciated and this integral part of the workers' compensation system rendered worthless by reason of the expense and exposure of a jury trial. Our decision in *Turner v. PCR, Inc.*,²¹¹ explains the quid pro quo out of which this immunity came into existence but also has heightened the need for pretrial review by broadening what can be pled as employee conduct that is not covered by workers' compensation immunity.²¹²

Although Justice Wells, who retired in 2009,²¹³ might not take the same view here, the logic still applies: litigation of potential work injuries by jury trial undercuts the purpose of the workers' compensation system.

Another consideration is that the easy availability of equitable estoppel forces an employer to take a position more or less instantaneously. This is inconsistent with the self-administered design of the workers' compensation scheme.²¹⁴ Employers are statutorily mandated to investigate claims. Recall that the "120 day rule" of Section 440.20(4), Florida Statutes, provides, "[i]f the carrier is uncertain of its obligation to provide all benefits or compensation, the carrier shall immediately and in good faith commence investigation of the employee's entitlement to benefits under this chapter and shall admit or deny compensability within 120 days" At the very least, employers should not be estopped based on positions taken within the investigation period.

B. Litigation to a Conclusion on the Merits is Not an Election of Remedies

As we have already seen, an employee who litigates compensability of a workers' compensation claim *unsuccessfully* would not herself be subject to judicial estoppel on filing a subsequent tort action

apply despite what the employer and carrier may have said in the notice of denial. We cannot agree."); *Mena*, 79 So. 3d at 224 ("We note that . . . under the circumstances of this case Mena was not required to litigate his claims to a final adjudication in the worker's compensation forum.").

211. 754 So. 2d 683 (Fla. 2000).

212. *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 823 (Fla. 2004) (Wells, J., dissenting).

213. *Justice Charles Talley Wells*, FLA. SUPREME CT., <http://www.floridasupremecourt.org/justices/wells.shtml> (last visited Aug. 23, 2015).

214. FLA. STAT. § 440.015 (2015).

(given the requirement that the position have been successfully maintained).²¹⁵ For that matter, an employee who sues in tort unsuccessfully would also be so protected in bringing a subsequent workers' compensation claim.

The doctrine of *election of remedies* applies to workers' compensation claims,²¹⁶ and might seem to prohibit the employee from bringing a tort action after an unsuccessful workers' compensation claim (or vice versa). However, the courts have held that an alternative cause of action does not accrue until the plaintiff is found to be an employee—or not. “Florida follows the rule that either a dismissed or an unsuccessful compensation claim does not bar a damage suit.”²¹⁷

[E]lection of remedies by its very terms presupposes that a plaintiff has at least two viable theories upon which recovery may be had. That is not the case with respect to an injured employee. When injury is suffered in the course and scope of employment, workers' compensation is the exclusive remedy for recovery against the employer.²¹⁸

In other words, there can be no election of remedies until a determination is reached on the merits of one of the claims, since the other cause of action is not yet mature. Thus, an employee who litigates his workers' compensation claim to a conclusion will not be deemed to have elected his remedy unless he prevails.

C. Constitutional Issues

As a limitation on the right to recover provided at common law, workers' compensation immunity clearly has constitutional implications. In *Seaboard Coast Line R. Co. v. Smith*, Section 440.11 of the Florida Statutes was upheld in the face of a due process challenge under Article I, Section 9 of the Florida Constitution²¹⁹ and, implicitly, the 14th Amendment to the U.S. Constitution.²²⁰

Arguably more pertinent is Article I, Section 21 of the Florida Constitution, which provides that, “[t]he courts shall be open to every

215. *Chase & Co.*, 156 So. at 610-11.

216. *Williams v. Duggan*, 153 So. 2d 726, 727 (Fla. 1963).

217. *Lowry v. Logan*, 650 So. 2d 653, 656 (Fla. Dist. Ct. App. 1995).

218. *Id.* at 658 (quoting *Wishart v. Laidlaw Tree Serv.*, 573 So. 2d 183, 184 (Fla. Dist. Ct. App. 1991) (heard in the Second District)).

219. 359 So. 2d 427, 429 (Fla. 1978).

220. *Id.* at 429-30. The Florida Supreme Court adopted the holding of *Coates v. Potomac Elec. Power Co.*, 95 F. Supp. 779 (D.D.C. 1951), in which the District of Columbia Circuit upheld the federal Longshoremen's and Harbor Workers' Compensation Act against a Fifth Amendment due process challenge.

person for redress of any injury, and justice shall be administered without sale, denial or delay.” In *Kluger v. White*, the Florida Supreme Court interpreted Section 21 to require that:

where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.²²¹

In *Eller v. Shova*, the Florida Supreme Court applied the *Kluger* test to Section 440.11, Florida Statutes, and found that it was not a denial of access to the courts.²²² It is not readily apparent why denial of equitable estoppel based on the employer’s immediate post-accident position requires a different result. Rejection of the equitable estoppel claim merely requires the injured worker to litigate his claim in a different forum—the essence of the workers’ compensation scheme.

CONCLUSION

It is clear that injured workers should be entitled to *some* preclusion when their claims are deemed non-compensable under the Workers’ Compensation Act. However, Florida’s appellate courts have failed to consistently apply their own precedent when finding equitable estoppel under the facts of such claims. Moreover, to find such preclusion based on the positions taken by employers—rather than the facts—undercuts the entire purpose of workers’ compensation immunity.

Pursuant to Section 440.45 of the Florida Statutes, the OJCC is headed by a Deputy Chief Judge. Judge David W. Langham has served in that role since 2006, and makes the following observations on the role of the workers’ compensation judiciary:

The Florida Office of Judges of Compensation Claims has adjudicators who specialize in precisely the critical decisions required of this analysis. The employer/employee relationship, compensability of accidents and injuries, major contributing cause, and other statutory constructs are issues that our judges analyze and adjudicate regularly.

221. 281 So. 2d 1, 4 (Fla. 1973).

222. 630 So. 2d 537 (Fla. 1993).

Judges of Compensation Claims have demonstrated an ability to rapidly conclude consideration of workers' compensation claims. The delay resulting from civil court deference for consideration of these issues would be reasonable. Such deference would result in actual determination of the questions of law regarding the Act, and relieve civil courts of the burden of conjecture regarding how such a workers' compensation claim might have hypothetically concluded.

The goal of the Act is to effectuate "quick and efficient" receipt of statutory benefits. The Florida Office of Judges of Compensation Claims has proven capable of delivering timely hearings and adjudications. The participation in that process may conclude with an award of needed medical care and wage replacement benefits in an approximately six month litigation process. One in which an injured worker's attorney fees for seeking such benefits are paid by the employer/carrier instead of being recouped from the award or settlement in a civil claim for damages.

The adjudication process for the Florida workers' compensation system is timely, efficient, and effective. Determinations are concluded far more rapidly than in civil court proceedings. This comes in part from specialization and concentration of the adjudicators. This also comes in part from the administrative nature of the proceedings and the statutory process that enables and compels it.²²³

Judge Langham's view underscores the idea that the OJCC is the proper forum for adjudication of disputes regarding workplace injuries. Accordingly, when an employer denies that an employee-employer relationship exists, or that an injury arose out of the course and scope of employment, the parties should litigate the issue to conclusion in the workers' compensation arena. If a JCC finds that a claim is non-compensable, such a finding should have preclusive effect in a subsequent civil action. Whether the mechanisms for this preclusion are found in the election of remedies doctrine, issue preclusion, or elsewhere, is a matter for the courts to decide.

223. Correspondence from Deputy Chief Judge, Office of the Judges of Compensation Claims David W. Langham, Florida Judge of Compensation Claims, to author (June 5, 2015) (on file with author).
