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Chavarria v. Selugal Clothing, Inc.:
A New Appellate Standard of Review in Workers' Compensation, or Just Business as Usual?

by Terry P. Roberts

The First District sitting en banc in *Chavarria v. Selugal Clothing, Inc.*[1] sought to clarify the appellate standard of review in workers' compensation cases. The standard of review enunciated in *Chavarria* is particularly relevant where a Judge of Compensation Claims makes findings of fact involving conflicting medical testimony. In a year that saw enormous statutory reform and adoption of a whole new set of rules of worker's compensation procedure, *Chavarria* is only one facet of a quickly evolving area of law. Yet, depending on who you ask, *Chavarria* either restates a clear, simple rule that dates back more than twenty-five years, or it is a profound and substantial departure from Supreme Court of Florida precedent. Those who think the latter say the new standard of review in *Chavarria* makes it impossible for the First District to perform intelligent judicial review of workers' compensation cases.

See "Businees as Usual," page 10

Message from the Chair:

November 2003 — Issues and Opportunities: A Holiday Sampler

by Jack J. Aiello, Chair

As we approach the holidays (as of this writing), we find ourselves, as usual, facing issues and opportunities and studying the causal relationship between them. As a Section, we have always sought the opportunities presented by both problem issues and by objectives that naturally arise from our stated goal of fulfilling our mission statement. This holiday season, both forces are at work. In other words, whether you think of this time of year as Thanksgiving or Angstgiving, there is something for everyone. Here's a sampler.

First, some of the opportunities to be thankful for. As we approach the holiday season, the Section's Mentor Program is being implemented. As has been written before in these pages, the program which has been developed under the tutelage of Susan Fox, as the Chair of the Mentor Committee, is designed to assist young lawyers, occasional appellate practitioners, and experienced appellate lawyers who venture into less familiar practice areas. Our program has been modeled after the SCOPE (which means "Seek Counsel of Professional Experience") program, which is sponsored by the Young Lawyers Division. The service will be

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accessed through the Section's website with questions posted on line to be relayed to volunteer mentors for response. Several legal subject areas have been identified, including such things as administrative, general civil, criminal, workers comp., family, juvenile, and federal. Those accessing the service would identify the subject area in which the question falls, which will allow the subcommittee chair for each of the areas to relay the question to the appropriate mentor and to assure a timely response. The model includes a conflict check and appropriate disclaimers of liability to avoid the creation of any attorney-client relationship and risk on the part of the mentors.

The opportunities created by the Mentor Program are clear. There is the opportunity for those who could benefit from the available input from mentors in the various subject areas, and there is also the significant opportunity for appellate practitioners, who want to help improve our specialty, to serve as mentors and occasionally respond to an appropriate inquiry. The general requirement to serve as a mentor is at least five years of experience in the subject area(s) designated by the prospective mentor and membership in good standing in The Florida Bar. For further detail about how to serve as a mentor or to request the assistance of a mentor, consult our website at the above address and choose the "Mentoring" link. The Section's goal -- which we anticipate will be met -- is that the typical mentor will address a couple of questions per year, while experiencing the satisfaction of giving something back to the justice system and improving appellate practice for both practitioners and judges.

The organization of the Mentor Program highlights another accomplishment for which to be thankful and another related opportunity: the Section's website. One of the major objectives of the Section Retreat held this past May was to beef up and mature the Section's website. The accomplishment of that goal is well underway, as a quick visit to *www.flabarappellate.org* confirms. In addition to much more information and frequently updated news and data useful to appellate practitioners -- with even more to be added soon -- regular blast e-mails to Appellate Section members have already begun and are making it much easier for Section leaders to keep members informed and as involved as they would like to be. Concerning the website, a significant opportunity awaits the right candidate. Under the bylaws of the Section, the Treasurer has ultimate responsibility for the website each year. The identity of the Treasurer changes each year. The interests of the Section and the continued maintenance and improvement of the website would be best served by identifying an appropriate "webmaster" from the Section who would be interested in playing the key role on the Website Committee of fostering that maintenance and improvement for a period beyond one year. This webmaster would work with the Treasurer and Website Committee to develop and fulfill our goals for the website. We believe that the website can best be kept strong through the continuity of leadership in this effort, much as we have achieved with the CLE Committee, the chairperson of which has typically served for multiple years. The Section has hired an internet hosting company to do the actual movement and placement of data, so this position calls much less for technical proficiency with computers and the internet and much more for organizational skills and for a vision of how and what to communicate to membership through the website. So the opportunity is there to play a critical role in this Section. If you are interested, please let me know, or contact either our current Treasurer, The Honorable Patricia Kelly at the Second District Court of Appeal, or Austin Newberry at The Florida Bar.

For those who recognize the merits of enjoyment but still can't help but focus on the Angstgiving alter ego of this holiday season, there are, as always, problem issues to vindicate your worriment. One that comes to mind is the impending impact of Revision 7 to Article V, a topic on which Chief Justice Anstead has been a frequent speaker. For those who have managed to remain so focused on the positives in our field that they have not become apprised of it, Revision 7 to Article V of the Florida Constitution was passed by the voters in 1998 and mandates that the State take over more fiscal support for the courts from financially-challenged counties, with the changes to be implemented no later than July 1, 2004. The changes affect several different sections of Article V of the Constitution, particularly including Section 14 and, at this point, essentially require the State to assume responsibility for funding the vast majority of trial court functions, removing that responsibility from the counties. At clear risk are, purely as examples, such things as the reliability of court reporting services, programs for children (such as those which have reduced the amount of time spent in foster care), programs to manage family court (including the use of hearing officers, mediators and case managers), and the funding of conflict counsel for matters handled by the public defender. The main source

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of the angst is the uncertainty that chief judges of the various circuits face as they await legislative funding decisions next Spring, in time for the July 1, 2004 deadline. For the glass-is-half-full crowd, the Florida justice system fared reasonably well in the legislature's revision bill this year. However, for the glass-is-half-empty-crowd, there have been some ominous clues as to what next year may bring, such as the decision to deny all 56 new trial court judges requested last year, and the cutting of the pilot dependency court program operating in some Florida circuits, which had shown effectiveness in dealing with the placement of children out of foster care.

Why should we care? Actually, that's pretty clear. As many have pointed out, among the most prominent features of our governance that distinguish us from other nations is the rule of law and our leading model for enforcement of it in the court system. It's not a lead that we can afford to squander. What's more, as appellate practitioners, think only of the many ways in which we rely upon the operations of the trial courts to ply our trade and you will see why some are feeling angst, even from an appellate perspective. In addition, the next logical target in the state court system for funding changes is the appellate courts.

The opportunity that springs from this dilemma is somewhat less clear, but it has been suggested that practitioners who would like to be heard and would like to have an impact should contact their local chief judge or their local legislators, and should encourage their business clients, who rely upon the efficiency of the court system to enforce contract rights and to prevent disputes from significantly disrupting their businesses, to contact their legislators.

Also this Angstgiving, I will be joining a discussion of fellow fretters about fresh scuttlebutt that our Bar is revisiting the section dues structure and section funding procedures and requirements. There is concern among some that certain potentially adverse dues-sharing and revenue-sharing changes will make it somewhat more difficult for the Section to continue to make the strides and to reach out to appellate practitioners in the way that we have sought to in the past several years. The opportunity that arises from this issue is generally to resist significant change, but as for the specific means, I don't yet know.

What I do know, however, is that I wish for each of you a happy, healthy and productive holiday season -- whether you dwell more on the enjoyment of Thanksgiving or the worriment of the Angstgiving alter ego side of the holiday -- spent focusing upon the opportunities presented rather than the negative prospects. That choice is within our discretion, which we, above all, should know better than to abuse. I look forward to seeing you at future Bar functions and Section meetings (in fact, only 211 more days until the next Dessert Reception!)

— Jack J. Aiello, Chair

Section Sponsors Appellate Practice Seminars

by Steve Brannock, CLE Committee Chair

Appellate Certification Review Course. The annual appellate certification review course will be held in Orlando on Friday, January 30, 2004 at the Crown Plaza Universal. Registration information is abailable at www.flabarappellate.org.

Workers Comp Appellate Seminar. The first appellate section seminar on appellate issues in workers comp cases is scheduled for March 26, 2004, at the Marriott Marina in Ft. Lauderdale. The seminar will be co-sponsored by the Workers Comp Section.

Lunchtime Telephone Conference Seminars. The Executive Council has approved a series of monthly lunchtime telephone conference seminars on issues of current interest. The calls will be held on the third Tuesday of every month except June and December. Here's how it works. Attendees will get a call-in number and pass code to join the call. The calls will start at 12:10 and last between 50 minutes and an hour. The first 45 minutes or so will be a presentation on a new development in appellate practice. The last 5-10 minutes will be reserved for "war stories" and other updates from the attendees of recent trends or rulings affecting appellate practice. Just bring your lunch to your desk, turn on the speaker phone, put your feet up, and get an hour of CLE credit on a current hot topic. The cost will be $10 per session or $50 for a ten-session package. John Mills and his committee (Denise Powers, Matt Conigliaro, and Louise McMurray) did a great job of getting this idea organized and off the ground.

Hot Topics. In the fall of 2004 the Section will present our biennial hot topics seminar. Calianne Lantz has agreed to Chair this subcommittee assisted by Dottie Venable, Jeff Crockett, Rebecca Townsend, Matt Conigliaro, and Denise Powers. Let the committee know if you have a hot topic idea.

Do you like to WRITE? Write for *The Record*!!!

The Record relies on submission of articles by members of the Section. Please submit your articles on issues of interest to appellate practitioners to Siobhan Shea, Editor, P.O. Box 2436, Palm Beach, FL 33480, or e-mail to *Shea@sheappeals.com*

A Few Comments on Practice in the Eleventh Circuit

by David Rhodes

When I was in private practice, almost all of the appeals I handled were in Florida's District Courts of Appeal. Although a few of my cases worked their way to the Court of Appeals for the Eleventh Circuit, none of them resulted in oral argument or even decisions on the merits. As a result of that inexperience, I was at first somewhat intimidated to appear before the Eleventh Circuit. Looking back, I am reminded of the Lion, the Scarecrow, and the Tin Man as they stood before the great and powerful Oz.

By now, however, I have repeatedly faced the prospect and privilege of practicing before the Eleventh Circuit, without a single race down the hallway and head-first dive through a plate-glass window. The never-ending stream of aggrieved (or at least dissatisfied) criminal defendants and civil litigants, as well as the occasional decision that has aggrieved me, has meant countless appeals and perhaps fifty oral arguments before that court in Atlanta, Jacksonville, Miami, and Tampa (apparently a one-time experiment that the Court has abandoned). Although the similarities between state and federal appellate courts greatly exceed their differences, here are a few thoughts to consider as you practice in the Eleventh Circuit.

It goes without saying that the judges on the Court are highly qualified and extremely committed to their crucial roles in the criminal and civil justice systems. At argument, the judges often are extraordinarily well-versed in the cases before them, which can be a pleasure if you are likewise well-versed, or a nightmare if you are not. And thus I have seen (and participated in, I like to think) some incredibly interesting and intriguing arguments, and I also have seen (from the gallery, I like to recall) some very painful moments.

The Court, however, probably will not hear oral argument in your case. The Court hears oral argument in less than a quarter of its cases decided on the merits. *See* Annual Report of the Administrative Office of U.S. Courts (*www.uscourts.gov*). My experience, which is primarily in criminal cases, indicates a much lower percentage. So, if the Court schedules your case for oral argument, appreciate its interest and have fun. It is possible, however, that the panel hearing the argument will not find the issues as interesting and worthy of argument as the screening panel that bound the case over for argument. That, I suppose, is why I have traveled to Atlanta to give this appellee's argument:

> COURT: *Counselor, given our controlling precedent, do you have anything that you feel the need to say, beyond what is in your brief?*
>
> RHODES: *Um, no, Your Honor.*

In any event, oral argument is your opportunity to have a dialogue with the judges who will be deciding your case and to assuage their concerns face to face. As those of you with a largely appellate practice know, these opportunities may not arise very often, so make the most of them. And, if you have a mother like mine, whose view of the law is guided by endless *Matlock* reruns, or kids like mine, whose views are dictated by *Legally Blonde* and *My Cousin Vinny*, you are expected to appear in court once in a while.

If the Court schedules oral argument for your case in Atlanta, here is some seemingly unnecessary advice: there are two courtrooms at the courthouse, and your calendar will designate either Courtroom 338 or Courtroom 339. Make sure you go into the correct one. (They are right next to each other; the larger, *en banc* one on the left is Courtroom 338.) I have seen the presiding judge impatiently awaiting a lawyer's appearance in his courtroom while the lawyer patiently waited for her case to be called in the other courtroom. The lawyer's confusion eventually abated, after five or ten interminable minutes, but the judge's displeasure, which he shared with the class, took quite a bit longer to dissipate. This is one of those potentially painful experiences that you can easily avoid.

And, as long as you are going to the right courtroom, you might as well get there on time. Check in for your oral argument one-half-hour before the arguments start. For example, an 8:30 a.m. check-in is standard for the 9:00 a.m. docket, although the court has at times begun argument one-half hour earlier. This early start time has tripped up a lawyer or two; do not begin your oral argument in this sort of hole, either. Check your calendar for the starting time and consider checking with the clerk for late schedule changes on the day before you go.

Even if you are standing well-prepared at the correct lectern at precisely the right time, if you are the appellant, then you probably will lose. The Eleventh Circuit reverses a lower tribunal in only about fifteen percent of civil appeals, and many of these reversals are not that particularly beneficial to the prevailing appellant. The reversal rate in criminal cases is much lower. This, of course, does not suggest any animus toward criminal defendants. Rather, it derives from the fact that most criminal defendants exercise their right to appeal their convictions or sentences, often at no cost to themselves, regardless of whether they have any realistic chance for reversal. (Not that there's anything wrong with that.) So consider carefully at the outset whether your client's chances of meaningful success justify the costs of an appeal.

While the scope of this article does not attempt to decipher the Federal Rules of Appellate Procedure or the Eleventh Circuit Rules and Internal Operating Procedures, a few points are worth noting. Bear in mind that the Federal Rules of Appellate Procedure differ significantly from the Florida Rules of Appellate Procedure, and the Eleventh Circuit's local rules and procedures differ in significant respects from the Federal Rules of Appellate Procedure. The most cur-

rent version of the Court's rules and forms may be found at its website: *www.ca11.uscourts.gov*. So read and know the Court's local rules at the outset: they will let you know what you have to file, when you have to file it, and how you have to file it. If you need more incentive, the Court terminates more appeals on procedural grounds than on the merits.

For example, the Court is a stickler for brief form, and there are many differences between the Eleventh Circuit's forms for briefs than those used in state appellate courts. On countless occasions, I have received copies of notices from the Court Clerk striking briefs that do not comply with the Court's multitude of briefing rules. Among the most frequent violations are: failure to include a certificate of interested persons, failure to have the correct color briefcover, and failure to file (or to even properly tab) record excerpts.

Furthermore, for those of you who remain technologically challenged, keep in mind that you now must electronically upload your brief to the Court, in addition to filing the requisite paper copies. *See* 11th Cir. R. 31-5. In other words, do not wait until the last minute to finalize your brief and expect that late-night trip to the airport post office to suffice. The Court does offer at least one slight benefit: briefs are considered "filed" if they are mailed or otherwise shipped by the filing deadline; they do not have to be received by the Court by that due date. *See* Fed. R. App. P. 25(a)(2)(B).

Finally, if you do need a short extension of time to file your brief, the Court Clerk can grant a one-week extension of time by telephone. Although the Court understandably discourages extensions of time, it nonetheless is gracious about granting relatively short extensions, particularly unopposed requests. The standards for extensions of time, however, are more stringent in civil cases. *See* 11th Cir. R. 31-2. Once again, consult the local rules.

As for extending the number of pages in a brief, remember this: they are almost never needed or helpful. The Court decides an extraordinary number of appeals each year, more than any other circuit. As a result, judges of the Eleventh Circuit understandably lament that briefs are much longer than they need to be, and as a result, are less effective than they could be. If, however, your appeal is that extremely rare case in which employing more than the allotted 14,000 words will increase your chances of prevailing, you must file your motion for a page enlargement at least a week before your brief is due and you must provide "extraordinary and compelling reasons." *See* 11th Cir. R. 32-4. That being said, I suggest that you forget a page enlargement is possible. The Court probably will deny your motion, and you will be left performing desperate, last-minute surgery on your magnum opus.

In the end, of course, good appellate advocacy is effective regardless of the forum. So, when appearing before the Eleventh Circuit or any other appellate court, take some tips from the Lion, the Scarecrow, and the Tin Man: Get some nerve, use your brain, and advocate your heart out.

David Rhodes *is Assistant United States Attorney, Middle District of Florida. The views expressed in this article are those of Mr. Rhodes and may not represent those of the United States Attorney's Office or the Department of Justice.*

State Appellate Court Dockets Are Now Online

by Valeria Hendricks, Co-Editor

Last week while performing my daily on-line check of the First District's released opinions with the hope that a reversal in favor of my client would appear, I noticed that in addition to the Supreme Court, the First, Second, Third, and Fourth District Courts of Appeal have made their dockets available on line. The Fifth District docket will be available on line soon.

The on-line docket is convenient to use, just go to the appropriate court's website, *www.1dca.org.* (for example), then click on the "on line docket" option. You can search the docket by party, attorney, appellate or trial case number, or date filed. When you have selected the method by which you want to search, you click and fill in the blanks that appear next. The cases with the information you have supplied will be listed and you can click on the case number to retrieve the desired docket.

The Florida Supreme Court docket information is refreshed twice daily at 10:00 a.m. and 4:00 p.m., Monday through Friday. The District Courts of Appeal docket information is refreshed once daily starting at 4:30 p.m., Monday through Friday, except that the Fourth District's information is refreshed twice daily at 10:30 a.m. and 4 p.m.

The Florida Bar Appellate Practice Section

Midyear Meeting Schedule

Thursday, January 15, 2004
Hyatt Regency Miami

Committees:	10:00 a.m. - 12:00 noon
Luncheon:	12:00 noon - 1:30 p.m.
Executive Council:	2:00 p.m. - 4:00 p.m.

Confessions of an Abuser of Motions for Extensions of Time and Other Stories

by Betsy E. Gallagher

Without a doubt, motions for extensions of time to file briefs are the most popular pleadings in the appellate courts. It is fitting that the very first legal document that I prepared over 25 years ago was a motion for a 30 day extension to file a brief. My recollection of this momentous event is vivid because the motion was met with a multi-paged response captioned: "Vociferous Objection to Motion for Extension of Time."[1] Of course, because the motion was filed in the Third District Court of Appeal, it was granted. I was on my way to an oft-repeated practice of filing motions for extension of time to file the many briefs I have written to date.

Almost every appellate judge or lawyer has memories of extending crucial deadlines extended through the seeming magic of the Motion for Extension of Time. There is no question that desperate or clever motions open otherwise closed appellate doors. As a law clerk to the Honorable Edward Davis, Justice Raoul G. Cantero remembers one practitioner filing a desperate, but successful, "Pretty Please" amended motion for extension of time after the original motion failed.

Chief Judge Chris Altenbernd of the Second District Court of Appeal recalled one extension request in which the lawyer advised that his dog died and he"just didn't feel like writing the brief." Judge Altenbernd says he granted the motion without any reflection. The judge also commented that the Second District always grants uncontested first motions for extension of time; however, second or third requests are scrutinized closer. Judge Altenbernd was quick to add that any request for a short extension to further edit and shorten the brief would be well-received–however, he is still waiting for such a motion to be filed!

Chief Judge Alan R. Schwartz of the Third District Court of Appeal relates his experience while in private practice of having four separate motions granted by the Fifth Circuit Court of Appeals (before the Eleventh Circuit was created). When the last motion was granted, attorney Schwartz received a personal letter from the Clerk of the Fifth Circuit, Edward Wadsworth, notifying attorney Schwartz that the court instructed him that no further extensions would be granted. When the fourth extension was almost up, Judge Schwartz was, of course, not close to having the brief completed. He was then forced to write back to the Clerk to explain he needed an additional extension because his case was extremely complex, involved undecipherable engineering questions, had a voluminous record and dozens of complicated exhibits. At the close of the letter, Judge Schwartz advised the clerk that the stains at the bottom of the page were from the perspiration and tears he shed over the brief. Judge Schwartz went on to receive two more extensions from the Fifth Circuit.

One of the most amusing incidents at the Third District involved a prominent criminal defense lawyer. After receiving seven extensions, the lawyer was ordered to file the brief by a date certain and admonished that no further extensions would be granted. The day after the brief was finally due the court received yet another motion for extension of time. In the motion, the attorney advised that he was driving to the court at 11:30 the night before when he had a flat tire. Reading between the lines, however, it was not hard to discern that the attorney was not on his way to file the brief, but to file another motion for extension of time, which the court granted.

Having a statewide practice, the writer is very familiar with the extension policies of each court and has been extremely grateful because the appellate courts have always granted extensions requested "due to extenuating circumstances." Of course, attorney Kevin Graham had no trouble obtaining an extension to file his answer brief based on extenuating circumstances. In his four-page motion, Graham finally got to the crux on page three asserting that he had been working on the answer brief on January 5, 2002 and left his office at approximately 4:00 p.m. leaving the pleadings and other papers on his desk, with the expectation that he would return to his office on January 6, 2002 to continue his work on the Answer Brief.

On January 5, 2002, at approximately 5:00 p.m., an airplane struck the Bank of America Plaza, destroying Mr. Graham's office and much of the contents thereof, including a substantial portion of ...[the] file for this matter...

Tom Hall, the Clerk of the Supreme Court of Florida, circulated to various clerks' offices an order released in July of this year. The order resulted after Microsoft Corporation, a defendant in a proceeding brought in the United States District Court for the Western District of Wisconsin, "in a scandalous affront to this court's deadlines," had the "temerity" to file a motion for summary judgment 4 minutes and 27 seconds after the "final" date elapsed for filing the motion (without requesting an extension). In accepting the late filed motion for summary judgment, Magistrate Stephen L. Crocker wrote:

> Microsoft's insouciance so flustered ...[the plaintiff] that nine of its attorneys [all nine listed]...promptly filed a motion to strike the summary judgment motion as untimely. Counsel used bolded italics to make their point, a clear sign of grievous iniquity by one's foe. True, this court did enter an order on June 20, 2003 ordering the parties not to flyspeck each other, but how could such an order apply to a motion filed almost five minutes late? Microsoft's temerity was nothing short of a frontal assault on the precept of punctuality so cherished by and vital to this court.
>
> Wounded though this court may be by Microsoft's four minute and twenty-seven second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed,

to demonstrate the even-handedness of its magnanimity, the court will allow ... [plaintiff] on some future occasion in this case to e-file a motion four minutes and *thirty* seconds late, with supporting documents to follow up to *seventy-two* minutes later.

Mr. Hall also relayed one of his favorite stories about an extension request. A pro se prisoner, who was known for taking advantage of motion's practice, served an eight to nine-page motion in which he detailed exactly what had occupied his time for each day which precluded his filing of the brief. He finally concluded the motion by stating that on Sunday "he took the day off." The supreme court accommodated him by also giving him the day off!

There is, of course, no question that Chief Judge Schwartz is every lawyer's hero when it comes to granting extensions. Never forgetting his need for extensions in private practice, Judge Schwartz has had a consistent practice of automatically granting up to 200 days of extensions unless there is an objection or other extenuating circumstance in which more time may be granted. This is not to complain about the extension practices of other courts–at least not publically.[2] Even the receipt of one extension provides great relief. Would a 12-step program help lawyers who push the appellate courts to their limits in asking for extensions? Absolutely not.

Betsy Ellwanger Gallagher *is a partner with Cole, Scott & Kissane P.A. A resident of the firm's Tampa office, she heads the firm's state court appellate division. Betsy received a B.S. from Cornell University in 1974 and a J.D. from the University of Florida with honors in 1976 where she was Executive Editor of the University of Florida Law Review.*

Endnotes:

[1] Little did I know that the author of the objection would later become published author Paul Levine.

[2] The practices of the Eleventh Circuit Court of Appeals come to mind. However, I am abiding by a lesson taught universally by mothers: if you can't say something nice, don't say anything at all.

Observations of a New Appellate Judge

by Douglas A. Wallace

I began work at the Second District Court of Appeal in June 2003 after having been in private practice for over thirty years. Although I did not devote my practice exclusively to appellate law, I had always handled appeals. Therefore, I was comfortable in my transition to the court because I was already familiar with the appellate rules and the basic principles of appellate practice. Of course, the internal operating procedures of our court were entirely new to me. I was lucky enough to be able to hire a judicial assistant, JoAnn Baker, with many years of experience at the court. Her assistance has been extremely valuable in helping me get started in my new position. My law clerks, Chris Kaiser and Stephanie Zimmerman, have also been quite helpful.

The single thing which I found most surprising at the court is the sheer volume of written material that appellate judges are required to read. Although many cases require extensive treatment, I have developed a new appreciation for the brief that does not exceed twenty pages.

As an appellate judge, applying the various standards of review to cases on a daily basis has enhanced my appreciation of the critical significance of the standards of review to appellate practice. Appellate standards of review range from a broad de novo review to the quite narrow review available in a "second tier" certiorari proceeding. It is not uncommon for us to conclude that we would very likely have reached a different result than the one reached in the trial court, but we affirm appeals or deny petitions nevertheless because of the applicable standard of review. I believe appellate practitioners should pay particular attention to the applicable standard of review not only in arguing a case but also in making the initial decision concerning whether to seek review of a trial court decision.

As an attorney waiting for a decision, I often wondered why the appellate court did not issue its opinion more quickly. Now that I am on the appellate bench, I can offer two reasons. The first is based on our case load. During the last fiscal year, our court disposed of 6,327 filings. Our high case load means that some opinions may not be released as quickly as we might wish. Second, opinions are drafted and redrafted for style and content before they are released. They are also checked repeatedly for grammar, punctuation, and citation format. Once the opinion leaves the office of the assigned judge, it must also circulate to the two other judges on the panel. There the opinion will again be proof-read and checked. If the other members of the panel suggest any substantive changes, the opinion may return to the office of the assigned judge before it is released. The objective in every case is to produce a well-reasoned, well-written, and carefully edited opinion. To fulfill this objective requires a substantial amount of time from the judges and their staffs.

Attorneys often wonder about the importance of oral argument to the court. I have found most oral arguments to be helpful. Oral arguments give the court an opportunity to resolve questions about the record, to test the lawyers' arguments, and to determine what issues may be dispositive of the case. As appellate judges, the bulk of our work is done in private; we generally have no direct contact with the litigants or their attorneys. Oral argument is the only opportunity we have as appellate judges for a "give and take" with the lawyers. Oral argument also provides a public forum at which both the attorneys and their clients can see the members of the court as real people who are engaged in attempting to resolve controversies based upon the facts and the law.

This is a wonderful job. I have found my service on the court to date to be both enjoyable and professionally rewarding.

Justice Kenneth Bell and Family Settle in Tallahassee

by Siobhan Helene Shea, Editor

JUSTICE BELL

Justice Kenneth Bell commuted from Pensacola since taking the bench January 7, 2003, until June this year, when he and his family finally settled into a home in Tallahassee. "It took awhile to find the right house" says Justice Bell, who also decided with wife Vicky to let the children finish their school year before moving.

Vicky Bell was busy, unpacking and getting active in the church and kids' new schools, while Justice Bell acclimated to his life as the newest Justice on the Supreme Court of Florida. Married since 1983, Justice Bell and his wife have four children. Oldest son, Brad, a musician who plays trombone and sings, started early admission at FSU. Seventeen year-old Brad graduated with an AA degree as a junior in high school. Comments Justice Bell, "I have a tough act to follow, between my oldest son and my father." Grace, who is thirteen, plays piano and basketball, and eleven year-old Stephanie enjoys volleyball and tennis. Youngest son Reed likes flag football. They were all active in the Pensacola Children's Chorus, and are among twenty-two grandchildren of the Bell family.

"The hardest part was leaving the rest of my family," says Justice Bell. He's one of six siblings, from a Pensacola family that dates back seven generations, till 1819, when Florida still was a Spanish colony. Justice Bell is the first justice from Pensacola in a century, the first from west of Tallahassee since 1917.

Justice Bell says, "My dad is my hero." Justice Bell's father is a community pediatrician who founded a children's hospital. His grandfather was the Clerk of Court. All his siblings, except one brother who moved to Mobile, Alabama, all live in Escambia.

Justice Bell started high school at Booker T. Washington High School in Pensacola in 1970, the year after it was integrated from an all black school in 1969. "It was kind of like the movie *Remember the Titans*, only reversed." The young Bell played football as a linebacker and fullback and graduated in 1974. He went on to play football at Davidson College in North Carolina, from which he graduated with a Bachelor of Arts degree in history. The college triangle area of North Carolina was familiar to Bell, who had spent some of his childhood there when his father and then older brother, Bill were at Duke University's School of Medicine.

Justice Bell went on to law school at Florida State University College of Law, and graduated cum laude in 1982. He is the first graduate of Florida State University College of Law to serve on the Court.

From law school, Justice Bell entered private practice, doing civil law with the firm Beggs and Lane in Pensacola for nine years, until he became a circuit court judge in 1991. In August of 1989, Justice Bell became the first attorney in Escambia and Santa Rosa counties to be designated by The Florida Bar as a Board Certified Real Estate Attorney. While in private practice, Justice Bell was an active member of the Real Property, Probate and Trust Law Sections of both The Florida Bar and the American Bar Association. He was also active in the Escambia-Santa Rosa Bar Association and a member of the American Judicature Society. His private practice focused mostly on commercial and residential real estate. He lectured at both state and local continuing education courses on tenancies, real estate contracts, leasing, commercial real estate financing, mechanic's lien law, attorney-realtor relationships, and other matters.

The only justice on the Court with prior experience as a trial judge, Justice Bell served as a circuit court judge for twelve years. In January of 1991, Justice Bell became the youngest circuit judge in the history of the First Judicial Circuit of Florida. As a trial judge, Justice Bell presided over a general jurisdiction division in Milton for the first 10 years. In Milton, Justice Bell presided over criminal, juvenile delinquency, probate, family, and civil cases. Then in Escambia he presided as circuit court judge for two years over criminal and general civil cases (except family cases). He handled more than 27,500 circuit court cases in his 12 years on the circuit bench. He also served as an administrative judge and on various circuit committees.

Throughout his service on the trial bench, Justice Bell was actively involved in improving the justice process. Justice Bell served as a Master Judge in the Pensacola Chapter of the American Inns of Court for four years. He also was member of the Florida Delphi Study Commission-Judges Committee and served on the Supreme Court's Circuit Committee on Professionalism. Justice Bell was a member of the Board of Directors of Justice Fellowship, having served on the Executive Committee and as Vice President. Justice Bell has also emphasized improving the judicial process as it impacted children. For example, he opened the first "child witness room" in the circuit and catalyzed the opening of the only PACE Center For Girls in the First Circuit. He worked with local officials to establish a juvenile boot camp program and to develop system-wide school violence prevention programs. He also regularly trained guardian ad litem volunteers.

Justice Bell has also been active in civic affairs. As a member of the Pensacola Area Chamber of Commerce, Justice Bell was an organizing member of the Committee of 100. He was the founding President of the Board of Directors for the Friends of Children's Hospital at Sacred Heart, Inc. and a member of the Sacred Heart Foundation Board of Directors. He was also a member of the Leadership Pensacola and served on the Board of Directors of Liberty Christian College in Pensacola. Justice Bell was General Counsel for the

Waterfront Rescue Mission and served on its Board of Directors Justice Bell also served on the Board of Directors of Escambia County 4-H Foundation.

As though being an active attorney, father, and community leader wasn't enough, Justice Bell also did his part to improve the lives of people in foreign countries. He was the Founding President and Board Member of Yan-Bian Chinese-Korean Technical University, the first private university in mainland China since the communist revolution. Justice Bell also served as a Board Member and President of Proclamation International, which assisted Ugandans in rebuilding their nation after the fall of Idi Amin.

In 2000, Justice Bell received the "Judicial Distinguished Service Award" presented by the Florida Council on Crime and Delinquency, Chapter VI. In 1996, he was awarded the "God in Government Award" presented by the Cantonment-Ensley Ministerial Association. Justice Bell also received the "Above and Beyond Award" presented by the SED Network (the Multi-Agency Network for Severely Emotionally Disturbed Children) for "dedication and commitment in service to severely emotionally disturbed children and their families" in 1995. Justice Bell was awarded a Certificate of Appreciation from the Florida Association of School Resource Officers and the Santa Rosa County Sheriff for "Continuous Assistance and Support to Santa Rosa County's School Resource and Dare Officers" for the years 1994 and 1995.

Before moving to Tallahassee, Justice Bell was an elder and active member of a church in Pensacola. He and his family are now active members of a local church in Tallahassee.


SIOBAHN SHEA

Siobhan Helene Shea *is an AV rated appellate lawyer in Palm Beach County, in addition to serving as Editor of* The Record, *she is a Vice-Chair of the Appellate Court Rules Committee of The Florida Bar.*

BUSINESS AS USUAL
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For the uninitiated, workers' compensation appeals already contain a few pitfalls. Florida Rule of Appellate Procedure 9.180 (2003), the rule outlining appellate procedure in workers' compensation matters governs. Any appeal of the decision of a Judge of Compensation Claims[2] ("JCC") must be made to the First District Court of Appeal regardless of the venue of the case.[3]

As in writing any appellate brief, the practitioner must determine the applicable standard of review. The typical standards of review apply. For pure questions of law, the appellate standard of review is *de novo*.[4] Entitlement to an attorney's fee and the amount of a fee is reviewed for an "abuse of discretion."[5]

If a JCC invokes the "logical cause doctrine," for instance, the case may not simply be governed by the competent substantial evidence standard.[7] Also, some case law indicates that medical testimony received by the JCC at trial via deposition as opposed to live examination is subject to *de novo* review.[8] Other than these exceptions, the competent substantial evidence standard means the JCC decision will be affirmed if supported by competent, substantial evidence. Under *Chavarria* a case may not be retried on appeal, and a ruling that is supported by competent substantial evidence will be upheld even though there may be some persuasive evidence to the contrary. The resolution of conflicts in the evidence falls within the authority of the JCC.

Chavarria is now **the** case workers' compensation appellate practitioners should focus on when discussing the competent, substantial evidence standard. In *Chavarria*, the First District's *en banc* opinion fully examines the history and the current meaning of the competent substantial evidence standard of review. It's a tough standard for Appellants to meet. The holding is essentially this: if a JCC accepts the testimony of a doctor or group of doctors over conflicting testimony by another doctor or group of doctors, she need not explain why. As long an Appellant cannot prove that a JCC "overlooked or ignored" the rejected testimony, a mere finding of "ultimate fact" supported by competent substantial evidence in the record shall suffice.

The relevant facts of *Chavarria* are relatively simple. The JCC resolved a conflict between the testimony of two psychiatrists regarding a claimant's level of psychiatric impairment and the resulting restrictions on her ability to return to work. The claimant's treating psychiatrist assigned her a 10% permanent psychiatric impairment rating and assigned severe work restrictions. A second psychiatrist, an independent medical examiner, assigned a 5% permanent impairment rating and only mild work restrictions. The JCC rejected the treating psychiatrist's opinions over those of the independent medical examiner without explanation as to why the second psychiatrist had been deemed more persuasive.

The claimant appealed the adverse ruling, contending the JCC failed to express adequate reasons as to why he accepted the opinion of one psychiatrist over the other. The First District affirmed the JCC and took the occasion to clarify the competent substantial evidence standard of review. The *Chavarria* court traced the history of the competent substantial evidence test from the 1950s, a time when Deputy Commissioners (predecessors of the JCCs) had to justify their decisions in sufficient detail to show the basis for their decisions.[9] The court recognized a legislative and judicial trend of increasing deference toward the JCC's and their predecessors during the 1970s.[10]

Buro v. Dino's Southland Meats, 354 So.2d 874 (Fla. 1978), stated that a JCC need not explain precisely why she accepts some medical opinions while rejecting other conflicting medical opinions as long as she does not "overlook" or "ignore" the conflicting opinions. The *Chavarria* court candidly admitted that the competent substantial evidence standard, as announced in *Buro*, "should not have caused us difficulty, but it has."[11] The *Chavarria* court restated the CSE standard, holding that a judge need merely make findings of "ultimate fact," and that in cases involving a dispute in expert or medical testimony, a judge's decision to accept the testimony of one expert or doctor over that of another, if supported by CSE, must be affirmed unless the reviewing court can say that the judge "ignored or overlooked the rejected opinion testimony.[12] In doing so, the Court overruled or disapproved a line of cases, mainly from the 1980s, that allowed for reversal of JCCs who chose between medical experts where the justification for the choice had not been, in the First District's eyes, "apparent from the record." Such cases had provided numerous departures from the *Buro* rule that threatened to swallow up the "no explanation needed" rule of deference. However, the *Chavarria* court did muddy the waters again by stating that it was "obvious" that a "JCC who is thorough enough to note reasons for acceptance of certain medical testimony will make clear that he or she has not simply ignored contrary opinions."[13] One can foresee the opinion that reverses a JCC because the JCC's failure to note her "reasons" for acceptance of a doctor's testimony provided evidence that she "obviously" overlooked or ignored such testimony.

Judge Ervin alone out of fifteen judges dissented from the restatement (or re-invention) of the competent substantial evidence standard, stating that the majority's opinion "seems to say that an order of a JCC will be affirmed if it is permitted by any view of the evidence and its permissible inferences."[14] Also, all opinions "will be upheld unless it appears that the JCC 'overlooked or ignored' contrary evidence in the record."[15] Judge Ervin questioned the court's authority to adopt such a standard, calling it a "profound and substantial departure" from the competent substantial evidence review standard.[16] Judge Ervin stated that the majority ignored the mandates of the Florida Supreme Court and employed existing case law to "bring about the result-oriented review process it now champions."[17]

In the wake of *Chavarria*, one wonders, however, how simple the "clarified" standard of review is. We know that a JCC need not explain why some medical testimony is accepted, while conflicting medical testimony is rejected. A JCC, however, will be reversed if the court determines that no "competent substantial evidence" supports the JCC's opinion. While the First District condemned its own tendency in the 1980s to second-guess JCCs by reversing findings of medical fact where the reason for choosing the testimony of one doctor over another was not "apparent from the record," the court is still free to reverse findings by JCCs that are not supported by competent substantial evidence. Is there really a difference? Is stating that there is no "apparent basis in the record" for a medical finding not the same thing as saying the JCC's finding was not "competent?" In his stinging dissent to the majority opinion in *Chavarria*, Judge Ervin provided help in defining the terms "competent" and "substantial." "Competent" evidence is evidence that accords with logic and reason.[18] The word "substantial" is qualitative rather than quantitative in nature, and is best defined by what the Court does *not* consider to be substantial. "Surmise, conjecture, or speculation have been held not to be substantial evidence."[19] Thus, an appellate panel that is so inclined might merely reverse a JCC who does not "overlook" or "ignore" a doctor's testimony, but whose finding nevertheless strikes the court as lacking in logic or reason.

Indeed, the First District cited *Chavarria* only 18 days after the case had been issued. In *Interim Services v. Levy*, 843 So.2d 915 (Fla. 1st DCA 2003), the First District cited *Chavarria*, but reversed the JCC because the JCC's finding that there was a causal connection between a claimant's injury and subsequent wage loss was not supported by competent substantial evidence. Oddly, the *Levy* court seemed to defer very little to the JCC in practice, reciting facts that would seem to provide CSE to support the JCC's holding. The facts involved a claimant who was injured, but who continued to work for her employer until she relocated for personal reasons from Florida to North Carolina. The claimant sought work at a North Carolina branch of her former employer, but she was not hired. The JCC found a causal connection between the claimant's injury and her subsequent wage loss, and awarded temporary partial disability ("TPD") benefits. The *Levy* court reversed the JCC for failing to consider the "totality of the circumstances."[20] The Court noted that to establish a causal connection between an injury and subsequent wage loss, a claimant "can" show that her capabilities preclude adequate performance of her prior job.[21] The *Levy* court seemed to read the word "can" as a "must," reversing the JCC because there had been no showing that Claimant could *not* perform her prior job and because the record showed claimant could have worked her job, but had instead voluntarily ended her employment to relocate for personal reasons.

Stewart v. CRS Rinker Materials Corp., 855 So. 2d 1173 (Fla. 1st DCA 2003) reversed a JCC for denying TPD benefits to claimant for lack of causal connection between injury and wage loss where the claimant relocated for personal reasons, but where the JCC did not expressly find that claimant relocated because of an "improper motivation" such as a desire to avoid work. *Chavarria* will not insure that JCCs will never be reversed on competent substantial evidence grounds.

However, in *Sewell v. Dove Healthcare*, 857 So. 2d 265 (Fla. 1st DCA 2003), the only other case to cite *Chavarria* thus far, the court may have provided fodder for critics of the *Chavarria* decision who feel that deference to the JCC has gone too far. The *Sewell* court affirmed a JCC who denied benefits based on a psychiatrist's opinion that a Claimant's psychiatric problems were unrelated to her work accident. Judge Browning strongly dissented, noting that the JCC was due deference under the *Chavarria* competent substantial evidence standard, but that the psychiatrist's opin-

ions adopted by the JCC were based upon facts that were ultimately rejected both by the JCC and by stipulations of the parties. Judge Browning argued that such deference to "inherently incredible and improbable" testimony does not constitute competent substantial evidence.[22] Judge Browning called the *Sewell* decision a "misapplication of the standard of appellate review," and complained that such an application of the principle "removes logic and reason from the legal process and thereby relegates the system to one no better than one based upon chance." [23] Nevertheless, a majority of the 3-judge panel affirmed the order of the JCC.

Thus, only eight months after *Chavarria*, an opinion meant to clarify the CSE standard, it has already been cited both to overturn a seemingly routine and well founded opinion of a JCC and to affirm another JCC's opinion that seems internally inconsistent. *Chavarria* may have raised more questions than it answered for the workers' compensation appellate practitioner.

Endnotes:

[1] *Chavarria v. Selugal Clothing, Inc*, 840 So.2d 1071 (Fla. 1st DCA 2003)(en banc)
[2] JCCs have exclusive jurisdiction to hear workers' compensation matters. JCCs fall under the Department of Management Services, Division of Administrative Hearings, but are not Administrative Law Judges.
[3]. *See* § 440.271, Fla. Stat. (2003).
[4] *Agency For Health Care Admin. v. Wilson*, 782 So.2d 977, 978 (Fla. 1st DCA 2001).
[5] *Alderman v. Florida Plastering*, 805 So.2d 1097, 1099 (Fla. 1st DCA 2002)[6] Nearly all workers' compensation appeals are governed by the "competent substantial evidence" standard of review, with a few minor exceptions.
[6] Any practitioner involved in an appeal of the amount of an attorney fee awarded by the JCC should closely examine *Alderman* for standards to which the JCC must adhere. Recent statutory amendments, however, may mean that *Alderman* has no application to fees awarded in cases involving dates of accident suffered on or after October 1, 2003.
[7] *Manley v. Bennett's Truck Equipment*, 506 So.2d 1145, 1146 (Fla. 1st DCA 1987).
[8] *See generally Bass v. General Motors Corp.*, 637 So.2d 304 (Fla 1 st DCA 1994)(*citing Hubbell v. Triple J. of Lee County*, 590 So.2d 1084 (Fla. 1st DCA 1991).
[9] *See Chavarria*, 840 So. 2d 1071, 1075-76 (*citing Ball v. Mann*, 75 So. 2d 758 (Fla. 1954).
[10] *Chavarria*, 840 So.2d at 1076-78 (*citing Pierce v. Piper Aircraft Corp*., 279 So.2d 281 (Fla 1973).
[11] *Id.*
[12] *Chavarria*, 840 So.2d at 1079.
[13] *Chavarria*, 840 So.2d at 1082.
[14] *Chavarria*, 840 So. 2d at 1082 (J. Ervin, dissenting).
[15] *Id.*
[16] *Chavarria*, 840 So. 2d at 1083 (J. Ervin, dissenting).
[17] *Chavarria*, 840
[18] *Chavarria*, 840 So.2d at 1083 (J. Ervin, dissenting)(*citing Andrews v. C.B.S. Division, Maule Industries*, 118 So.2d 206, 210-11).
[19] *Chavarria*, 840 So. 2d at 1087 (*citing Florida Rate Conference v. Florida Railroad & Public Utiltities Commission*, 108 So. 2d 601, 607 (Fla. 1959)).
[20] *Levy*, 843 So.2d at 916.
[21] *Id.*
[22] *Sewell* at 4 (*citing Shaw v. Shaw*, 334 So.2d 13, 17 (Fla. 1976)).
[23] *Id.*

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300