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Florida Workmen's Compensation Law (Second Edition)

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BOOK REVIEW

FLORIDA WORKMEN'S COMPENSATION LAW. Second Edition. By Leo & Jonathan Alpert. Atlanta, Ga.: Harrison Co. 1975. Pp. xxi, 886. $55.00.

Reviewed by Stephen Marc Slepin[1]

> Some books are to be tasted, others to be swallowed, and some few to be chewed and digested.
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> —Francis Bacon

Like the Bachs, the Dumases, the Strausses, and other fathers and sons, the Alperts—Jonathan and his late father, Leo (who died amidst completion of his work on this book)—are a distinguished duo responsible from 1966 to 1975 (when Jon joined his dad's effort) for thoroughly chewy and digestible books.

I teethed on the senior Alpert's book in 1967 and, as an erstwhile philosophy instructor, found and still find it an exceptionally readable law book pleasantly atypical in its felicity and clarity. *La clarte est las politesse*—and Leo Alpert was an exceptionally polite lawyer-author. But Leo Alpert was more than a conducive medium of scholarship. He was very much a critic: one who appreciated the importance of workmen's compensation in our society, but who apprehended its occasionality—it fragility and transience.[2]

When, in early 1971, Florida's workmen's compensation jurisprudence and adjudicatory enterprise entered upon a period of pervasive reformation, Leo Alpert expressed to this writer his concern that the formalization attendant to these reforms threatened the value of the prevailing system. That "system," of course, neither fish nor fowl, was a gallimaufry of ad hoc and ill-assorted procedures and functions, and in fact had already perished of institutional arteriosclerosis—leaving this author in 1971 to liken it to the proverbial McCarthy siblings:

> Oh, McCarthy was dead, but his brother did'n know it;
> His brother was dead, but McCarthy did'n know it;
> They both of them slept in the very same bed—
> But not either one knew that the other was dead.

But by June 1972, Chief Justice Roberts, in his "State of the Judiciary" address to The Florida Bar, could describe the Industrial Re-

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1. Partner, Kaplin, Schwartz & Slepin; Chairman, Workmen's Compensation Law Section, The Florida Bar. Formerly Chairman, Florida Industrial Relations Commission.

2. *See* Alpert, *Preface to First Edition* in L. ALPERT & J. ALPERT, FLORIDA'S WORKMEN'S COMPENSATION LAW (2d ed. 1975).

lations Commission—then and now the state's only judicially qualified appeals tribunal—as the "Court of Workmen's Compensation Appeals."[3] And by 1975, the state had established its administrative law judicial system, complete with decisional law service. Exfoliating from informal administrative reforms by Governor Askew and Lt. Governor Adams at the onset of 1971, and ratified by the 1972 session and later by the 1974 session of the legislature, this administrative law reform had emerged from a workmen's compensation system which was once the poor step-cousin of the bar. The butterfly had left the cocoon.[4]

But even though the Judges of Industrial Claims, the state's administrative law judges, have finally been recognized as state officers, like circuit judges,[5] and the commission has become an appellate court,[6] the Alperts' book, alas, continues to reflect more past than present. And for that reason, it does not divulge the "real," the operational or everyday, law of workmen's compensation. It seems curiously bound to pre-1969 institutional realities and to those occasional juristic lightning bolts which emanate from a supreme court less and less willing to consider or pronounce upon workmen's compensation law.

The *fons et origo malorum* is to be found in the preface to the second edition, which confesses exclusive reliance upon supreme court decisions and promises to limn commission decisions in future supplements and editions. This goes to explain much of the book's desuetude—partially a product, I suspect, of Leo Alpert's resistence to the reforms heretofore discussed, and partially a result of his passing before completion of this book, requiring his brilliant son to make haste in its completion—but it neither explains nor excuses other notable gaffes. For example, there is provided an application for claim directed to "Florida Industrial Commission, Workmen's Compensation Division" —which has been simply wrong for six years [p. 528]. Too, the forms in Chapter 31 erroneously direct motions and other pleadings to the "Division of Labor, Bureau of Workmen's Compensation," whereas the correct form is:[7]

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3. Roberts, *The State of the Judiciary*, 46 FLA. B.J. 457, 459 (1972). *See* Slepin, *Florida Labor Law: Administrative Law Paradigm . . . and Problem*, 48 FLA. B.J. 526 (1974).

4. *See* Slepin, *Introduction* to THE FLORIDA BAR, FLORIDA WORKMEN'S COMPENSATION PRACTICE, at 1-3 (2d ed. 1975).

5. Pierce v. Piper Aircraft Corp., 279 So. 2d 281, 284 (Fla. 1973).

6. Scholastic Systems, Inc. v. LeLoup, 307 So. 2d 166 (Fla. 1974).

7. *See, e.g.*, Southern Vault Co. v. Washington, IRC Order 2-2810 (June 26, 1975); Busbee Crate Co. v. Terry, IRC Order 2-2644 (*S*) (Jan. 17, 1975); THE FLORIDA BAR, *supra* note 4, at 103-28.

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The book also missed the seminal 1975 legislative changes of nomenclature throughout Chapter 440, which relate to the appellate court functions of the Industrial Relations Commission.[8]

The distinct disvalue of continuing to omit commission decisions, or even selected decisions of Judges of Industrial Claims, is great.[9] Imagine a Southern Second advance sheet or volume without district court of appeal opinions, and the jurisprudential anemia of this volume is thereby suggested. For example, and they may be either the meanest or the most important examples, several general legal propositions in the book are either wrong or are correct only in the most mischievous sense—mischievous because, as St. Thomas Aquinas allowed, a line not perfectly directed towards a point will actually go further away from it as it comes nearer to it.

The Alpert book refers to *John Gaul Construction Co. v. Harbin*,[10] as an "exciting" decision applying Florida's erstwhile Administrative Procedure Act to workmen's compensation, and then categorically declares the new A.P.A. "now held not applicable" since the commission is judicial rather than administrative [pp. 572-73]. In fact, *John Gaul* was founded on a thoroughly wrong and unsupportable rationale from which the court retreated sub silentio in *International Brotherhood of Electrical Workers v. Albury*.[11] As to the applicability *vel non* of the A.P.A. to the workmen's compensation enterprise—which this writer has elsewhere described[12] as resembling nothing so much as the application of the principles of mammalian obstetrics to the hatching habits of turtles—Mr. Alpert's certitude is not reasonably derivable from *Scholastic Systems, Inc. v. LeLoup*,[13] which did not hold forth on the point, but went only to laying the predicate for a test yet to come.[14]

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8. Fla. Laws 1975, ch. 75-209; Fla. Laws 1975, ch. 75-237.

9. *See* Band v. American Hosp. Supply, IRC Order 2-2119, *cert. denied*, 271 So. 2d 140 (Fla. 1972).

10. 247 So. 2d 33 (Fla. 1971).

11. 299 So. 2d 581 (Fla. 1974). *See also* Albury v. International Bhd. of Elec. Workers, IRC Order 2-2231 (Oct. 4, 1973).

12. Memorandum from Steven Marc Slepin to Law Revision Comm'n, 1973, on file in Florida State Archives.

13. 307 So. 2d 166 (Fla. 1974).

14. In Mahler v. Lauderdale Lakes Nat'l Bank, Case No. 46,602 (Fla., Sept. 24, 1975), the supreme court again suggests applicability of the A.P.A. The opinion was written by Mr. Justice England.

It is noteworthy that Mr. Justice England was a reporter of the Law Revision Commission, and in that capacity authored the new Administrative Procedure Act which has yet to be tested in respect to its applicability *vel non* to our workmen's compensation jurisprudence.

The Alpert book correctly opines that a Judge of Industrial Claims may exercise jurisdiction for 20 days after entry of his order, absent an appeal, but further opines that "there are no decisions on the point," which is wrong [p. 605]. There are decisions by the commission,[15] but the book, of course, discloses no IRC decisions. Thus it transmutes incorrect statements into correct ones by restrictively defining its own universe of discourse.

In respect of modification [ch. 27], an exception to res judicata and a signally important element of our law, the absence of commission orders deprives the practitioner of the useful information that, *inter alia,* a "change of condition" supportive of modification (by either the claimant or the employer) can be evidenced by "wage earning capacity."[16] Further, we are not told that the condition which is sought to be modified, or the elements which would warrant modification, may well be denominated "pain."[17] Moreover, and this may be as interesting in the future as it has upon occasion been in the past, it is the entire "case," rather than the prior order alone, which is to be reviewed by the court upon modification.[18]

Elucidation of the Special Disability Trust Fund's role necessarily requires explanation of the cutting of the Gordian Knot by which the Fund and apportionment were tied. *Fleet Transport Co. v. Special Disability Trust Fund,*[19] which attempted to sever the strands of the knot, albeit without complete success, isn't even mentioned. But, then, Fund law remains, as it long has been, a puzzlement the repeated explanations of which are productive at best of strabismus.[20]

Apart from the errors or failures hereinbefore noted, Jonathan Alpert is a brilliant intellect, who has inherited and perfected a commendable style, and whose next volume of this established work should be a wonder to behold and a boon to the practice of any Florida lawyer.

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15. *E.g.,* Matthews v. Seaboard Properties, Inc., IRC Order 2-1972 (April 12, 1971), *cert. denied,* 257 So. 2d 258 (Fla. 1971).

16. Dupont Hotel v. Shiffman, IRC Order 2-2326 (Sept. 24, 1973), *cert. denied,* 291 So. 2d 5 (Fla. 1974).

17. Florida Sanitarium & Hosp. v. Hanna, IRC Order 2-2313 (June 5, 1973).

18. *Id.* at 6-7.

19. IRC Order 2-2133 (Dec. 7, 1972), *aff'd,* 283 So. 2d 31 (Fla. 1973).

20. It simply is not so, as asserted at p. 471, that medical benefits are not reimbursable by the Special Disability Trust Fund. Only temporary medical benefits are not reimbursable. *See* Fleet Transport Co. v. Special Disability Trust Fund, 283 So. 2d 31 (Fla. 1973).

Withal, the Alperts' *Florida Workmen's Compensation Law* remains, in Baconian terms, a book to be chewed and digested.