WALTON LANTAFF SCHROEDER & CARSON LLP

SINCE 1934 YOUR PARTNERS IN RISK MANAGEMENT

MIAMI
9350 S. Dixie Hwy
10th Floor
Miami, FL 33156
Tel: 305-671-1300
Fax: 305-670-7065

FT LAUDERDALE
110 E. Broward Blvd.
Suite 2000
Ft Lauderdale, FL
33301
Tel: 954-463-8456
Fax: 954-763-6294

ORLANDO
200 S. Orange Ave.
Suite 1575
Orlando, FL 32801
Tel: 407-425-3250
Fax: 407-425-3255

PENSACOLA*
21 East Garden Street
Pensacola, FL 32501
Tel: 850-262-0214
Fax: 850-701-1786
* Satellite Office

TALLAHASSEE
2074 Centre Pointe
Blvd
Suite 100
Tallahassee, FL 32308
Tel: 850-701-1781
Fax: 850-701-1786

TAMPA
Island Center,
2701 N. Rocky Point
Drive, Suite 225,
Tampa, FL 33607
Tel: 813-775-2375
Fax: 813-775-2385

WEST PALM BEACH
1700 Palm Beach
Lakes Blvd
7th Floor
West Palm Beach, FL
33401
Tel: 561-689-6700
Fax: 561-689-2647

ON APPEAL

Walton Lantaff prevails for second time in highly litigated Palm Beach PTD claim

No catastrophic injury; no loss of earning capacity.

Michele Bachoon, Esq.

Gregg Margre, Esq.

Senior Partner **Gregg Margre** and Associate, **Michele Bachoon**, attorneys in the firm's West Palm Beach Office, prevailed before the Judge of Compensation Claims in a Permanent Total Disability ("PTD") claim which was previously litigated. The Claimant, a bus driver, was injured in three separate workers' compensation accidents on September 26, 1996, August 21, 2001, and November 10, 2004.

The Claimant continued to work for the Employer following her accidents and retired on June 1, 2007, due to medical problems unrelated to her workers' compensation accidents. To wit, she was legally

PALM BEACH continues on page 2

SOUTH FLORIDA

Working all around Florida...

working in the Caribbean...

and working on auto repairs.

Just how injured?

Claimed L2 back injury didn't prevent work, work and more *work*

Allison Chittem Hartnett and **Lourdes C. de Armas-Suarez** obtained a favorable ruling on behalf of WLSC's Employer/Carrier client, defeating a workers' compensation permanent and total disability claim. The Claimant in this case was working as a mezzanine installer when he suffered a compensable fall from a mezzanine and injured his back.

Medical treatment was authorized and the Claimant was diagnosed with a L2 compression fracture. Back surgery was performed and the Claimant was placed at maximum medical improvement approximately one year thereafter. Subsequently, the Claimant treated with a psychiatrist, Dr. Diaz, and a physiatrist, Dr. Tannenbaum. After previously filing and dismissing Petitions for Benefits twice before, the Claimant filed a third claim for Permanent and Total Disability benefits asserting that based on his physical and vocational limitations, he was unable to work in a sedentary capacity within fifty miles of his home. The defense theory was

HOW INJURED? continues on page 3

FIRST DISTRICT COURT OF APPEALS

E/C Proves Claimant Retained Earning Capacity

PALM BEACH from page 1

blind and no longer capable of driving a bus.

The Claimant filed a Petition for Benefits requesting PTD as a result of each accident. On August 26, 2009 the parties attended the first trial on the Claimant's claim for PTD and PTD Supplemental benefits from June 1, 2007 to the present (2009). Her claim was denied by Order on October 12, 2009. Judge of Compensation Claims, Shelley Punancy, found the Claimant failed to prove she is unable to engage in any substantial gainful activity by reason of any physical impairment resulting from her compensable work injuries, and that the Employer/Carrier had sustained its burden to show, by conclusive proof, the Claimant retained a substantial earning capacity. The Claimant appealed and the Order was affirmed by the First DCA on September 28, 2010.

On February 23, 2012 the Claimant filed her second Petition for Benefits requesting PTD and PTD Supplemental benefits; this time from February 21, 2012 to the present and continuing. On November 5, 2012 the parties attended a second trial on the Claimant's claim for PTD.

The Claimant argued that she turned sixty-five (65) years old and as such, according to Social Security's Medical-vocational Guidelines ("the Grid"), she was now disabled. The Grid is part of a five step analysis that the Social Security Administration undertakes in determining disability. According to the Claimant, she was of advanced age with limited education and non-transferable skills. As such, she "grid out" and is disabled.

Margre argued that there was no catastrophic injury and no indication of PTD; there was conclusive proof of a substantial earning capacity and ability to engage in substantial gainful activity; and that any disability is due to unrelated medical conditions. Margre proved the Claimant's medical treatment and condition remained stable since 2009. Her doctors testified that her restrictions and capabilities were the same as in 2009 and that nothing changed with regard to her condition.

Additionally, Margre argued successfully that because the Claimant had non-exertional limitations, reliance on the Grid was inappropriate and it should only be used as an advisory tool. He presented the Judge with evidence via testimony from a vocational expert and the Claimant's treating physicians that she was capable of performing substantial gainful activity at a sedentary to light duty level. The JCC entered a Final Compensation Order on November 29, 2012, denying the claim for PTD for the second time. The basis for the denial was that the Claimant failed to prove that she was unable to engage in any substantial gainful activity by reason of her worker's compensation accident and that the Employer/Carrier sustained its burden to show, by conclusive proof, that Claimant has a substantial earning capacity. The Claimant has since appealed and the firm's appellate expert, Partner **Michele Ready** has assisted with the appellate proceedings. The firm is confident that the JCC's order will once again be upheld.

— Michele Bachoon, Associate

LIABILITY

Duo Defends Insurer Against Non-Disclosure of Defective Drywall

Judge Agrees Insurer Not Liable on Owner's Misrepresentations

John P. Joy, Esq.

Kelly Corcoran, Esq.

Senior Partner **John Joy** (Ft. Laud.) and Junior Partner **Kelly Corcoran** (WPB) recently obtained a Final Declaratory Judgment on behalf of the insurer in an action to determine insurance coverage regarding the existence of Chinese drywall in a home.

The claims against the insured were related to representations by the insured during the sale of a home regarding the non-existence of Chinese drywall (even though it was alleged the insured knew Chinese drywall was present). The insurer defended the insured in the underlying tort suit, and simultaneously filed a complaint for declaratory relief seeking a ruling that it had no duty under the policy to defend or indemnify the insured with regard to the suit based on the intentional act and business pursuits exclusions.

Judge Lucy Brown ruled in favor of the insurer, finding that the claims against the insured were that the insured intentionally made misrepresentations regarding the non-existence of Chinese drywall and made the representations in the course and scope of his occupation triggering the intentional act and business pursuits exclusions.

— Kelly Corcoran, Partner

MIAMI-DADE

Judge agrees with WLSC: Medical, Vocational Evidence Rules Out PTD Claim

HOW INJURED? from page 1

that the Claimant had shown the ability to work throughout the years and that surveillance called into question his credibility.

During the three day workers' compensation trial, medical and vocational evidence was presented to the Court from both the Claimant and the Defendants. With regard to the Claimant's psychological state, the treating psychiatrist, Dr. Diaz, testified that the Claimant was capable of working on a full duty work status with limitations on pace and concentration.

Allison Chittem Hartnett, Esq.

Lourdes de Armas-Suarez, Esq.

As for the Claimant's physical condition, the treating physiatrist, Dr. Tannenbaum, opined that the Claimant's work restrictions included a 20 to 30 pound lifting restriction, and allowance of stretching every hour or two. During Dr. Tannenbaum's deposition, the doctor was presented with a surveillance video of the Claimant. Dr. Tannenbaum did not believe that the contents of the surveillance video was consistent with the manner in which the Claimant presented himself within the doctor's office.

Dr. Tannenbaum also opined that the Claimant had not been fully candid with him as to the Claimant's abilities. Vocational experts' opinions were also presented to the Court on behalf of both the Claimant and the Employer/Carrier.

Walton Lantaff's effective defense helped the E/C prove that the Claimant conducted business around Florida, fixed cars and even flew to Turks and Caicos for business.

In addition, Mrs. Hartnett and Mrs. de Armas-Suarez submitted evidence which ultimately established that the Plaintiffs' had performed various jobs in a supervisory capacity after his work accident, including a job that required him to fly to the Turks and Caicos Islands, a job that required him to travel to other counties in Florida, and a job performing work in an automobile repair shop.

Evidence on behalf of the Employer/Carrier was also presented that the Claimant had his own business and had physiologically moved around sufficiently to work for his own business.

After the conclusion of the trial, the Court issued a comprehensive Final Compensation Order stating that the medical and vocational evidence warranted a denial of the Claimant's permanent total disability claim. The Judge found that the medical evidence demonstrated that the Claimant could at least work in a sedentary capacity within fifty miles from his home.

The Judge also ruled that the evidence demonstrated that the Claimant was able to perform several jobs, could communicate in English, and worked as a supervisor post-accident and surgery.

The workers' compensation Judge also found the Employer/Carrier's vocational expert to be credible and accepted all of his opinions over the Claimant's vocational expert.

The Employer/Carrier vocational expert's opinions substantiated that the Claimant could work from a vocational standpoint and that there was potential work available for the Claimant in the Miami-Dade County labor market, despite the Claimant's vocational and physical limitations. Over the Claimant's numerous objections to the surveillance tapes, the court admitted the surveillance into evidence.

"The Employer/Carrier vocational expert's opinions substantiated that the Claimant could work from a vocational standpoint..."

Based on the surveillance and the Claimant's demeanor at the trial, the Judge found the Claimant exaggerated the overall impact of his compensable accident and surgery, found inconsistencies in his deposition testimony and live testimony, and ultimately found him not to be a credible witness. In conclusion, the Court found that after considering all of the evidence, the Claimant did not prove that he was entitled to permanent total disability benefits.

— Lourdes de Armas-Suarez

HOMEOWNERS INSURANCE

Bathroom Remodel Goes Awry, Sledgehammer Gets Blame; WLSC Succeeds in Protecing Insurer

Partner **Douglas Cohen** Esq. of WLSC's Fort Lauderdale office successfully defended Citizens Property Insurance Corporation against a first party property loss claim by arguing the lawsuit should be dismissed solely based on the Pleadings.

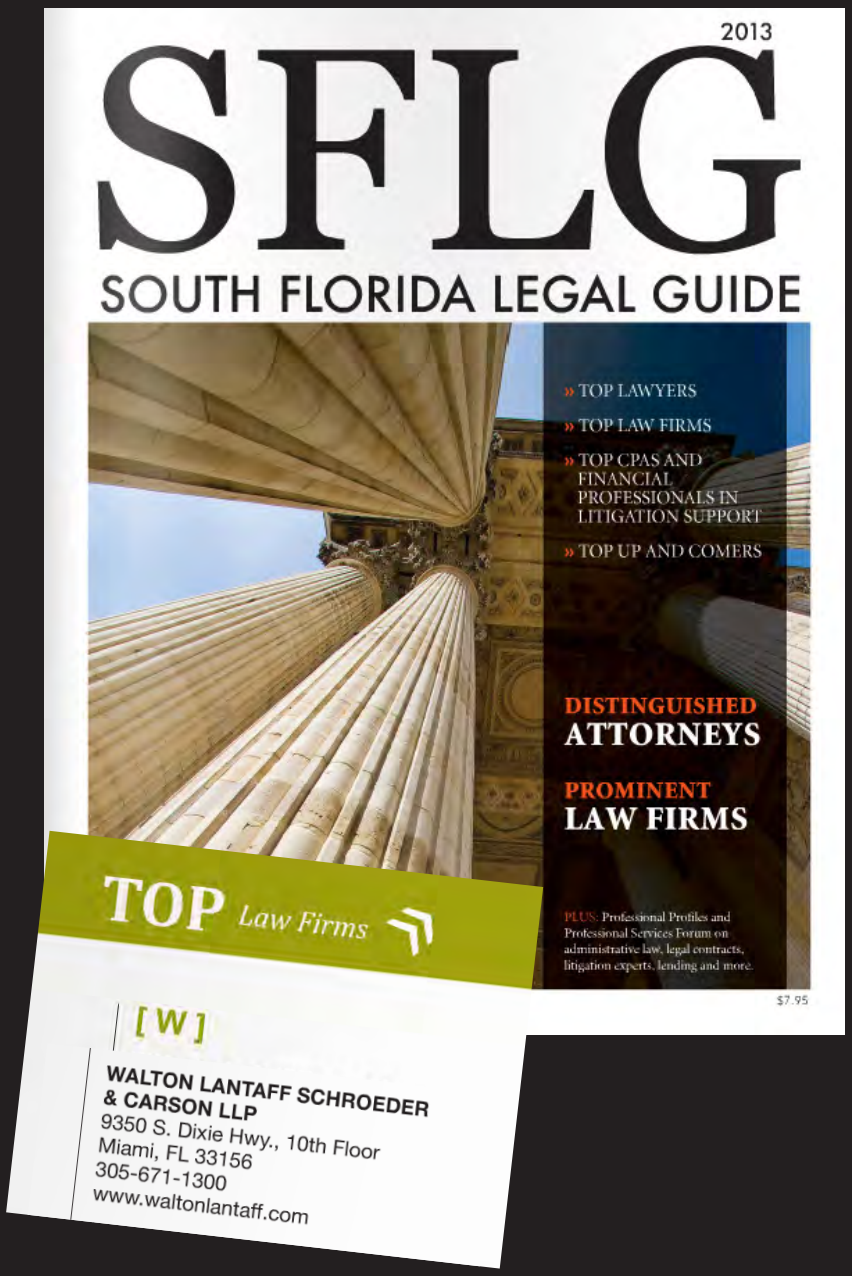
Judgment on the Pleadings may be available when Plaintiff's allegations, even if taken as true, are excluded under the unambiguous language of the insurance policy.

The Plaintiff's Complaint alleged that while the Plaintiff was performing a remodeling of his bathroom, he lost control of the chipping/sledgehammer he was using on bathroom tile, and he accidentally damaged the tile in the hallway.

Douglas Cohen, Esq.

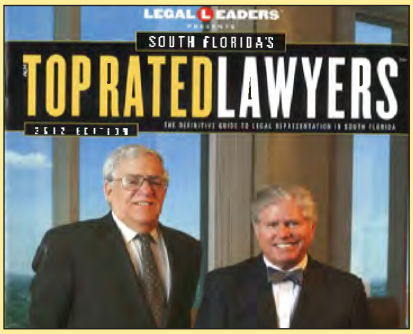
Based on an exclusion for lost property due to faulty, inadequate, or defective: design, specification, workmanship, repair, construction, renovation, remodeling, grading, compaction, WLSC argued that the allegations in the Complaint, even if taken as true, constituted faulty remodeling which was patently excluded under the policy.

The Court agreed, and granted the Motion for Judgment on the Pleadings, thus disposing of Plaintiff's case. Sweetening this victory was the ability to move for attorney's fees and costs, due to Plaintiff's rejection of a previously served Proposal for Settlement.



WAY TO GO, ALL!

Our Firm has been listed as a
TOP LAW FIRM for 2013 in the SFLG,
and Bernard I. Probst, Esq., was individually listed!



Top Rated South Florida Lawyers

Six lawyers from Walton Lantaff are listed in the current edition of *South Florida Top Rated Lawyers*, in personal injury and workers compensation.

Michael R. Jenks, Esq.

Bernard I. Probst, Esq.

Beth J. Leahy, Esq.

Robert J. Strunin, Esq.

James Armstrong, Esq.

Michele E. Ready, Esq.

PALM BEACH COUNTY

Homeowners Claim Denied: Water Damage Was Just Beginning

The insureds only realized they had a leak when their water bill was unusually high.

The insureds claimed they suffered a loss to their residence due to an under the slab pipe leak. The applicable policy provided coverage for direct loss to property, but only if that loss is a physical loss to property. Coverage was denied. The insured filed a Petition for Declaratory Relief. During the deposition of the insureds, testimony was obtained that there was no damage to the residence from the water leak.

Gregg Margre, Esq.

The insureds also testified the only damage to the residence was caused by the plumber's attempts to access the leak. The defense filed a Motion for Summary Judgment or in the Alternative a Motion to Dismiss.

At the hearing on same, Partner **Gregg Margre** argued, in support of the Motion for Summary Judgment, that prior to coverage being afforded for access to the plumbing system there must first be a direct physical loss to the property.

As the insureds stated during their deposition that there was no damage to the property as a result of water, there was clearly no physical loss to the property from the water leak. The insureds only realized they had a leak when their water bill was unusually high. As such, by the clear and unambiguous language in the policy there was no coverage for the damage caused by the plumber to access the leak.

Margre further argued that the Petition for Declaratory Relief should be dismissed due to the failure of the insureds to allege any specific facts or policy provisions which required judicial interpretation. As such, the Petition failed to state a cause of action.

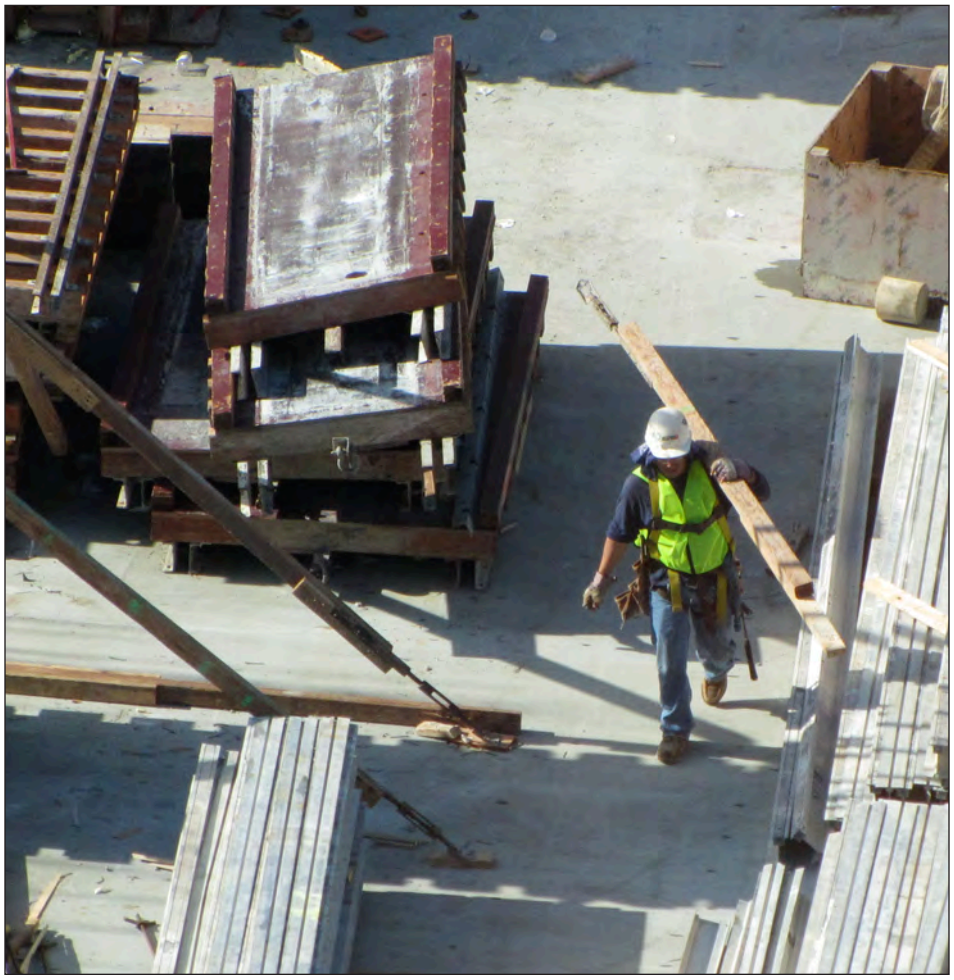
The Court was reluctant to grant the Motion for Summary Judgment but granted the Motion to Dismiss without Prejudice to amend. However, due to the fact that testimony was secured during the insureds deposition proving that there was no physical loss to property, the Plaintiff's attorney decided not to pursue the claim and has not amended the Complaint. As such, the dismissal is now final.

— *Michele Bachoon, Associate*

MIAMI FEDERAL COURT

Walton Lantaff Wins $4.35 Million Federal Coverage Case on Behalf of Insurer

Claimant's counsel argued the decedent was a 'statutory employee' of the insured employer.... But, as a subcontractor he wasn't covered.



The most-repeated word at construction sites such as this is 'safety first,' but when a developer's subcontractors are injured, it is frequently included in litigation.

In the summer of 2008, a construction worker fell off a ladder and was killed. The deceased worker's estate filed a wrongful death action against the contractor. The suit was tendered to the firm's client, an insurance carrier that had issued a CGL policy to the contractor. The carrier declined to provide defense and indemnity with regard to the wrongful death suit. In response to same, the plaintiff and the insured contractor entered into a *Coblentz* agreement which included entry of a consent judgment in the amount of $4,350,000. The policy limits were $1,000,000.

The personal representative of the injured worker's estate, as assignee of the insured, filed suit in federal court in Miami against the carrier to recover the consent judgment asserting that the carrier wrongfully refused to defend; that there was coverage under the policy for the claim based on the facts of the incident; and, that the $4.35M consent judgment was reasonable and made in good faith based on the facts pertaining to liability and damages.

WLSC was retained to defend the suit filed against the carrier. The case was handled by **Jack Joy** (Sr. Partner – Ft. Laud.); **Jim Armstrong** (Jr. Partner – Miami); and, **Kelly Corcoran** (Jr. Partner – West Palm Beach).

In defense of the suit, the firm developed the position that Plaintiff was a "statutory employee" of the insured contractor under Sec. 440.10, Fla. Stat.; and, thus, there was no coverage for the claim under the CGL policy based on exclusion "d" (bodily injury to an employee of the insured); and, exclusion "e" (obligations of the insured under a workers compensation law). This coverage defense was based on a 1997 decision of the Florida Third District Court of Appeal in *FIGA v. Revoredo*, 698 So. 2d 890 (Fla. 3d DCA 1997), a case handled for the firm by Mr. Joy.

John P. Joy, Esq.

James Armstrong, Esq.

Kelly Corcoran, Esq.

In opposition, Plaintiff asserted that they were entitled to recover the excess consent judgment based on the carrier's breach of the duty to defend, and the facts and case law which held that exclusions "d" and "e" did not apply to a claim by an employee of one subcontractor against another subcontractor.

Following completion of discovery, the parties filed cross-motions for summary judgment on the coverage issues. The federal judge ruled in favor of the insurer, holding that there was no coverage under the policy for the claim.

— by Kelly Corcoran

Supporting Community By Staying Fit, Walton Lantaff Leads S. Florida Pack

CORPORATE RUN: More than a dozen members of Walton Lantaff South Florida offices joined together to participate in the 2013 Mercedes Benz Corporate Run.

FORT LAUDERDALE: Walton Lantaff was a participant and sponsor of the 2012 Riverwalk Run along the New River downtown.

Continuing Education Opportunity

REGISTER NOW

Our annual firm seminar in Fort Lauderdale has been set for Friday, September 27, 2013 at the Fort Lauderdale Marriott North, 6650 N. Andrews Ave, Fort Lauderdale, FL 33309.

- **Workers' Compensation Track (6 CEU hrs.)**
- **Liability Track (6 CEU hrs.)**

To RSVP, please contact Robert Freschlin via rfreschlin@waltonlantaff.com or (407) 425-3250.

Get more info and directly register online:
waltonlantaff.com/seminar

This course has been designated by the Florida Department of Financial Services as INTERMEDIATE LEVEL. It is intended for the student who has a basic knowledge with the subject matter or who has a limited experience with the subject matter.

You're Invited!

What	**Walton Lantaff 'Sweets in the Suite' Dance Party**
Where	**Suite 22176**
When	**Monday 9 p.m - midnight**

Going to the 68th Workers' Comp Educational Conference in Orlando?

Save the dates August 18 - 21, 2013. Mark your calendars for WCI's 2013 Workers' Compensation Educational Conference, the nation's largest gathering of professionals for the workers' compensation industry.

Your friends at Walton Lantaff will see you there!

More at http://www.wci360.com/conference

WALTON LANTAFF SCHROEDER & CARSON LLP

10th Floor
9350 South Dixie Hwy.
Miami, FL 33156