

STORAGE NAME: h0529.cla
DATE: February 22, 1999

Florida House of Representatives
Committee on Claims
SPECIAL MASTER'S FINAL REPORT

February 15, 1999

SPECIAL MASTER'S FINAL REPORT

The Honorable John Thrasher
Speaker, Florida House of Representatives
420 the Capitol
Tallahassee FL 32399-1300

Re: HB 529 - Representative Frankel
SB 26 - Senator Rossin
Relief of Robert Rosado

THIS IS A VERDICT-BASED EXCESS JUDGMENT CLAIM FOR \$145,407, AGAINST PALM BEACH COUNTY TO COMPENSATE ROBERT ROSADO FOR THE INJURIES HE SUSTAINED IN A MOTOR VEHICLE ACCIDENT INVOLVING MR. ROSADO'S TRACTOR-TRAILER TRUCK AND A COUNTY FIRE RESCUE TRUCK. THE COUNTY CONTESTS THIS CLAIM BILL.

FINDINGS OF FACT:

The accident. Robert Rosado, the claimant, was self-employed and the owner and operator of a long distance tractor-trailer truck. On May 8, 1995, Mr. Rosado was driving his vehicle southbound on Greenwood Avenue in West Palm Beach. Mr. Rosado was in the far right lane as he drove by St. Mary's Hospital. At that time, a Palm Beach County fire rescue truck was making a right hand turn onto Greenwood Avenue from the hospital's Turner Entrance driveway. The driveway is controlled by a stop sign. The fire rescue truck failed to stop at the sign and struck the side of Mr. Rosado's truck. The fire rescue truck was not on an emergency call and was not operating either a siren or flashing emergency lights.

At impact, the fire rescue truck hit just behind Mr. Rosado's passenger door lifting his truck up in the air. Mr. Rosado's brother, who was in the passenger seat, was unharmed. In anticipation of impact, Mr. Rosado stood on his brake and as his truck lifted up, his air seat went up and down causing his right foot to slip off the brakes, snag on the clutch, and he hit his right leg on the steering wheel. Mr. Rosado also hit the left side of his head on the cab.

The front end of the fire rescue truck was extensively damaged, requiring repair costs of over \$11,000. Mr. Rosado's truck sustained over \$15,000 in damages. Mr. Rosado had to replace the passenger side tires and fuel tank. He had to have the transmission rebuilt and had various other repairs made. Palm Beach County paid for these damages to Mr. Rosado's truck prior to the trial.

Mr. Rosado's prior leg injury and history. Mr. Rosado is currently 32 years old. At age 11, he had a mini-bike accident in which he injured his right leg. When he was treated for this injury, doctors

discovered a cyst in his right thigh bone. The doctors operated to remove the benign cyst. After a period of recovery, he resumed normal activities.

At the time of the 1995 accident, Mr. Rosado had not been treated for, nor complained of, right leg pain for 16 years. During those years, Mr. Rosado's work history involved strenuous activity and physical labor. He drove trucks and worked with heavy machinery. Until the 1995 accident, Mr. Rosado was physically able to meet the rigorous demands of his occupation.

Dawn Martin, Mr. Rosado's fiancée, testified at the Special Masters' hearing that Mr. Rosado was quite active before the accident and that he never limped or complained of leg pain. According to Ms. Martin, Mr. Rosado had strenuous hobbies including air boating and jet skiing before the accident.

Hospital visit. Immediately after the accident, Mr. Rosado went to the St. Mary's Hospital emergency room. The emergency room record shows that Mr. Rosado's chief complaint was "pain in the leg." He was also complaining of pain in his back and neck. Mr. Rosado was given pain medication, discharged that day and advised to follow up with Dr. Chaim Arlosoroff, if the pain continued.

Dr. Arlosoroff treats and operates on Mr. Rosado. Just 4 days after the accident on May 12, 1995, Mr. Rosado visited Dr. Arlosoroff, an orthopedic surgeon. In his initial examination, Dr. Arlosoroff noted some tenderness in Mr. Rosado's right thigh, but did not see any swelling or bruising. From an x-ray and the physical examination, Dr. Arlosoroff suspected Mr. Rosado had a partial fracture in his right thigh through the previously healed bone cyst. Fearing that weight bearing would completely fracture the leg, Dr. Arlosoroff placed Mr. Rosado on crutches and directed that he stop working. Dr. Arlosoroff believed that there was evidence of a recent injury based on the physical examination indicating pain, a restricted range of motion, the x-rays and a subsequent bone scan.

Dr. Arlosoroff next saw Mr. Rosado on May 31, 1995. From an examination and an x-ray taken that day, Dr. Arlosoroff did not believe Mr. Rosado was healing. He consulted with others about the x-rays and received different opinions on whether the x-rays showed evidence of a fracture. Also, Dr. Arlosoroff consulted with a radiologist who felt that there was no evidence of an acute fracture in the cystic area, but thought there might be a stress fracture due to there being some bone remodeling and callus deposition in the area.

On June 21, 1995, after 7 weeks of non-weight bearing, Mr. Rosado was still symptomatic. This prompted Dr. Arlosoroff to recommend surgery. Dr. Arlosoroff performed surgery on June 27, 1995. He took bone fragments from Mr. Rosado's hip and placed them in the right thigh area in an attempt to "help heal the bad bone." Dr. Arlosoroff excised bone specimens from the cystic area and submitted them to a pathologist for analysis.

Pathologists analyze bone specimen. Dr. J. Darrel Hutson, a local pathologist, analyzed the bone specimens. He testified that he found lamellar bone (matured calcified bone) with segments of woven bone (new bone formation indicating recent injury). Dr. Hutson testified that “recent injury” could mean “*several weeks*, possibly a month or two before.” Concerned that one of the bone specimens may have shown evidence of malignancy, he sent the specimen to the Armed Forces Institute of Pathology (AFIP) for further analysis.

Dr. T.N. Vinh of the AFIP confirmed that there was no evidence of malignancy and stated in his report that he agreed there was the presence of “woven bone, consistent with an old grafted bone cyst with associated *recent traumatic fracture*.”

In his deposition testimony, Dr. Hutson was asked a hypothetical question which contained the essential facts of this claim. Based on this hypothetical, Dr. Hutson was asked whether he had an opinion on whether the specimen he and the AFIP examined was consistent with Mr. Rosado suffering a traumatic fracture through an old bone cyst on May 8, 1995. Dr. Hutson answered: “With no additional history, it’s reasonable to assume that that’s probably what happened.”

Post-operation. After surgery, Mr. Rosado was unable to walk, even on crutches, for 2 to 3 weeks. The pain was intense after the surgery, but his condition improved over time. Mr. Rosado went through rehabilitation, but was out of work for a total of 5 months from the date of the accident.

Mr. Rosado testified at the Special Masters’ hearing to his current condition as follows: If he is sitting for long periods of time, he develops pain in the right leg. If Mr. Rosado is merely inactive, there is no pain; however, if he is active at work climbing or standing for long periods of time he develops pain. Mr. Rosado may develop leg pain from weather changes. He does not take prescribed pain medications, only “Tylenol.” Mr. Rosado last saw Dr. Arlosoroff in 1997, as his leg has achieved maximum improvement.

Ms. Martin testified that Mr. Rosado limps if he is on his feet for a long time. According to Ms. Martin, he is considerably less active since the accident.

LEGAL PROCEEDINGS:

The claimant sued Palm Beach County for its employee’s negligent operation of the fire rescue truck. The county admitted fault in the accident. The county also admitted that Mr. Rosado was not at fault and that he was wearing his seat belt. At trial, the county argued that the accident did not cause the loss, injury, and damages Mr. Rosado claimed. The lawsuit was resolved by a jury verdict in favor of the claimant in the amount of \$225,297.79*. The county did not appeal the verdict.

[*The record in this case contains two jury verdict forms with conflicting amounts. One of the forms was unsigned by the jury

foreperson. \$225,297.79 is the amount reflected in the signed jury verdict form and in the final judgment entered by the trial judge. House Bill 529 contains a whereas clause on page 2, lines 3 through 4, that appears to incorrectly indicate that the jury verdict was \$225,279.]

CLAIMANT'S ARGUMENT:
(Paraphrased)

1. Mr. Rosado comes to the Legislature having obtained a Palm Beach County jury verdict for \$225,279.79. The verdict compensates him for the permanent injuries, medical costs, and lost earnings he suffered as a result of the county's admitted negligent act. The verdict also includes \$103,200 for Mr. Rosado's future pain and suffering. The county did not appeal this verdict. There is no legitimate or compelling reason to overturn the jury verdict, and no evidence was presented at the Special Masters' hearing that the jury did not hear or consider.
2. Mr. Rosado was treated at the hospital emergency room within an hour of the accident. His chief complaint was right leg pain. Four days later he saw an orthopedic physician, Dr. Chaim Arlosoroff, who testified that x-rays showed Mr. Rosado suffered a traumatic fracture through a previously healed bone cyst.
3. Fearing the partial fracture would become a complete break, Dr. Arlosoroff immediately put Mr. Rosado on crutches. After 7 weeks, Dr. Arlosoroff performed surgery, removing the bone graft area and repairing the break with bone harvested from Mr. Rosado's hip.
4. Dr. J. Darrel Hutson, the chief pathologist at Good Samaritan Hospital where the surgery was performed, testified that the specimen harvested from Mr. Rosado's leg was "woven" or "new" bone, the result of a recent traumatic fracture. This finding was confirmed in a subsequent analysis of the specimen by the Armed Forces Institute of Pathology.
5. Mr. Rosado had a bone cyst removed when he was 11 years old. It is without dispute that Mr. Rosado never had any complaints, problems, or treatment to his right leg for over 16 years, until the accident.
6. Although the county's 2 medical experts, testified that the x-rays showed only a "stress fracture," they conceded that x-rays are subject to varying interpretations and that they have no competency to disagree with the opinion of the pathologists. The county did not present any evidence at trial to contradict the pathologist's opinion.
7. Regarding Mr. Rosado's \$40,000 settlement with his insurer LDG, an offset of the collateral source payment is not appropriate in light of a court decision denying an offset where the plaintiff settled a workers' compensation claim and presumably settled the claim in exchange for the workers' compensation insurer's waiver of its subrogation right. This is analogous to what Mr. Rosado did here with his insurer, LDG.

8. The jury award of future pain and suffering is appropriate given the evidence which shows that Mr. Rosado will forever have leg pain when he is active. The jury was aware that Mr. Rosado could be expected to live for an additional 43 years. Presumably his disability is going to be aggravated with the normal aging process.

RESPONDENT'S

ARGUMENT:

(Paraphrased)

Palm Beach County identified three primary issues:

- i. Whether the collision caused a fracture of Mr. Rosado's right thigh bone?
- ii. Whether the collision caused Mr. Rosado's subjective complaints of limping and pain?
- iii. Whether Mr. Rosado has already been made whole?

The following arguments were made by the county regarding these issues:

1. "Callus formation" is a stage of the bone healing process that cannot be seen on x-rays until 4 to 6 weeks after a fracture. Dr. Arlosoroff's medical report identifies callus formation and remodeling in the x-rays of May 12, 1995 (4 days after the collision), and in the x-rays of May 31, 1995 (23 days after the collision). The radiologist he consulted believed that the x-rays showed callus formation and remodeling, indicating a fracture that must have been at least 4 to 6 weeks old, predating the accident.
2. While Dr. Arlosoroff testified at trial and in his second deposition that the accident caused the fracture, he testified in his first deposition that he *could not* say within a reasonable degree of medical probability that the accident caused a fracture to the right thigh bone. Further, Dr. Arlosoroff's own notes indicate that a consulting radiologist told him that the x-ray showed no evidence of an acute fracture that would have been caused by the accident.
3. Dr. Michael Zeide, a board certified orthopedist for 20 years, testified for the county that the x-rays showed no medical evidence of an acute fracture to the right thigh bone which would have been caused by the accident. In his opinion, the only fracture, if any, was a pre-existing stress fracture.
4. Dr. Bruce Distell, a board certified radiologist, testified for the county that the x-rays showed no medical evidence of an acute fracture to the right thigh bone which would have been caused by the accident.
5. The evidence clearly shows that the jury verdict was premised on Dr. Arlosoroff's conflicting trial testimony. Approving this claim bill would support Dr. Arlosoroff's irreconcilable testimony, punish the taxpayers of Palm Beach County, and promote the filing of unmeritorious claims bills.

6. The evidence more plausibly establishes a “possible” stress fracture which *predates* the accident. The evidence shows that Mr. Rosado was 5' 4" tall and weighed 225 pounds, that he suffered from an abnormal cystic defect in his right leg, and he constantly climbed in and out of a large tractor-trailer truck and operated a manual crank, putting tremendous stress and pressure on his abnormally shaped right thigh bone.
7. Dr. Arlosoroff's medical records and operative report never identified a fracture line and indicate that no surgical repairs were performed on any fracture. The county does not dispute that Mr. Rosado may have needed a biopsy of his right leg, to determine if the cyst was cancerous, however, the surgery was not designed to repair a fracture.
8. In his doctor's medical reports sometime after surgery, Mr. Rosado reported no complaints of pain. Mr. Rosado gave a taped statement the day after the accident in which he said that he always walked with a limp. In contrast, he testified at trial that prior to the accident he never limped. The limping condition was not mentioned by Mr. Rosado in his last several medical exams and the condition was not identified in the medical records.
9. An award for Mr. Rosado's future pain and suffering is unreasonable in that he testified in the Special Masters' hearing that he does not have fairly constant pain in his right leg. Mr. Rosado has not missed a day from work, has not changed occupations, and does not have pain which requires him to take anything more than “Tylenol”.
10. In a \$40,000 settlement agreement with his insurance carrier (LDG), Mr. Rosado has received full compensation for his medical bills, and any amount the county is required to pay should be reduced by the full amount of the settlement.

STANDARDS FOR
FINDINGS OF FACT:

Findings of fact must be supported by a preponderance of evidence, although the Special Master is not bound by formal rules of evidence or civil procedure. The Special Master may collect, consider, and include in the record, any reasonably believable information found to be relevant or persuasive. The claimant has the burden of proof on each required element.

CONCLUSIONS OF LAW:

Liability. The county admitted complete fault in the accident. The county's fire rescue truck ran a stop sign and struck the side of Mr. Rosado's tractor-trailer. The county's employee breached his duty to exercise reasonable care while operating his vehicle. The only issues presented by this claim bill are whether the accident *caused* Mr. Rosado's injury and to what extent Mr. Rosado suffered *damages* and has been paid for these damages.

Proximate cause of injury. Whether or not there is a jury verdict, as there is here, every claim bill must be based upon facts sufficient to meet the preponderance of the evidence standard. I find that a

preponderance of the evidence establishes that the county's negligence was the cause of Mr. Rosado's injuries.

Rosado's testimony. Based on his demeanor and testimony at the Special Masters' hearing, I found Mr. Rosado to be a credible witness. Further, significant parts of his testimony were corroborated by the testimony of his fiancée, Ms. Dawn Martin.

The county argues that there was no evidence that medical examinations shortly after the accident found bruising, swelling, lacerations, or redness on Mr. Rosado's thigh which would indicate an injury to his right leg. The county also suggests that Mr. Rosado's claim that his right leg hit the steering wheel during the collision was fabricated after "much reflection." The county argues that in a recorded statement given just a day after the accident Mr. Rosado failed to mention that his leg hit the steering wheel. According to the county, Mr. Rosado made the same critical omission in a written statement taken just 4 days after the accident.

However, in both the recorded statement and the written statement, Mr. Rosado stated that he hit his leg upon impact. In the recorded statement he said: "... the other vehicle hit me on the right which is my passenger side of the unit it picked it up and threw me on the seat jerked me and it *hit my leg against the brake.*" In the written statement he said: "right side was hit, left side of head hit the cab and *right leg snagged clutch pedal*, air seat slammed up and down from collision." While it is true that Mr. Rosado's earlier statements did not mention the steering wheel, he did mention an impact with his right leg. Consequently, I am not persuaded that these omissions are critical or that it calls into question Mr. Rosado's credibility.

Even without the reference to the "steering wheel" in these statements, a preponderance of the evidence establishes that the impact by the county vehicle caused Mr. Rosado to bounce in his truck cab enough to hit his right leg in some manner.

The county argues that Mr. Rosado's complaints of pain and of a limp are not credible and should not be believed. I do not find the county's arguments persuasive. The record evidence supports Mr. Rosado's claim of right leg pain after exertion from walking or standing. This claim was also corroborated by the testimony of Ms. Martin.

Medical testimony. Dr. Arlosoroff's trial testimony did conflict with the testimony in his first deposition. However, the evidence shows that Dr. Arlosoroff treated Mr. Rosado as if he had a recent acute fracture to his right leg based not just on the x-rays, but on his complete physical examination of Mr. Rosado. This examination included a review of the patient's medical history, and the results of a bone scan, MRI, and other medical tests. During the first visit, Dr. Arlosoroff placed Mr. Rosado on crutches and eventually conducted surgery on his leg. The surgery succeeded in alleviating Mr. Rosado's chronic pain, evidencing that Dr. Arlosoroff treated the injury that was causing the pain.

Further, the pathologist's testimony is key evidence supporting a traumatic injury. Dr. Hutson testified that the specimen harvested from Mr. Rosado's leg during the surgery was "woven" bone, an indication of a recent injury. This finding was confirmed in a subsequent analysis of the specimen by the Armed Forces Institute of Pathology. Moreover, Dr. Hutson testified that "recent injury" could mean "several weeks, possibly a month or two before." Since the surgery was 7 weeks after the accident, this testimony is very persuasive.

The county argues, and does have some expert medical testimony to support its contention, that Mr. Rosado had a stress fracture which predated the accident. The county presented evidence that "callus formation" was present on x-rays taken 4 days and 23 days after the collision. Callus does not normally show up on x-rays until 4 to 6 weeks after a fracture. The county's two medical experts, testified that the x-rays showed only a "stress fracture". However, there was conflicting testimony by Dr. Arlosoroff which indicated that no callus was present on these x-rays. The county's two medical experts conceded that x-rays are subject to varying interpretations and that they have no competency to disagree with the opinion of the pathologists.

If the existence of a pre-accident stress fracture is assumed, there is no evidence to show that Mr. Rosado had any pain associated with this stress fracture prior to the collision with the county vehicle. All of the record evidence indicates that Mr. Rosado was not experiencing pain prior to the accident and was able to carry out normal work and recreational activities. Further, given his childhood medical history, it seems likely that Mr. Rosado would have sought medical treatment prior to the accident if he had been experiencing pain in his right leg.

Even accepting the county's argument that Mr. Rosado suffered from a pre-existing stress fracture, the preponderance of the evidence establishes that the collision aggravated this pre-existing condition. If a pre-existing condition was aggravated as a result of the county's negligence, the county is still responsible because "the tortfeasor takes the plaintiff as he finds him." *Silva v. Stein*, 527 So.2d 943, 944 (Fla. 3rd DCA 1988).

I find there was sufficient record evidence to support the jury's finding that the collision caused Mr. Rosado's injuries.

Damages. The table below itemizes Mr. Rosado's damages including the jury's verdict award and the judgment claim amounts.

DESCRIPTION	AMOUNT
Jury verdict: past medical expenses	\$25,853.70
Jury verdict: past loss earnings	\$16,244.09
Jury verdict: past pain and suffering	\$80,000.00

DESCRIPTION	AMOUNT
Jury verdict: future pain and suffering	\$103,200.00
JURY VERDICT: TOTAL	\$225,297.79
Final judgment: costs award	+\$4,502.78
FINAL JUDGMENT: TOTAL	\$229,800.57
Damage not in verdict: truck repair*	+\$15,624.73
TOTAL DAMAGES:	\$245,425.30
Final judgment: offset - truck repair*	-\$15,624.73
Final judgment: county payment	-\$84,375.27
UNPAID EXCESS JURY VERDICT	\$145,425.30

[*In the final judgment the trial judge allowed an offset toward the sovereign immunity limitation for the \$15,624.73 paid by the county to Mr. Rosado prior to trial for damages to his vehicle. The jury verdict did not include an award for property damage to Mr. Rosado's truck.]

On the damage awards for past medical expenses and past lost earnings, the claimant has submitted sufficient documentary evidence to establish that the jury award was correct. The claimant has also provided sufficient evidence through testimony to support the jury's award for past pain and suffering.

The county argues that the award for Mr. Rosado's future pain and suffering is unreasonable in that he does not have constant pain in his right leg and only has to take an occasional "Tylenol." I find that the jury's award of \$103,200 is reasonable considering that Mr. Rosado's leg condition will not improve further (his doctor gave him a 6 percent total body impairment rating); he experiences pain with either prolonged activity or prolonged sitting; he experiences pain with changes in the weather; and, the jury was aware that he could be expected to live for an additional 43 years.

In determining future pain and suffering damages, I give great deference to the jury's judgment on this issue and find their award reasonable. As the Florida Supreme Court has stated:

Jurors know the nature of pain, embarrassment and inconvenience, and they also know the nature of money. Their problem of equating the two to afford reasonable and just compensation calls for a high order of human judgment, and the law has provided no better yardstick for their guidance than their enlightened conscience.

Their problem is not one of mathematical calculation but involves an exercise of their sound judgment of what is fair and right.

Angrand v. Key, 657 So.2d 1146, 1149 (Fla. 1995), quoting, *Braddock v. Seaboard Air Line Railroad*, 80 So. 2d 662 (Fla.1955).

ATTORNEYS FEES:

Section 768.28(8), F.S., limits claimant's attorney fees to 25 percent of judgment or settlement obtained pursuant to the statute. Claimant's attorney submitted an affidavit stating that his fee arrangement complies with the statutory limitation.

COLLATERAL SOURCES:

Mr. Rosado had an independent contractor protection policy with LDG. Pursuant to this policy, LDG had a contractual right to subrogation. Mr. Rosado sued LDG in connection with this accident when he was denied coverage. Before the start of the LDG trial, the parties settled for \$40,000. According to claimant's counsel, Mr. Rosado settled for this amount because Dr. Arlosoroff was not available to testify at the LDG trial. As part of the settlement, LDG agreed to assign its right to subrogation to Mr. Rosado.

The following table shows how the settlement proceeds were disbursed:

DESCRIPTION	AMOUNT
Gross settlement proceeds	\$40,000.00
Less attorney's fees	\$7,875.00
Less costs	\$4,392.74
Less medical bills	\$25,852.70
NET PROCEEDS TO MR. ROSADO	\$1,879.56

The jury awarded Mr. Rosado \$25,853.70, for past medical expenses. As shown in the table, Mr. Rosado's medical expenses were paid with the proceeds of the LDG settlement. In addition, Mr. Rosado received net proceeds to compensate him for unspecified damages related to this accident. This claim bill seeks \$145,407, an amount which includes within it the amount of the jury's award for medical expenses.

The county argues that any amount it is required to pay should be reduced by the full amount of the \$40,000 settlement. The claimant argues that the county did not move for an offset in the legal proceedings, and any right to an offset has been waived. I conclude that equity requires that the unpaid excess jury verdict amount of \$145,425.30 be reduced by a total of \$27,732.26 (paid medical expenses of \$25,852.70, plus Mr. Rosado's net proceeds of \$1,879.56), which results in a claim bill amount of \$117,694. If the

claim bill is not reduced then Mr. Rosado will have recovered more than the jury's award of damages. I find no basis to award Mr. Rosado any amount in excess of the jury's verdict.

The claimant argues that an offset of the collateral source payments is not appropriate in light of the court's decision in *Bruner v. Caterpillar, Inc.*, 627 So. 2d 46 (Fla. 1st DCA 1993). However, the *Bruner* concurring judge explained that the statutes under consideration were designed to "permit an injured person having both a third-party tort claim and a workers' compensation claim to achieve no less than, nor more than, a full recovery." *Id.* at 47. An offset is required here in order to ensure that Mr. Rosado's recovery is limited to no less than nor more than a full recovery of his damages.

RECOMMENDATIONS:

I recommend that House Bill 529 be amended to direct Palm Beach County to compensate Mr. Rosado in the amount of \$117,694.

Further, I also recommend that the whereas clause of House Bill 529 be amended to show the correct amount of the jury verdict awarded in this case, \$225,297.79.

With adoption of the above amendments, I recommend that House Bill 529 be reported FAVORABLY, AS AMENDED

Respectfully submitted,

Phillip B. Miller
House Special Master

cc: Representative Frankel
Senator Rossin
Abel Gomez, Senate Special Master