STORAGE NAME: h0229.cla.doc
DATE: February 8, 2001

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SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 0229 - Representative Kendrick
Relief of Clyde Kilpatrick

THIS IS AN EQUITABLE CLAIM FOR $191,244.59, BASED UPON A FINAL JUDGMENT AGAINST ESCAMBIA COUNTY, TO COMPENSATE THE CLAIMANT FOR NEGLIGENT DESIGN, CONSTRUCTION, AND MAINTENANCE OF A STAIRWAY AT THE ESCAMBIA COUNTY CIVIC CENTER.

FINDINGS OF FACT:

The Claim

This is a local claim bill following an adverse adjudication by a trial court. The Respondent Escambia County disputes the claim. At trial, the court found damages as follows:

Past Medical	$4,519.34
Future Medical	$8,468.00
Past Lost Earnings	$5,814.00
Future Lost Earning Capacity	$270,254.40
Pain and Suffering	$75,000.00
Subtotal	$364,055.74
Deduct: 20% comparative negligence	($72,811.15)
Net Judgment	$291,244.59
Deduct: Paid by County	$100,000.00
Net claim	$191,244.59

Liability

Mr. Kilpatrick, a resident of Mobile, Alabama, made a honeymoon trip to Pensacola to attend a concert being held at the Pensacola Civic Center. The Pensacola Civic Center is owned by Escambia County.

Like many similar arenas, patrons enter at a mezzanine level, and then proceed either up or down the bleachers to their assigned seating. In this case, Mr. Kilpatrick had purchased premium seats on the floor level. To reach his seats, he and his wife had to traverse the fixed bleacher rows, pass through a gate, and traverse a moveable bleachers consisting of three rows of seating to reach the floor seating area. Mr. & Mrs. Kilpatrick entered the Civic Center and successfully reached the floor level as they arrived. At that time, the house lights were up and they were able to see the steps. The concert promoter had an usher stationed in the moveable bleacher area who cautioned all patrons to be careful as they tried to maneuver through the moveable bleachers.

Also similar to other arenas, the bathrooms are located on the mezzanine level. During the course of the concert, Mr. Kilpatrick left his seat and walked to the bathrooms. During the concert, the house lights were off and the ushers were no longer stationed in the moveable bleachers. On the return trip from the bathroom is when Mr. Kilpatrick fell on the moveable bleachers area and was hurt.

There was considerable argument at the trial level, and before the special master, as to whether the area that Mr. Kilpatrick fell at was a "staircase" or a "bleacher." The petitioner argues that it was a staircase, and that building codes applicable to staircases apply. The respondent county argues that the area was part of the bleachers, and that standard building codes have no applicable safety requirements for bleacher areas. *The special master finds that the area that Mr. Kilpatrick fell to be a staircase, governed by standard building requirements for a staircase.* The special master makes that finding on two independent grounds. The first is that the special building codes for bleachers state that, on any issue not specifically covered by the special code, the standard building code applies. Secondly and more importantly, Mr. Kilpatrick was sold floor seats. The only way for him to gain access to those floor seats was to travel through the bleachers on an apparent stairway.

An important issue in examining the design and construction of stairways is the rise and the run. The "rise" is the distance from the top of one tread to the top of the next tread. The "run" is the width of the treads. Standard building codes give directions as to minimum and maximum rise, run, and the ratio between the two (which determines the angle of the staircase). Importantly, building codes require that the rise and run be consistent throughout a staircase. This consistency is important, as persons traversing a stairway quickly adopt a cadence. If that cadence is broken by an uneven or inconsistent rise or run, falls are inevitable.

Building codes require a number of safety features be built into a stairway. Those safety features include: a consistent rise to run ratio, adequate lighting, a contrasting color edge on each

tread (that is commonly also an increased friction surface), and a sturdy hand railing. The area of the moveable bleachers where Mr. Kilpatrick fell failed on each of these safety features. Even a small change in the rise to run ratio may lead to falls; this area had a large differential. The lighting was plainly inadequate. The area where Mr. Kilpatrick fell had a contrasting color edge *only on every other tread.* The insufficient lighting and the contrasting color edge only on every other tread created the optical illusion that Mr. Kilpatrick described in his testimony, an optical illusion that directly led to his misjudging the cadence in his steps and thus directly led to his fall. It is clear and apparent to the special master that the fall would not have occurred had there been a consistent rise to run ratio and/or adequate lighting. It is also clear that a hand railing, if it had been available, would likely have reduced or eliminated the extent of Mr. Kilpatrick's injury. The negligent design, construction, and maintenance of the moveable bleachers were a proximate causes of the injuries sustained by Mr. Kilpatrick.

Mr. Kilpatrick was not intoxicated at the time of the accident.

The county, in its defense, attempted at trial to introduce into evidence a statement claimed to have been made by Mr. Kilpatrick that he tripped on somebody's foot in the stairway. The statement is attributed to Mr. Kilpatrick in an accident report filled out by a Red Cross volunteer. Mr. Kilpatrick admits to signing the report, but denies that he tripped on a foot and denies making the statement. The County asserts that it is not liable because Mr. Kilpatrick tripped on someone's foot, not on a defective stair; and that accordingly, the unknown person with the foot in the aisle is the proper defendant. The Special Master finds this defense wholly unpersuasive. The testimony of the engineering expert established that stair tread lighting is required by code, and that this stair area was insufficiently lighted. If there was an errant foot blocking the stair area, the injury could have been prevented by proper lighting. The negligence lies with the County, whether or not an errant foot was blocking the staircase. Accordingly, the special master finds the "Red Cross Report", and the argument that blame lies in the owner of the errant foot, as irrelevant.

Escambia County next claims that it is the wrong party to be named as defendant. The county owns the Civic Center, and under general premises liability theory that alone is sufficient to confer liability. The county has entered into a long-term contract for management of the Civic Center with Ogden Enterprises, Inc. The contract provides that Ogden will carry liability insurance and will indemnify the county for any loss sustained as a result of a lawsuit involving the Civic Center. Ogden paid Mr. Kilpatrick the sum of $100,000 after the trial court judgment was entered. The County asserts that Ogden alone is liable, and that a claim against the County should be denied. This argument too is unpersuasive. Ogden

Enterprises, Inc. cannot be named as a respondent in this proceeding. The County could have moved to dismiss the original lawsuit for failure to name Ogden as a defendant, on the ground that Ogden is an indispensable party. The County did not. The County could have named Ogden as a third party defendant; it did not. It is disingenuous to suddenly point a finger at an outside party at this time.

In sum, there is clear evidence that Escambia County, as owner of the property, was negligent and liable to the petitioner Clyde Kilpatrick.

The County next raises the defense of contributory negligence, asserting that Mr. Kilpatrick was partially at fault in the accident. The trial court found that Mr. Kilpatrick was 20% negligent in the accident, and accordingly reduced his damages by that percentage. A hearing before a special master is *de novo*, and while trial court findings are persuasive, they are not binding on a special master or upon the Legislature. Given the evidence of prior accidents in the same location, the absence of step lighting, the optical illusion created by extremely poor design, the uneven rise to run configuration, and the lack of a handrailing, the special master recommends that there be no finding of contributory negligence on the part of Mr. Kilpatrick. The special master finds that 100% of the negligence should be attributed to the respondent.

Injuries Sustained

Mr. Kilpatrick sustained two injuries as a direct result of the accident:

1. Mr. Kilpatrick sustained a fracture of the medial calcaneous of the distal end of the left tibia. In layman's terms, the medial calcaneous of the distal end of the tibia is that knob that sticks out of the top inside of the ankle. The medical testimony states that the injury healed as well as it could, although it is likely to cause Mr. Kilpatrick pain in the future. Mr. Kilpatrick claims that he still feels pain in this area.

2. Mr. Kilpatrick sustained a high fracture of the left fibula. The fibula is the smaller bone on the outside of the lower leg. An x-ray taken days after the injury shows a severe splinter injury of the fibula. Given the apparent sharpness of the two pieces of bone, Mr. Kilpatrick was fortunate that neither piece severed an artery, vein, nerve, or the skin. The medical reports reveal that this injury healed well, which is confirmed by a later x-ray.

The medical records show that Mr. Kilpatrick has had recent problems with heel spurs. He blames these heel spurs on the accident; however, the evidence does not support this assertion. The ankle x-ray taken days after the accident shows a prominent heel spur that had already formed at the

time.[1] It is possible that he adjusted his gait in order to compensate for the injury, and that in so doing, he has in the past few years aggravated the existing bone spurs. The special master noted, however, that Mr. Kilpatrick was not limping at the hearing.[2] Mr. Kilpatrick's physician was unwilling to attribute the heel spurs to the accident. The special master finds that the heel spurs in the left ankle are a pre-existing injury, and thus not related to the accident and therefore not compensable in this claims bill.

The medical records also show that Mr. Kilpatrick has complained of back pain. While this could be related to any number of things, it is not uncommon for a person who has injured a leg to adjust their gait, and in so doing, to cause low back strain. It is also not uncommon for someone who works with heavy machinery and equipment, as Mr. Kilpatrick does, to suffer low back pain. Finally, it is not uncommon for low back pain to come about simply due to growing older. There being no medical evidence that the complaint of low back pain is directly related to the injury at the Civic Center, the special master finds that the low back pain is not related to the accident and is thus not compensable in this claims bill.

Damages

The next issue for determination is the proper measure of damages. Here again, the special master recommends a departure from the trial court finding.

The trial court assessed Mr. Kilpatrick's damages as follows:

Past Medical	$4,519.34
Future Medical	$8,468.00
Past Lost Earnings	$5,814.00
Future Lost Earning Capacity	$270,254.40
Pain and Suffering	$75,000.00

The sum for past medical is substantiated and undisputed. The special master finds the award of $4,519.34 for this category appropriate.

The respondent disputes the sum for future medical expenses. The respondent argues that Mr. Kilpatrick's recent medical expenses do not justify this expense. The petitioner points out that the award, as calculated by the trial judge, was a lifetime average. Given the location and type of injury, it is possible and perhaps even probable that future medical costs will be incurred as a result of this accident. The petitioner's argument being more persuasive, and finding no reason or cause to depart from the trial court finding, the special master finds the award of $8,468.00 for this category appropriate.

[1] Heel spurs often take years to form, and cannot form in a matter of a few days.

[2] The Special Master specifically looked at Mr. Kilpatrick's gait when he entered and left the hearing room. After the hearing, the Special Master happened to notice Mr. Kilpatrick walking away from the hearing; his gait appeared normal in all aspects, without limping or favoring of any sort.

The sum for past lost earnings is substantiated and undisputed. Immediately after the accident, Mr. Kilpatrick was justifiably out of work for several months, during which time he lost $4,519.34 in wages. The special master finds the award of $4,519.34 for this category appropriate.

The respondent disputes the sum for future lost earning capacity. This category presents a troubling issue in this claims bill. Mr. Kilpatrick works as a millright, which is a person who installs, maintains, and repairs factory equipment. He claims that millrights may be classified as a "heavy millright" and a "light millright". He further claims that, because of his injury, he can no longer work as a heavy millright, but is delegated to work as a light millright. Mr. Kilpatrick's physician did advise Mr. Kilpatrick that he should not climb over 10 feet because the decreased range of motion that resulted from this injury makes it more difficult for Mr. Kilpatrick to climb. Mr. Kilpatrick claims that this restriction keeps him from being a "heavy millright."

Mr. Kilpatrick's earnings history is as follows (note that the accident occurred in 1991):

1989	$22,400.55		
1990	$21,968.71		
1991	$30,575.82		
1992	$26,584.67		
1993	$23,433.81		
1994	$28,952.63		
1995	$27,145.45		
1996	$32,978.74		
1997	$38,123.48	+	$1,140.00 unemployment
1998	$36,718.15	+	$3,420.00 unemployment
1999	$38,973.75	+	$765.00 unemployment

This earnings history is compiled from records that have been produced by the petitioner. Troubling is the fact that the wage records that have been produced at the hearing were incomplete. The Special Master asked for copies of tax returns for the years 1996-1999, the petitioner provided copies of W-2 forms for those years. At the hearing, the petitioner admitted that he has not filed tax returns for those years. Subsequent to the hearing, Mr. Kilpatrick did produce tax returns that comport with the W-2 forms that were provided. At the hearing the petitioner was asked to provide a wage and earnings statement from the Social Security Administration, as that form would accurately show lifetime earnings. That statement has not been produced.

At the trial in 1996, Mr. Kilpatrick was making $10.15 an hour, but claimed that he could make $1.27 an hour more as a heavy millright. The trial court used that testimony, together with the testimony that Mr. Kilpatrick was losing 10 hours a

week overtime, to calculate future lost earning capacity at $270,254.40.

At the hearing before the special master, Mr. Kilpatrick testified that he was making $15.50 an hour, but that he could make $18 to $19 an hour as a heavy millright.[3] Upon this bare testimony alone, Mr. Kilpatrick bases approximately a quarter of a million dollars of damages.[4] No occupational specialist or expert testified. No testimony from plant managers or operators was presented. No advertisements for employment as a millright were offered. Mr. Kilpatrick could not at the hearing justify his characterization of the difference between a "heavy millright" and a "light millright". In fairness to the petitioner, the respondent also failed to present any evidence to refute Mr. Kilpatrick's bare assertion. However, the burden of presenting sufficient proof to warrant a claim is upon the petitioner, and the special master finds that the petitioner has failed to produce competent substantial proof of future lost earning capacity. It appears from the testimony and the evidence provided that Mr. Kilpatrick is today fully employed, in his field, without restriction, and where he would likely have been but for this accident. The special master accordingly finds that it is appropriate to make no award for future lost earning capacity.

This finding may also be justified by examining the actual earnings of Mr. Kilpatrick. For 1990 and 1991, the two years immediately proceeding the year of the accident, Mr. Kilpatrick earned $22,400.55 and $24,549.00 respectively, for an average of $23,474.78. In 1991, the year of the accident, Mr. Kilpatrick lost several months of work due to the injury, yet still earned $30,575.82, a banner year compared to the previous two. Only in 1993 did he earn less than the 1990 and 1991 average, earning $23,433.81 for the year (a $40.97 difference). In 1999, he earned $39,739, which is $15,190 more than earned in the last full year of employment before the accident, which was ten years earlier (a 62% increase).

The sum for pain and suffering was undisputed at the hearing before the Special Master, but post-hearing the respondent disputes the amount. Given the nature and type of the injury sustained, the amount is clearly within the bounds of what a reasonable jury might award. There is clear and substantial evidence in support of the award. The special master finds the award of $75,000.00 for this category appropriate.

[3] Contrast this with the testimony just four years ago at the civil trial that, but for the injury, he would be making $11.42 an hour.

[4] In closing arguments at the special master hearing, the petitioner's counsel actually suggested that the award for future lost earning capacity should be increased from that found by the trial court.

Collateral and other Payments

The claimant has been paid $100,000 by the county.[5]

CONCLUSIONS OF LAW:

This is a premises liability matter (slip and fall case) filed by Mr. Clyde Kilpatrick against Escambia County, as owner of the Escambia County Civic Center. Mr. Kilpatrick was at the Civic Center as a paid patron of a concert, and thus is considered a business invitee. In a premises liability case, "a landowner owes two duties to a business invitee: (1) to use reasonable care in maintaining the premises in a reasonably safe condition; and (2) to give the invitee warning of concealed perils which are or should be known to the landowner, and which are unknown to the invitee and cannot be discovered by him through the exercise of due care." *Emmons v. Baptist Hospital*, 478 So.2d 440, 442 (Fla. 1st DCA 1985).

The special master finds that the respondent failed to use reasonable care in maintaining the premises in a reasonably safe condition through negligent design of the stairs (uneven rise to run, uneven tread edge highlighting, and no handrailing), and failed to give the invitee warning of the concealed peril (the uneven rise to run) by failing to maintain adequate lighting.

Florida courts have adopted the "step in the dark" rule, which provides that "one who enters a totally unfamiliar area in the darkness is not ordinarily justified in proceeding without first ascertaining whether there are obstacles to safe progress, [which] is a rule of contributory negligence." *Schoen v. Gilbert*, 404 So.2d 128 (Fla. 3rd DCA 1981).[6] In this case, the special master recommends that the step in the dark rule be found inappropriate. Mr. Kilpatrick's only remedy, if he had been scared to step into the dark hole that he did step into, was to abandon his newlywed wife and (probably unsuccessfully) demand a refund of his ticket price in mid-concert. Given the facts and circumstances, it is wholly unreasonable to have expected him to do so. The step in the dark rule is appropriate to, for instance, a dark parking lot that an individual drives into and then chooses to alight from his or her automobile. Application of the step in the dark rule appears, under the facts of this particular case, inequitable.

ATTORNEYS FEES:

The attorney for the claimant has certified by affidavit his compliance with the 25% limit on attorney's fees.

[5] The claimant's wife was also paid $20,000 for a loss of consortium claim established by the trial court; and she was reimbursed for all of the court costs.

[6] The Respondent Escambia County did not cite to the step in the dark rule at the civil trial or at the hearing before the Special Master. The Respondent did, however, argue comparative negligence on an un-cited authority that appeared to be an argument under the step in the dark rule.

RECOMMENDATIONS: The special master recommends that the claimant be awarded the sum of $93,801.34 for his injuries incurred due to the negligence of respondent Escambia County, Florida, calculated as follows:

Past Medical	$4,519.34
Future Medical	$8,468.00
Past Lost Earnings	$5,814.00
Future Lost Earning Capacity	$-0-
Pain and Suffering	$75,000.00
Subtotal	$93,801.34
Deduct: 0% comparative negligence	($-0-)
Gross Award	$93,801.34
Deduct: Paid by County	$100,000.00
Net claim	$-0-

Accordingly, the special master recommends that this claims bill be reported UNFAVORABLY.

Respectfully submitted,

Nathan L. Bond
House Special Master

Stephanie Birtman
Staff Director, Claims Committee

cc: Representative Kendrick, House Sponsor
Senator Mitchell, Senate Sponsor
Jim Rhea, Senate Special Master
House Claims Committee