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It is not every day that your workers' compensation claim will clash with a Claimant's Fifth Amendment rights, but if it does there are a few important factors to consider.

The protection of the Fifth Amendment is invoked when a person refuses to answer a question for fear of incriminating themselves. Situations where this may arise in workers' compensation are false identification, immigration status, running an illegal side business, audio recordings without consent, termination for gross misconduct, among many other possibilities. However, a Claimant may not simply refuse to answer discovery requests or questions under oath in order to disrupt the Employer/Carrier's case or halt the investigation. This concept is often referred to as the "sword and shield" doctrine. The idea is that a civil litigant's Fifth Amendment right may be used as a shield, but not used as a sword.

The protection of the Fifth Amendment may not be invoked in order to prevent compliance with discovery requests or avoid defenses. See *City of St. Petersburg v. Houghton*, 362 So.2d 681, 683 (Fla. 2d DCA 1978). In order to succeed defending against a claim wherein the Claimant invokes his/her 5th Amendment right, the deciding factor will be the meaningful prejudice suffered by the Employer/Carrier due to the refusal of discovery. See *Hill v. Greyhound Lines, Inc.*, 988 So.2d 1250 (Fla. 1st DCA 2008). For example, in *Fernandez*, the Court found the Employer/Carrier failed to show meaningful prejudice when the Claimant refused to answer questions regarding the Claimant's immigration status, but the Employer had actual knowledge that the Claimant did not have a social security number at the time of hire. *Fernandez v. Blue Sky/Venecia Food Corp.*, 40 So. 3d 779, 782 (Fla. Dist. Ct. App. 2010). *Village Inn*, demonstrates a different scenario where meaningful prejudice was shown to warrant sanctions when the Claimant invoked the Fifth Amendment during a deposition regarding questions about his income for the time period she was attempting to collect benefits, even though his answers to questions would likely expose him to criminal liability for fraud. *Vill. Inn Rest. v. Aridi*, 543 So. 2d 778 (Fla. Dist. Ct. App. 1989).

When brought to the JCC's attention, the JCC should impose an appropriate sanction that relieves the resulting prejudice to the Employer/Carrier's defense. *Eatmon v. Bonagura*, 590 So. 2d 4, 4 (Fla. Dist. Ct. App. 1991). Proper sanctions may be compelling the discovery requested, dismissal of the claim with prejudice, striking the pleadings, and/or other sanctions against the party. See *Village Inn Restaurant v. Aridi*, 543 So.2d 778 (Fla. 1st DCA 1989); see also *Rollins Burdick Hunter v. Euroclassics Ltd.*, 502 So.2d 959 (Fla. 3d DCA 1987).

Other things to consider:

- Is the Claimant represented by other counsel for the event/incident/information you will be questioning them about?
- If there is a criminal or civil case open, what information is available through searching public court records? (i.e. police reports, witness statements, government documents, etc.)

Will this information/incident impact the Claimant's ability to work? (i.e. immigration, other court dates, background screening requirements, or possible incarceration)

--Elizabeth Montalvo, Esquire