IN THE SUPREME COURT OF FLORIDA

CASE NO: 85,343

ROY MILLINGER,

Petitioner,

vs.

BROWARD COUNTY MENTAL HEALTH DIVISION, ET AL.,

Respondent.

_______________________________/

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RESPONDENT'S ANSWER BRIEF

BARBARA B. WAGNER, ESQUIRE
Attorney for Respondent
2151 W. Hillsboro Blvd. #301
Deerfield Beach, FL 33442
(305)427-3133
Fla. Bar No. 341606

TABLE OF CONTENTS

TABLE OF CITATIONS iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

SUMMARY OF ARGUMENT 5

POINTS ON APPEAL

JURISDICTIONAL ARGUMENT 7

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CAUSE AND THAT OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT WITH REGARD TO THE JURISDICTION OF A JCC TO VACATE AND RE-ENTER A FINAL ORDER, AND THIS COURT THEREFORE SHOULD NOT ACCEPT JURISDICTION.

MERITS ARGUMENT

POINT I 10

THE FIRST DISTRICT COURT OF APPEAL RULED CORRECTLY THAT THE JCC LACKED JURISDICTION TO VACATE AND RE-ENTER THE ORDER OF 1/27/93.

POINT II 14

THE JCC'S DETERMINATION THAT THE CLAIMANT'S GRAVES EYE DISEASE WAS NOT AGGRAVATED OR ACCELERATED BY THE CLAIMANT'S ACCIDENT IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF CITATIONS

CASES:

	PAGE
Breen v. Smith. 644 So.2d 183 (Fla. 1st DCA 1994)	10
Dowd v. Sun-Crete Construction Co., Inc., 582 So.2d 83 (Fla. 1st DCA 1991)	10
E. M. Scott Contractors v. Baker, 479 So.2d 292 (Fla. 1st DCA 1985)	10
Farrell v. Amica Mutual Insurance Co., 361/408 (Fla. 1978)	5,7,8,10
Gibson v. Maloney, 231 So.2d 823 (Fla. 1970)	9
Jenkins v. State, 385 So.2d 1356 (Fla. 1980)	8,9
Morgan Yacht Corp. v. Edwards, 386 So.2d 883 (Fla. 1st DCA 1980)	12,13
New Washington Heights Community Development v. Dept. of Community Affairs, 515 So.2d 328 (Fla. 3rd DCA 1987)	5,7,8,11,12,13,15
Stone & Webster Engineering Co. v. McCray, 377 So.2d 30 (Fla. 1st Dca 1979)	11
Threat v. Rogers, 443 So.2d 149 (Fla. 1st DCA 1983)	8,10

STATUTES:

Section 440.271, Fla. Stats. (1990)	8
Section 440.28, Fla. Stats.	13

RULES:

Rule 4.141(6), Fla. R. Work. Comp. P.	10

INTRODUCTION

In this brief, the Petitioner/Appellant/Claimant, ROY MILLINGER, will be referred to as Millinger or Petitioner. The Respondent/Appellee/Employer/Servicing Agent, Broward County Mental Health Division and Risk Management, will be referred to as Broward County or Respondent. References to the Appendix to Petitioner's Brief on the Merits will be designated by the letter "A" followed by the appropriate page number. References to the record will be designated by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE

Respondent, Broward County, agrees with the Statement of the Case presented in the Jurisdictional Brief of Petitioner and Petitioner's Brief on the Merits, with the following additions and clarifications.

The Judge of Compensation Claims' [hereinafter "JCC"] order denying compensability of Millinger's thyroid eye disease became final on 2/26/93. A Notice of Appeal dated 2/24/93 was filed with the First District Court of Appeal on 3/2/93 (R.136, 142). Millinger then filed a "Motion for Extension or in the Alternative Motion for Remand" requesting that the appeal be accepted as timely or in the alternative that the case be remanded to the JCC to determine whether excusable neglect existed so as to allow the JCC to vacate and re-enter the order of 1/27/93 (R.446-449). The motion was accompanied by an affidavit of claimant's counsel's legal secretary attesting that she called the office of the Clerk of the First District Court of Appeal and was instructed that the Notice of Appeal needed to be postmarked before the 30 day time period following rendition of the order (R.443-44). Undersigned counsel for Broward County filed a Response to the Motion for Extension or in the Alternative Motion for Remand (R.451-53). By order dated 4/15/93, the motion was denied and the appeal dismissed as untimely (R.455). Millinger then filed with the JCC a Motion for Rehearing and Motion to Vacate, based on the same grounds asserted in the Motion for Extension/Motion for Remand filed earlier with the First District Court of Appeal (R. 457-459). Following a hearing on the motion, the JCC entered the order which is the subject of this proceeding (R.462-464).

Millinger filed a Notice of Invoking Discretionary Jurisdiction on 3/8/95. This Court entered an order dated 3/17/95 postponing its decision on jurisdiction and directing the parties to serve briefs on the merits. Millinger served a Jurisdictional Brief on 3/18/95. Broward County will address the issue of jurisdiction in this brief.

STATEMENT OF THE FACTS

Petitioner has presented a Statement of Facts, as well as argument, dealing with the underlying case before the JCC which resulted in an order on the merits dated 1/27/93. As pointed out in Petitioner's Brief, the First District Court of Appeal did not reach the merits of the underlying case because the court found that the JCC was without jurisdiction to vacate and re-enter the order after it had become final (Petitioner's Brief on the Merits, p. 4; A. 1-6). The appellate court vacated the JCC's order and dismissed the appeal (A. 1-6). Under the circumstances, it would be improper for this Court to address the merits of the underlying case, when the First District Court of Appeal has not done so. The alleged conflict which would invoke this Court's jurisdiction involves the issue of the jurisdiction of the JCC to vacate and re-enter an order which has become final, and has nothing to do with the issues in the underlying case. If this Court accepts jurisdiction, it must determine whether the First District Court of Appeal erred in vacating the JCC's order and dismissing the appeal, not whether the JCC's order on the merits is supported by competent substantial evidence. The latter determination is within the jurisdiction of the First District Court of Appeal.

Based upon the foregoing, and in the interest of judicial economy, Respondent will not present facts or argument in this brief regarding the JCC's findings as to Millinger's entitlement to workers' compensation benefits. If this Court disagrees with Respondent's position, it is respectfully requested that leave be granted to file an Amended Brief with facts and argument addressing the merits of Millinger's claim for compensation benefits.

SUMMARY OF ARGUMENT

Respondent respectfully asserts that this Court should not accept jurisdiction to review this matter as there is no express and direct conflict between the decision of the First District Court of Appeal in this case and the decision of the Third District Court of Appeal in New Washington Heights v. Department of Community Affairs, 515 So.2d 328 (Fla. 3rd DCA 1987). Although the First District Court of Appeal certified a "possible" conflict with New Washington Heights, a review of the decisions reveals no express and direct conflict on the same question of law. The instant case deals with the jurisdiction of a Judge of Compensation Claims to vacate and re-enter a final order, an issue which has already been addressed by this Court in Farrell v. Amica Mutual Insurance Co., 361 So.2d 408 (Fla. 1978). This precedent was correctly followed by the First District Court of Appeal. New Washington Heights is not a workers' compensation case, but rather deals with an appeal from an order rendered by an administrative agency.

If this Court accepts jurisdiction, Respondent urges that the decision of the First District Court of Appeal, vacating the JCC's order and dismissing the appeal, must be affirmed. The JCC improperly found that he had "inherent jurisdiction" to vacate and re-enter a final order under the circumstances of this case. The appellate court corrected this error and determined, based on prevailing statutory and case law as well as the workers' compensation rules of procedure, that the JCC lacked jurisdiction to vacate and re-enter his order of 1/27/93 which had become final. New Washington Heights and the workers' compensation decisions dealing with fraud cited by Petitioner are distinguishable from, and therefore not controlling, in the instant case. Since the First District Court of Appeal held

correctly that the JCC did not have statutory or rule authority or inherent jurisdiction to vacate an order which had become final, its order of 12/20/94 vacating the order and dismissing the appeal must be affirmed.

ARGUMENT

JURISDICTIONAL ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CAUSE AND THAT OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT WITH REGARD TO THE JURISDICTION OF A JCC TO VACATE AND RE-ENTER A FINAL ORDER, AND THIS COURT THEREFORE SHOULD NOT ACCEPT JURISDICTION.

In its opinion dated 12/20/94, the First District Court of Appeal held that the JCC was without jurisdiction to vacate and re-enter his final order. The court noted that the factual situation in the instant case is similar to that in New Washington Heights v. Department of Community Affairs, 515 So.2d 328 (Fla. 3d DCA 1987)(hereinafter New Washington Heights), but held that the case is controlled by Farrell v. Amica Mutual Insurance Co., 361 So.2d 408 (Fla. 1978) and subsequent decisions of the First District Court of Appeal in workers' compensation cases (A.4). Although the court certified a "possible conflict" with New Washington Heights (A.2), Respondent asserts respectfully that a careful reading of the decisions reveals no express and direct conflict sufficient to invoke this Court's jurisdiction.

The instant case concerns the jurisdiction of a JCC to vacate and re-enter an order which has become final. As noted in the opinion of the First District Court of Appeal, this Court addressed previously the issue of the authority of the Industrial Relations Commission to vacate a final order, and concluded that the IRC had no express, implied or

inherent authority to do so (A.4-5); Farrell v. Amica Mutual Insurance Co., 361 So.2d 408 (Fla. 1978). The same rationale was held to apply to a JCC (A.5). Threat v. Rogers, 443 So.2d 149 (Fla. 1st DCA 1983). The First District Court of Appeal correctly applied this precedent in the instant case.

New Washington Heights did not involve a workers' compensation claim, but rather an administrative appeal from an order rendered by the Department of Community Affairs. Faced with facts similar to those in the case at bar, the appellate court dismissed the untimely appeal "without prejudice to the appellant to apply to the Department to vacate and re-enter the operative order." 515 So.2d at 330.

As noted in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), the Florida Constitution provides that this Court may review a decision of a district court of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Id. at 1357, citing Article V, section 3(b)(3) of the Florida Constitution as amended April 1, 1980 (emphasis added). It is respectfully suggested that the decision of the First District Court of Appeal in the instant case and the decision in New Washington Heights are not in express and direct conflict on the same question of law. In New Washington Heights, the court allowed an appellant to apply to an administrative agency to vacate and re-enter an order to allow a timely appeal. In the instant case, the First District Court of Appeal, which has exclusive jurisdiction over appeals of orders of judges of compensation claims (See Sec. 440.271, Fla. Stats. (1990), acknowledged that this Court had already addressed the issue of vacation of a final workers' compensation order and determined that it was improper. In addition, the court

noted that other workers' compensation cases, as well as the Florida Rules of Workers' Compensation Procedure, provide that a final order may not be amended or vacated by a JCC. The two decisions at issue here, one dealing with an administrative agency and one dealing with the jurisdiction of JCC, are clearly not in conflict. "As stated by Justice Adkins in Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970) '(i)t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari' (Emphasis in original.)" Jenkins, 385 So.2d at 1359. There is no basis for this Court to accept jurisdiction.

MERITS ARGUMENT

POINT I

THE FIRST DISTRICT COURT OF APPEAL RULED CORRECTLY THAT THE JCC LACKED JURISDICTION TO VACATE AND RE-ENTER THE ORDER OF 1/27/93.

In its order of December 20, 1994, the First District Court of Appeal stated that this case is controlled by Farrell v. Amica Mutual Insurance Co., 361 So.2d 408 (Fla. 1978) and subsequent First District Court of Appeal decisions which hold that a JCC is without jurisdiction to vacate a final order in a workers' compensation proceeding (A. 1-6). Petitioner argues that case law allows an exception to this well-established rule under the circumstances of this case. Respondent disagrees, and asserts that the First District Court of Appeal correctly applied prevailing law and the Rules of Workers' Compensation Procedure in determining that the appeal should be dismissed.

Pursuant to Rule 4.141(b), Fla. R. Work. Comp. P., a JCC may vacate or amend only an order which is not yet final. See Farrell; Breen v. Smith, 644 So.2d 183 (Fla. 1st DCA 1994); Dowd v. Sun-Crete Construction Co., Inc., 582 So.2d 83 (Fla. 1st DCA 1991); E. M. Scott Contractors v. Baker, 479 So.2d 292 (Fla. 1st DCA 1985)(A JCC has no authority to vacate an order which has become final, although he does have the authority, within the period before the order becomes final, to correct errors arising from inadvertence, mistake, or excusable neglect); Threat v. Rogers, 443 So.2d 149 (Fla. 1st

DCA 1983); Stone & Webster Engineering Co. v. McCray, 377 So.2d 30 (Fla 1st DCA 1979).

Millinger urges that the JCC had the authority to vacate and re-enter the prior final order because Millinger was deprived of the right to appeal due to the representation of a state functionary (Petitioner's Brief on the Merits [hereinafter "P.B."], p.14). He argues that the Stone-Farrell line of decisions cited above are distinguishable from New Washington Heights because those cases did not involve misrepresentation on the part of a state functionary (P.B., p. 15). First, it must be pointed out that Respondent does not agree with Millinger's assertion and the JCC's finding that the late filing of claimant's appeal was the direct result of misrepresentations of a state functionary. This finding was challenged by Broward County on appeal but the argument was not addressed by the First District Court of Appeal because the appeal was dismissed based on the JCC's lack of jurisdiction to enter the order. Respondent's position is that neither "state action" nor "excusable neglect" deprived appellant of the ability to file a timely notice of appeal. The workers' compensation statute, rules of procedure and case law clearly set forth the applicable time limits and procedures for perfecting an appeal. These authorities are readily available to practicing attorneys, precluding any need to consider or rely on information obtained by a secretary from an employee of the court clerk's office. Although the appellate court did not address this issue, it acknowledged in a footnote that the cases cited in New Washington Heights presented a "somewhat different situation than the present case" since they involved situations in which an appellant had not been notified of the entry of a final order. In this case, the court noted, Millinger's attorney stated at the

hearing that he knew the notice had to be filed by the 30th day and gave his secretary appropriate instructions, but she took it upon herself to call the court (A. 2). The court thus implied that it was not persuaded that actions of a state official caused the late filing of the appeal in this case, making it distinguishable from New Washington Heights.

Even if the facts of the instant case are considered to be identical to the situation in New Washington Heights, however, there is no basis for reversal of the First District Court of Appeal's determination that the JCC was without jurisdiction to vacate and re-enter his earlier order. Workers' Compensation in Florida is governed by statutes, rules of procedure, and case law which address specifically the powers, duties, and jurisdiction of a Judge of Compensation Claims. As noted above, these authorities provide that a final order may not be vacated. New Washington Heights, in which the Third District Court of Appeal stated that the appellant could apply to a particular administrative agency to vacate and re-enter an order, cannot be read as granting a JCC "inherent jurisdiction" to set aside and re-enter a final compensation order. As noted by the First District Court of Appeal in this case, "absent statutory or rule authority, a JCC, or the equivalent, does not have jurisdiction to vacate an order that has become final" (A. 5). A JCC cannot give himself "inherent" jurisdiction which has not been granted by the legislature or rules.

Millinger asserts that Morgan Yacht Corp. v. Edwards, 386 So.2d 883 (Fla. 1st DCA 1980) provides authority for a JCC to exercise inherent jurisdiction after an order becomes final. The First District Court of Appeal considered and properly rejected this argument by noting that Morgan Yacht and cases which follow it are limited to specific situations involving orders or stipulations procured by fraud which can be addressed by

way of a petition for modification pursuant to Sec. 440.28, Fla. Stats. (A. 5, fn. 3). The instant case does not involve "flagrant fraud and misrepresentation" as was present in Morgan Yacht, 386 So.2d at 884, but instead deals with a missed appeal deadline, and is therefore clearly distinguishable from the cases cited by Petitioner.

The First District Court of Appeal ruled correctly in its order of December 20, 1994 that the Judge of Compensation Claims did not have jurisdiction to vacate and re-enter his earlier order which had become final. The appeal was properly dismissed. Neither the workers' compensation statutes, rules, nor case law grant a JCC authority to vacate a final order as was done in this case. New Washington Heights, in which the Third District Court of Appeal allowed an appellant to apply to an administrative agency to vacate and re-enter a final order, has no applicability to workers' compensation proceedings.

POINT II

THE JCC'S DETERMINATION THAT THE CLAIMANT'S GRAVES EYE DISEASE WAS NOT AGGRAVATED OR ACCELERATED BY THE CLAIMANT'S ACCIDENT IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

As pointed out above, in Respondent's Statement of the Facts, the merits of the JCC's order were not reached by the First District Court of Appeal since the appeal was dismissed based upon the JCC's lack of jurisdiction. Respondent moves to strike the facts and argument in Petitioner's brief pertaining to the merits of the underlying case, as it would be improper for this Court to address a matter not reached by the court below.

If the Court disagrees with Respondent's position, request is made that leave be granted to file an Amended Brief addressing the merits of the underlying case.

CONCLUSION

Based upon the argument and legal authority set forth above, it is respectfully suggested that this Court should not accept jurisdiction over this matter as there is no express and direct conflict between the decision of the First District Court of Appeal and the decision of the Third District Court of Appeal in New Washington Heights, as alleged by Petitioner.

If jurisdiction is accepted, it is respectfully requested that the decision of the First District Court of Appeal dated December 20, 1994 dismissing Millinger's appeal be affirmed, as the court determined correctly that the Judge of Compensation Claims did not have jurisdiction to vacate and re-enter an earlier order which had become final.

Respectfully submitted,

Barbara B. Wagner

BARBARA B. WAGNER, ESQUIRE
Attorney for Respondent
2151 W. Hillsboro Blvd. #301
Deerfield Beach, FL 33442
(305)427-3133
Fla. Bar No. 341606

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed this 8 day of June, 1995 to: Jay Levy, Esquire, Attorney for Petitioner, 6401 SW 87th Ave. #200, Miami, FL 33173.

Barbara B. Wagner
BARBARA B. WAGNER, ESQUIRE
Attorney for Respondent
2151 W. Hillsboro Blvd. #301
Deerfield Beach, FL 33442
(305)427-3133
Fla. Bar No. 341606