IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,343

ROY MILLINGER,

Petitioner,

vs.

BROWARD COUNTY MENTAL HEALTH DIVISION, et al.

Respondent.

ON PETITION FOR REVIEW OF A
DECISIONOF THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, ON THE GROUNDS
OF EXPRESS AND DIRECT CONFLICT OF DECISION

PETITIONER'S BRIEF ON THE MERITS

JAY M. LEVY, P.A.
ATTORNEYS FOR PETITIONER
6401 SW 87TH AVENUE
SUITE 200
MIAMI, FLORIDA 33173
PHONE (305) 279-8700

RICHARD BERMAN, ESQUIRE
4300 NORTH UNIVERSITY DRIVE
SUITE B-100
LAUDERHILL, FLORIDA 33351

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Other Authorities

IN THE SUPREME COURT OF FLORIDA

CASE NO: 85,343

ROY MILLINGER,

Petitioner,

vs.

PETITIONER'S BRIEF ON THE MERITS

BROWARD COUNTY MENTAL HEALTH DIVISION, ET AL.,

Respondent.
_____/

I.
Preamble

This is an appeal from a final compensation order denying Appellant's claim for worker's compensation benefits. Appellant ROY MILLINGER, Claimant below, shall be referred to as the "MILLINGER". Appellee, BROWARD COUNTY MENTAL HEALTH DIVISION, Employer below, shall be referred to as the "BROWARD COUNTY". Appellee RISK MANAGEMENT, Servicing agent below, shall be referred to as "SERVICING AGENT". The record on appeal shall be referred to by the letter "R". The Judge of Compensation Claims shall be referred to as "JCC".

II
Statement of the Case

A claim for worker's compensation benefits was filed by the MILLINGER on November 25, 1991 (R. 152). MILLINGER sought payment certain medical bills, temporary total and temporary partial disability, attorney's fees, interest, penalties and costs (R. 152). The parties entered into a pretrial stipulation on December 13, 1991 (R. 147-150). This stipulation indicates the accident but

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

not MILLINGER's injuries was accepted by BROWARD COUNTY as compensable (R. 147). The parties indicated MILLINGER's date of maximum medical improvement was an issue for determination by the JCC (R. 148).

The matter came on for trial before the JCC on November 17, 1992 (R. 1-63). At the commencement of the hearing, the parties agreed to limit the hearing to compensability (R. 130-134). All medical evidence at trial was adduced by deposition.

On January 27, 1993, the JCC a final compensation order wherein the JCC noted a conflict between the testimony of Dr. Gelman, and endocrinologist, and Dr. Tenzel, an ophthalmologist, concerning the causation of MILLINGER's injury (R. 439). The JCC found the testimony of Dr. Tenzel to be more persuasive, reasonable and logical and accepted his opinion that MILLINGER's symptomatology was part of the normal progression of thyroid eye disease which occurred in the absence of trauma (R. 439). The JCC noted Dr. Tenzel testified the disease is progressive and the symptoms begin with the proptosis noted by Dr. Yang in February, 1991 (R. 440). As a result of the JCC's acceptance of Dr. Tenzel's testimony, the JCC found MILLINGER's thyroid eye disease was not causally related to his accident of March 28, 1991, and not compensable (R. 440). The condition was the result of the natural progression of thyroid eye disease and was not caused, aggravated or accelerated by the accident of March 28, 1991 (R. 440). The claim for compensation was denied (R. 441).

MILLINGER appealed this order by mailing the notice of appeal to The District Court of Appeal (R. 443). Although mailed timely, the notice was received by the District Court after the expiration of the thirty day filing period (R. 443). This District Court dismissed the appeal as untimely (R. 455).

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

MILLINGER then filed a motion before the JCC to vacate the final order pursuant to Fla.R.Civ.Pro. 1.540(b) and Fla.R.W.C.Pro. 4.141 (R. 457-460). The factual basis for the motion is contained in the affidavit of the secretary of MILLINGER's attorney. In this affidavit, the secretary stated she was advised by a Clerk of this Court that the notice of appeal could be sent to the District Court by mail so long as it was postmarked within the thirty (30) day period (R. 457). Based upon this representation, the secretary mailed the notice of appeal to the District Court on February 24, 1993, within the thirty (30) day period (R. 457). Relying in *New Washington Heights Community Development Conference v. Department of Community Affairs, 515 So.2d 328 (Fla. 3DCA 1987)*, MILLINGER suggested the JCC should vacate and re-enter the final compensation order because the appeal was not timely filed as a result of a misrepresentation of a state functionary (R. 458). This motion came on for hearing before the JCC on June 2, 1993 (R. 64-114). BROWARD COUNTY distinguished *New York Washington Heights* because the case relied by analogy on *Fla.R.Civ.Pro. 1.540* which BROWARD COUNTY contended did not apply to worker's compensation proceedings (R. 86). BROWARD COUNTY contended the January 27, 1993 order was final and as Rule 4.140 allowed only for vacation of non-final orders, the JCC lacked jurisdiction to entertain the motion (R. 86).

On June 30, 1993, the JCC entered the order which is the subject of this proceeding (R. 462-464). The JCC found when state action deprives a party of the ability to file a timely notice of appeal, the party should be entitled to apply to the trial court to re-enter the operative order so the order may be appealed (R. 462-463). The JCC set aside his original order of January 27, 1993 and re-entered said order as of June 30, 1993 (R. 463). On the jurisdictional question, the JCC found that although the matter may not be expressly within the four corners of Sec. 440.20, Fla.Stat., the JCC had

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

jurisdiction to correct a mistake performed by a judicial official, expressly relying upon the *New Washington Heights* decision (R. 463).

From this order of the JCC, MILLINGER appealed to the District Court of Appeal challenging the JCC's denial of his claim due to the lack of a causal relationship between the aggravation or acceleration of his injury and the accident (R. 116-117). BROWARD COUNTY cross-appealed challenging the JCC's grant of MILLINGER's motion to vacate the compensation order (R. 118-120).

On December 20, 1994, the District Court issued its opinion (A.1-6). The District Court did not reach the merits of MILLINGER's appeal because the Court found that the JCC was without jurisdiction to vacate and re-enter the final judgment to allow MILLINGER an opportunity to file the appeal (A. 1-2). In ruling on this issue, the Court certified a possible conflict between its decision and that of the District Court of Appeal, Third District, in *New Washington Heights Community Development Conference v. Department of Community Affairs*, 515 So.2d 328 (Fla. 3DCA 1987) (A.2). MILLINGER moved for rehearing and rehearing en banc. By its subsequent opinion on rehearing entered February 24, 1995, the District Court of Appeal determined its decision inthe instant cause was not in conflict with its prior decision in *National Corp. v. Department of Health and Rehabilitative Services*, 560 So.2d 1184 (Fla. 1DCA 1989) which cited the *New Washington Heights* with approval (A. 7-8).

Based upon the District Court of Appeal's certification of potential conflict, MILLINGER now invokes this Court's review based upon express and direct conflict between the decision rendered below and that of the District Court of Appeal, Third District in *New Washington Heights*.

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

III
Statement of the Facts

MILLINGER is sixty years old (R. 41). In August of 1991, he was hired to work as a van driver for EMPLOYER (R. 42). In order to be hired, MILLINGER had to pass a physical examination (R. 42). As part of the physical, he took an eye exam which disclosed he had 20/20 vision (R. 42). As a result of the physical, MILLINGER was advised he had high blood sugar level for which he sought treatment at a Veterans Administration facility (R. 43). MILLINGER never had any problems of blurry vision when he was being treated by the VA doctors for diabetes (R. 44).

MILLINGER suffered an on-the-job injury on March 28, 1991, when an individual he was transporting went neurotic, became violent and punched MILLINGER above the eye and in the ribs (R. 45). MILLINGER immediately reported the incident to the supervisor (R. 45). The next day when MILLINGER woke up, his right eye was a bit swollen, reddish in color and crusted, and MILLINGER had to bathe his right eye to get it open (R. 46). He reported to work and was sent for medical treatment (R. 46). His right eye was swollen and his vision was blurry (R. 47).

MILLINGER was sent to see Dr. Perlman an ophthalmologist (R. 47). He eventually saw Dr. Gelman an endocrinologist and Dr Tenzel an ophthalmologist surgeon (R. 48). MILLINGER's eye was bulging, his vision was not correct and he had double vision (R. 49). His depth and peripheral vision were not good in his right eye (R. 49). From August, 1990, until the date of the accident, MILLINGER was driving the van without any vision problems (R. 49-50).

Dr. Tenzel examined the MILLINGER and sent him for a CAT scan and MRI at Bascom Palmer Institute. He eventually recommended eye socket surgery which MILLINGER underwent on July 2, 1991 (R. 50). After the surgery, MILLINGER no longer had double vision over his entire

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

right eye (R. 51). MILLINGER began having trouble with his other eye around November of 1991 (R. 51). After MILLINGER's treatment with Dr. Tenzel, he came under the care of Dr. Tennenbaum at the Veterans Administration (R. 52). At the present time, he is no longer treating with Dr. Gelman for his thyroid (R. 52). He has been prescribed prismatic glasses (R. 53). MILLINGER still has eye problems (R. 54). He suffers from proptosis in his left eye which is a bulging of the eye ball (R. 54). MILLINGER no longer has 20/20 vision and his eye mobility on his right eye has been restricted due to his operation (R. 54). He has difficulty with light and cannot drive due to the glare (R. 54). Prior to the accident, MILLINGER did not need any type of glasses for driving (R. 55).

Dr. Jay Spiegelman gives pre-employment physical exams for EMPLOYER (R. 296-297). He examined the MILLINGER on June 18, 1990 (R. 297). MILLINGER's vision was 20/30 in his right eye and 20/35 in his left (R. 298). The 20/30 vision in his right eye and 20/35 in the left eye was uncorrected (R. 299). MILLINGER did not need glasses for distance and obtained his driver's license without glasses (R. 300). MILLINGER had positive laboratory findings for blood sugar of 166 with normal being 115, cholesterol at 280 with normal of 200 and his lipoprotein were elevated (R. 300). The doctor suggested MILLINGER might be a diabetic and advised him to consult his own physician (R. 300). MILLINGER then went to the VA where a diagnosis of diabetes was made (R. 301). Other than MILLINGER's need for reading glasses, Dr. Spiegelman noted no other abnormality of the eye (R. 301). MILLINGER had no blurry or double vision (R. 302). If MILLINGER's eyes has been swollen or discolored, Dr. Spiegelman would have noted it (R. 302).

Dr. Yang is employed by the VA as a cardiologist and internist (R. 323). He first saw the MILLINGER on June 28, 1990 when he came to the VA with a blood sugar problem (R. 324). MILLINGER was diagnosed as having a mild case of diabetes with no other abnormality (R. 324,

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

326-327).

Dr. Yang saw MILLINGER on November 8, 1990 for follow-up regarding diabetes (R. 327). During this visit, the doctor noted a little bit of swelling in MILLINGER's right eye (R. 331). The doctor noted a borderline ptosis condition (R. 331). He sent MILLINGER to Dr. McCoy, an eye doctor, for evaluation (R. 331). MILLINGER had no complaints of vision problems (R. 333). The eye doctor did not detect a ptosis condition (R. 333).

The last time MILLINGER was seen by Dr. Yang was on May 9, 1991 (R. 334). At that time, there were no signs or symptoms to suggest he had a thyroid problem (R. 335-343). When Dr. Yang examined MILLINGER, the right eye did not impress and it was only after MILLINGER mentioned that his right eye was swollen that the doctor noticed it (R. 339).

Dr. Kenneth Gelman is a board certified endocrinologist (R. 161). He first saw the MILLINGER on May 3, 1991 and received a history that MILLINGER suffered a trauma over his right eye when struck by a passenger approximately four (4) weeks before the appointment (R. 161-162). MILLINGER had a CT Scan which showed no fracture but swelling and protrusion of the right eye (R. 162). MILLINGER was referred to Dr. Perlman an ophthalmologist who felt MILLINGER had Graves Eye Disease. Graves Disease is a form of tyroid disease associated with hyperthyroidism, the symptoms of which include eye bulging and a rash which develops in the anterior surface of the legs (R. 163). One of the theories concerning Graves disease is it commences after a traumatic event (R. 164). Dr. Gelman was of the opinion MILLINGER had Graves Eye Disease without hyper-thyroid (R. 165). MILLINGER's double vision began after the trauma (R. 165). The trauma may have led to some edema in the orbit of the eye muscle which contributed to double vision (R. 165). The Graves disease could have bee present in subclinical degree before the trauma (R. 165).

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 276-8700

Dr. Gelman next saw MILLINGER in June of 1991 (R. 166). His right eye appeared to be more proptotic (R. 166). At this time, Dr. Gelman advised MILLINGER he had Graves Disease (R. 166). Although he saw old pictures of the MILLINGER, Dr. Gelman could not state if MILLINGER had Graves Disease before he sustained the trauma (R. 166). As of the June, 1991 appointment, MILLINGER had a lid lag and a noticeable stare which are symptoms of hyperthyroidism (R. 169). As of this appointment, June 1991, Dr. Gelman's opinion MILLINGER had Euthyroid Graves Disease (R. 170). He recommended the MILLINGER be followed clinically to see of the eye condition would lessen the time (R. 170).

Graves Disease is an endocrinological problem (R. 172). As of the June 1991 appointment, MILLINGER's right eye was worsening (R. 166). Dr. Gelman was asked a lengthy hypothetical question concerning the causation of the MILLINGER's eye condition and answered Graves Eye Disease is insidious and usually has been present for a while before it is diagnosed (R. 172-174). However, Dr. Gelman knew MILLINGER did not develop the symptoms with regard to double vision and severe bulging until after the trauma of the accident (R. 175). Within a reasonable degree of medical probability the trauma to the eye was an aggravating factor of MILLINGER's Graves Disease (R. 175).

MILLINGER was not at maximum medical improvement the last time he was seen and Dr. Gelman believed MILLINGER's condition was worsening (R. 181). MILLINGER had the beginnings of Graves Disease before the accident (R. 183). The swelling or bulging of the eye is one of many symptoms that occur as a result of Graves disease (R. 184). The trauma to the head or the orbit of the eye aggravated the disease process (R. 184). The eye condition was not disabling except to the extent it impaired MILLINGER's vision (R. 185). Double vision is something associated with

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

Graves Disease (R. 185).

David Tenzel is an ophthalmologist specializing in diseases of the eyelids and tear draining system (R. 202). He first saw the MILLINGER on June 28, 1991 (R. 203). MILLINGER's main complaint was his eye was prominent unilaterally (R. 207). MILLINGER also complained he was unable to lift his eyelid and he had decreased vision in the eye (R. 207). These complaints occurred after MILLINGER got hit on the head (R. 207). MILLINGER had a CT Scan before the accident which showed protrusion of the right globe, swelling of the superior rectus muscle and swelling of the inferior rectus muscle (R. 208). None of the prior reports indicated MILLINGER had trouble lifting his eyelids or suffered from decreasing vision (R. 208).

Dr. Tenzel's examination revealed MILLINGER had decreased movement of the right eye in all fields, and MILLINGER's right eye protruded 8 millimeters more than normal (R. 211). Swelling of the orbit caused the right eye to be pushed forward (R. 215). The swelling in the muscle causes limitation in the field of vision (R. 215). This swelling of the muscle puts pressure on the optic nerve which causes an efferent pupillary defect (R. 215). Visual field testing done after the trauma showed constriction of the field to the right (R. 218). MILLINGER also complained of decreased vision (r. 219). MILLINGER had double vision for about 270 degrees (R. 219). The doctor's diagnostic impression was MILLINGER had proptosis with retropulsion, decreased vision and efferent pupillary defect (R. 220). The doctor recommended an orbital decompression be done to relieve the optic nerve compression which was causing the double vision, decreased vision, efferent defect and field loss. These problems were caused by the compression of the nerves by the muscles (R. 220).

Thyroid eye disease is a component of Graves disease (R. 222). A person can have a normal thyroid function but still have Graves eye disease (R. 222). Graves disease is a thyroid disease and

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

one of its sequelae is eye problems (R. 222). With regard to a patient with Graves disease, the ophthalmologist treating the patient, evaluates his eye, while the endocrinologist evaluates the patient systematically for the same problem (R. 223). The doctor's impression was MILLINGER had Graves disease with eye problems as part of its sequelae (R. 224-225).

MILLINGER was scheduled for an orbital decompression which would relieve the pressure (R. 226). After the procedure was performed his vision improved from 20/100 to 20/70 and then to 20/50 (R. 229). His double vision was completely resolved (R. 229). MILLINGER's vision improved, his field improved, his nerve efferent pupillary defect improved and his double vision improved (R. 230).

Dr. Tenzel believed no one could definitively state whether the cause of the Graves disease was due to trauma or an activation of MILLINGER's thyroid (R. 245). The eye problems are a sequelae of the Graves disease (R. 247). Thyroid eye disease and thyroid problems can be caused by trauma (R. 247). The trauma of the accident could have caused MILLINGER's thyroid to get worse (R. 252). The doctor agreed that it would be appropriate to defer to an endocrinologist because thyroid disease is within such doctor's expertise (R. 254-255). The doctor believed he was in a better position to deal with the causes and treatment of thyroid disease n the area of his expertise (R. 257). The symptoms MILLINGER initially demonstrated to Dr. Tenzel were part of the normal progression of thyroid eye disease (R. 258). The doctor admitted he could not state within a reasonable probability whether the incident caused, aggravated or accelerated the MILLINGER's eye disease (R. 261). Graves disease has no specific time course and can be rapid or chronic (R. 262). The blurry and double vision could be a normal process of the disease in the absence of trauma (R. 263). The progressive swelling of the muscles prevents the eyes from moving well which causes

JAY M. LEVY, P.A. • 8401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

double vision (R. 263). Not every person with thyroid eye problems which have the eye disease progress as it did in MILLINGER's case (R. 265). The doctor could not say one way or the other whether trauma had an effect on the condition (R. 267).

IV
Point Involved on Appeal

Point I

WHETHER THE JCC DID NOT LACK JURISDICTION TO VACATE AND REENTER THE ORDER OF 1/27/93?

Point II

WHETHER THE JUDGE OF COMPENSATION CLAIMS DETERMINATION THAT THE MILLINGER'S GRAVES EYES DISEASE WAS NOT AGGRAVATED OR ACCELERATED BY THE MILLINGER'S ACCIDENT IS UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND IS CONTRARY TO THE MEDICAL EVIDENCE IN THIS CAUSE?

V
Summary of Argument

I.

The JCC had jurisdiction even after the January 27, 1993 compensation order became final to vacate said order for the sole purpose of reentering the order to preserve MILLINGER's appeal rights. There are two separate basis for this jurisdiction. The first is Sec. 440.33(1), Fla.Stat. which allows a JCC to do all things conformable to law which are necessary to discharge the duties of his office. This statute has been applied to allow a JCC to vacate a stipulation procured by fraud even after the order has become final. The action taken by the JCC in this cause is an action necessary to discharge the duties of his office and is within his authority pursuant to Sec. 440.33(1), Fla.Stat..

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

The second basis, which is the one expressly relied upon by the JCC below as authority for the vacation and reentry of the ordr, is the proposition recognized by the Third District Court of Appeal in *New Washington Heights Community Development Conference v. Department of Community Affairs, infra.*, that when reliance upon the instructions of a state functionary cause a notice of appeal to be untimely filed, an Administrative Agency has jurisdiction to vacate and reenter the order to restart the appellate clock. As there is no substantial difference between quasi-judicial administrative proceedings and a worker's compensation proceeding and as the rules of finality are identical in both types of proceedings, the foregoing rule should apply equally to worker's compensation matters. The JCC had jurisdiction to enter the order.

Any issue of the existence of a causal relationship between the representations of the state functionary and the untimely filing of the appeal is a question of fact for the JCC. There is competent substantial evidence in this record, which was agreed to by BROWARD COUNTY, which establishes the causal relationship. As the finding is supported by competent substantial evidence and is a factual matter, the order should be affirmed.

II

The issue raised by this appeal concerns the evidence of a causal relationship between MILLINGER's Graves eye disease and the industrial accident. Causation of non-observable injuries is essentially a medical question. In this cause all medical evidence was presented by deposition. As a result this Court is in as good a position as the JCC to interpret the medical testimony on the causal relationship issue.

Dr. Tenzel, upon whom the JCC relied in finding no causal relationship between the injury and the accident, clearly testified he could not state whether or not such a causal relationship existed. In

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

other words, this doctor had no opinion on the causal relationship issue. Dr. Tenzel also deferred to an endocrinologist on the issue of causal relationship. The JCC has misinterpreted Dr. Tenzel's testimony to mean the Doctor rejected any causal relationship between the condition and the accident. Even the most cursory review of the doctor's deposition establishes he never testified there was no relationship.

The only doctor in this record with an opinion on causal relationship is Dr. Gelman, a board certified endocrinologist, who testified the trauma of the accident aggravated or accelerated MILLINGER's eye disease. The JCC rejected Dr. Gelman's opinion in favor of that of Dr. Tenzel based upon a perceived "conflict" between the opinions. However, there was no conflict and the JCC has rejected Dr. Gelman's uncontradicted medical opinion on aggravation in determining there is no causal relationship between MILLINGER's Graves Eye Disease and his industrial accident. This the JCC may not do. The order should be reversed and the cause remanded with instructions the condition be held compensable.

VI
Argument

Point I

THE JCC DID NOT LACK JURISDICTION TO VACATE AND REENTER THE ORDER OF 1/27/93

Before the JCC, MILLINGER sought to vacate the final order of January 27, 1993 and to re-enter the order because he contended representations of a state functionary had deprived him of his right to timely appeal the JCC's decision. The sole purpose of MILLINGER's action was to restart the time for filing a notice of MILLINGER's action was to restart the time for filing a notice of

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

appeal. Similar type relief is available under Fla.R.Civ.Pro. 1.540(b) in civil actions. *See: Kanecke v. Lennar Homes, Inc., 543 So.2d 784 (Fla. 3DCA 1989).* However, there is no analogous provision in either the worker's compensation act or in the workers' compensation rules of procedure upon which to predicate such relief. MILLINGER contends even in the absence of such a provision, the JCC has the authority to enter an order vacating and reentering the prior order where the MILLINGER has been deprived of the right to appeal due to the representation of a state functionary.

An order becomes final under the worker's compensation act, thirty (30) days after it is mailed by the JCC to the parties. Sec. 440.25(a), Fla.Stat.. Once an order becomes final, the JCC lacks jurisdiction to amend, vacate, or republish the order. *Stone & Webster Engineering Co. v. McCray,* 377 So.2d 30 (Fla. 1DCA 1979). *See also: Dowd v. Sun-Crete Construction Co.,* 582 So.2d 83 (Fla. 1DCA 1991); *E.M. Scott Contractors v. Baker,* 479 So.2d 292 (Fla. 1DCA 1985). This Court in *Farrell v. Amica Mutual Insurance Company,* 361 So.2d 408 (Fla. 1978), held that a worker's compensation case is not a civil action before a court with common law powers, but an administration action before an administrative tribunal operating under a grant of quasi-judicial power, and the Industrial Relations Commission lacked jurisdiction to vacate an order after the order had become final. The District Court of Appeal in its decision held that *Farrell* was binding authority and required the reversal of JCC's order. However, *Farrell* did not involve nor did it consider a delay caused by the misrepresentations of a state functionary.

In the order sought review, the JCC found as a matter of fact, that counsel's secretary received instructions from an employee of the District Court that she could mail the notice of appeal and such notice would be considered timely if postmarked within the thirty (30) day period allowed for the filing of an appeal (R. 462). Based upon these unchallenged facts, the JCC concluded he had

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

"inherent jurisdiction" even after the order had become final (thirty (30) days after mailing of the order to the parties), to vacate the order and reenter same to allow MILLINGER to file his appeal (R. 463). The issue raised by this point is one of jurisdiction - whether the JCC has the authority to vacate an order for the foregoing purpose after the order has become final.

A.

The JCC as authority for this order vacating and then reentering the prior order of January 23, 1993, expressly relied upon the Third District's decision in *New Washington Heights Community Development Conference v. Department of Community Affairs*, 515 So.2d 328 (Fla. 3DCA 1987), a case involving an appeal from an administrative agency (R. 463). The facts of *New Washington Heights* are almost identical to the facts of the instant cause:

> The uncontroverted facts reveal that on Friday morning, October 3, 1986, a secretary to appellant's counsel in Miami, Florida, telephoned the Department's clerk in Tallahassee, Florida, inquiring about the procedure for perfecting the appeal, and, more particularly, whether the notice of appeal would be considered timely if it arrived by express mail that same day, after normal working hours. The clerk advised the secretary that the Department would consider the appeal filed as of the postmark date if it were sent by certified mail. Appellant's counsel then proceeded in accordance with those instructions, and the notice of appeal was sent by certified mail postmarked October 3, 1986.
>
> *Id.* at 329

New Washington Heights is to be distinguished from the *Stone-Farrell* line of decisions because none of those cases involved a misrepresentation on the part of the state functionary. In *New Washington Heights* as in the instant cause, counsel's reliance on the instructions of a state functionary caused the notice of appeal to be untimely filed. In dismissing the untimely appeal, the Third District noted that due to the misrepresentation of the state functionary, the appellant was not remediless:

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

> It is, however, also well-settled that where state action deprives a party of the ability to file a timely notice of appeal, the appellate court, although deprived of jurisdiction over the appeal, will provide the thus-reject-ed appellant with an alternative avenue of review...It would be anomalous indeed if...relief were not available to one appealing an administrative determination merely because the procedure governing administrative matters contains neither a counterpart to Florida Rule of Civil Procedure 1.540 nor anything resembling the great writ. Therefore, although we dismiss this appeal, we do so without prejudice to the appellant to apply to the Department to vacate and re-enter the operative order.
>
> *Id. at 329-330*

New Washington Heights has been cited with approval.[1] Significantly, there is no difference between the jurisdiction of an administrative agency and a JCC after their order has become final. As in worker's compensation, once the order of an administrative agency becomes final it is no longer subject to change or modification. *Austin Tupler Trucking, Inc. v. Hawkins,* 377 So.2d 679 (Fla. 1979); *Revell v. Florida Department of Labor and Employment Security,* 371 So.2d 227 (Fla. 1DCA 1979) (Appeals Referee in Unemployment Compensation proceeding lacked jurisdiction to rescind order after order became final); *Kalbach v. Department of Health and Rehabilitative Services*, 563 So.2d 809 (Fla. 2DCA 1990)(HRS lacked jurisdiction to amend order which had become final). Therefore, *New Washington Heights* applies to a situation where the order has become final and the agency lacks jurisdiction to vacate the order - the identical situation which is presented by the instant cause.

The parallels between *New Washington Heights* and the instant cause are uncanny. Both are administrative matters. Both concern the advice by a state officer to mail a notice of appeal. In both

---

[1]. *In the Interest of* A.W., 591 So.2d 1099 (Fla. 1DCA 1992); National *Healthcorp, L.P. v. Department of Health and Rehabilitative Services, 560 So.2d 1184, 1185 (Fla. 1DCA 1989); Battaglia Fruit Co. v. City of Maitland*, 530 So.2d 940 (Fla. 5DCA 1988)(Sharp J., Dissenting).

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

cases, the notice was untimely due to its mailing. If there is relief available in the *New Washington Heights* administrative matter, there must be relief available to MILLINGER in the instant cause which while a worker's compensation matter is also an administrative proceeding. The order should be affirmed insofar as it finds the JCC has jurisdiction to vacate and reenter the prior order.

B.

The exceptions to the rule that the JCC loses jurisdiction to vacate or modify a worker's compensation order after the order has become final.[2] In *Morgan Yacht Corporation v. Edwards,* 386 So.2d 883 (Fla. 1DCA 1980), the Court was concerned with a settlement stipulation which was procured by fraud and held the JCC had jurisdiction to vacate a settlement procured by fraud after the order became final. The *Morgan Yacht* decision directly bears on the instant cause. While the Court did not expressly so state, its reasoning implies the JCC has jurisdiction over matters which may be considered inherent to his authority.

> [I]t would be inconceivable to give a Judge of Industrial Claims authority to approve a settlement but no authority to rescind his action when it is based on misrepresentation and fraud.
>
> [I]t is our opinion that a Judge of Industrial Claims has this authority. Section 440.33(1), Florida Statutes (1977), provides a Judge of Industrial Claims has authority to do all things conformable to law which may be necessary to discharge the duties of the office. Setting aside orders based on flagrant fraud and misrepresentations as present in this case is an authority granted by Section 440.33(1).
>
> *Id.* at 884
> (Emphasis Added)

---

[2]. The JCC has jurisdiction to vacate or modify a workers compensation order before it becomes final. In *Acosta Roofing Company v. Gillyard,* 402 So.2d 1321 (Fla. 1DCA 1981), *rev.den.* 412 So.2d 463 (Fla. 1982), the Court construed Sec. 440.25(a), Fla.Stat. and found the JCC has jurisdiction within the period of time before the order becomes final to vacate and/or correct an order. In *Threat v. Rogers,* 443 So.2d 149 (Fla. 1DCA 1983), the Court determined whether the facts of a particular situation constituted excusable neglect were within the JCC's discretion to determine.

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

As noted in the foregoing portion of *Morgan Yacht*, the Court relied on Sec. 440.33(1), Fla.Stat., as support for its position. This section states:

> The Judge of compensation claims may preserve and enforce order during any such proceeding; issue subpoenas for, administer oaths or affirmations to, and compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, or the taking of depositions before any designated individual competent to administer oaths; examine witnesses; and do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office.
>
> (Emphasis Added)

The emphasized language of the above quoted statute was broadly construed by this Court in *Morgan Yacht* to give the JCC the power to set aside a settlement stipulation procured by fraud. This power was broadened in *Oakdell, Inc. v. Gallardo,* 505 So.2d 672 (Fla. 1DCA 1987) to allow for the vacation of orders rendered by adjudication where the order was procured by fraud.*See also: Metropolitan Dade County v. Barry,* 614 So.2d 666 (Fla. 1DCA 1993)*; Atlantis Nursing Center v. Drinkwater,* 616 So.2d 627 (Fla. 1DCA 1993).

The JCC had jurisdiction to render the order sought review. Under *Morgan Yacht*, even after an order becomes final, Sec. 440.33(1), Fla.Stat., vests the JCC with jurisdiction to "do all things conformable to law which may be necessary to discharge the duties of the office". *Id.* at 883. Protecting a parties appeal rights through the procedure utilized below is an action necessary to the discharge of the duties of the office of the JCC. There is no qualitative difference between the action taken below by the JCC in vacating and reentering the order and the authority given the JCC by this Court in *Morgan Yacht* and its progeny to vacate orders procured by fraud.

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

II

THE JUDGE OF COMPENSATION CLAIMS DETERMINATION THAT THE MILLINGER'S GRAVES EYES DISEASE WAS NOT AGGRAVATED OR ACCELERATED BY THE MILLINGER'S ACCIDENT IS UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND IS CONTRARY TO THE MEDICAL EVIDENCE IN THIS CAUSE

The instant cause is an appeal from an order of the Judge of Compensation Claims denying MILLINGER's claim due to his finding the accident is not causally related to the MILLINGER's Graves Eye Disease. MILLINGER contends the record is devoid of any competent substantial evidence supporting the JCC's determination. The only medical evidence on the issue of causal relationship establishes the opposite: There is a causal relationship between the accident and the condition. The JCC has erred reversibly in ignoring uncontroverted medical testimony and his decision is not supported by competent substantial evidence.

The injury with which this cause is concerned, Graves Eye Disease, is a non-observable injury. Causation of non-observable injuries is essentially a medical question. *Thomas v. The Salvation Army,* 562 So.2d 746 (Fla. 1DCA 1990). If the medical proof as to causation is unrefuted, the JCC may not reject such unrefuted medical proof without a reasonable explanation for doing so. *Lindsay v. TVS Trucking Company,* 565 So.2d 864 (Fla. 1DCA 1990). This Court in reviewing this cause determines whether the JCC's order is supported by competent substantial evidence. *Arand Construction Co. v. Dyer,* 592 So.2d 276 (Fla. 1DCA 1991). Where the testimony and evidence at the hearing are uncontradicted, a finding contrary to the manifest weight of such evidence cannot be supported by competent substantial evidence. *Loughan v. Slutz Seiberling Tire,* 483 So.2d 1389 (Fla. 1DCA 1986); *McCandless v. N.M. Parish Construction,* 449 So.2d 830 (Fla. 1DCA 1984). As will be presently demonstrated, the JCC's finding of no causal relationship is unsupported by competent

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

substantial evidence because it is contrary to the uncontradicted testimony. The order denying the claim should be reversed.

A.

In this cause, all of the medical testimony was received by deposition. The vantage point of this Court is not inferior to that of the JCC with regard to interpreting deposition evidence. *McCabe v. Bechtel Power Corp.*, 510 So.2d 1056 (Fla. 1DCA 1987); *Hidden Harbor Boat Works v. Williams*, 566 So.2d 595 (Fla. 1DCA 1990). When the evidence is entirely by deposition, in determining whether there is competent substantial evidence to support the JCC's order, this Court will closely scrutinize the testimony to determine whether it substantiates the JCC's reasoning and determine whether such reasoning is correct. *See for example: Metropolitan Transit Authority v. Bradshaw*, 478 So.2d 115 (Fla. 1DCA 1985). With regard to the compensability issue, the JCC found the testimony of Dr. Tenzel to be in conflict with that of Dr. Gelman on causal relationship, accepted the testimony of Dr.Tenzel, rejected that of Dr. Gelman and found the accident neither caused, aggravated nor accelerated MILLINGER's Graves disease (R. 440). The JCC noted as to Dr. Gelman:

> [I] am aware of Dr. Gelman's testimony that the trauma may have aggravated the Graves' disease. In reviewing Dr. Gelman's deposition as a whole, however, I found that he was somewhat equivocal, and relied on his impression that the MILLINGER had no symptoms of thyroid eye disease prior to the accident of 3/28/91 except the "borderline swelling" noted by Dr. Yang in 2/91. The evidence of record reveals that the MILLINGER did have symptoms prior to 3/28/91.
>
> (R. 440).

As to Dr. Tenzel, the JCC stated the following:

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

> He indicated that the MILLINGER's symptoms of decreased vision, prominence of the eye, inability to move the eye and double vision are part of the normal progression of thyroid eye disease, and occur in the absence of trauma. When presented with a hypothetical question regarding the MILLINGER's condition and symptoms, the doctor testified that he could not state within reasonable medical probability that the incident of 3/28/91 either caused, aggravated, or accelerated the MILLINGER's thyroid eye disease...He could not state within reasonable medical probability that the trauma in any was affected the progression of the MILLINGER's condition.
>
> (R. 439-440)

These findings are predicated upon a misrepresentation if not an outright misstatement of the testimony of the doctors. The findings do not accurately recite the testimony of the doctors as contained in their depositions. Consequently, these findings are not supported by competent substantial evidence.

B.

Dr. Gelman, the board certified endocrinologist, contrary to the finding of the JCC in the order sought review, was never equivocal in his opinion with regard to causation. Dr. Gelman found the occurrence of certain symptoms after the trauma to be significant:

> Q: (By Mr. Berman): [W]hat I was asking you, if there was any significance to you with regard to Mr. Millinger telling you that his symptoms began after his attack.
>
> A: Well, his symptoms of double vision began after the attack. And he certainly has a history of trauma. And I felt that, as did the ophthalmologist from speaking to him, that the trauma may have led to some edema in the orbits around the eye muscles, etc...which may have contributed partly to his double vision. But certainly the Graves' disease could have been present to a subclinical degree before he actually sustained the trauma.
>
> (R. 165).

Dr. Gelman never testified that the Graves Disease was caused by the accident as Dr. Gelman did

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

believe the Graves Eye Disease was either aggravated or accelerated by the trauma. He was asked the following hypothetical and gave the following response:[3]

> Q: (By Mr. Berman) That Mr. Millinger had applied for a job as a driver with...Broward County and in June of 1990 had a pre-employment physical by Dr. Spiegelman. And Dr. Spiegelman stated on his deposition that he--tested the eyes and he had 20/30 vision in the right eye. That there were no abnormalities that he could see. He tested for vision, pupillary size, reaction to light, extra ocular motions, and everything was normal. He didn't note any swelling. He didn't note any chemosis. He okayed him to be a driver. He did notice high blood sugar and referred him to a doctor to have that checked out for diabetes.
>
> Mr. Millinger then went to the VA to get checked out for diabetes, and they did that. And they were treating him for diabetes, the high blood sugar. He did not complaint of any blurry vision, eye problems, swelling, visual problems, anything of that nature.
>
> Dr. Yang who was a physician, cardiologist and internist at the VA, saw him in June of 1990 through February of 1991. And he testified that Mr. Millinger had no eye complaints and he didn't note any eye complaints. However, on February 21, 1991, he did refer him to an eye doctor to have the eye checked out because he helf there might be a borderline swelling or borderline something in the right eye, but no eye complaints and no other symptoms.
>
> He has the trauma in March 28 of '91, and develops these symptoms that you have explained in your history such as the swelling, the double vision, excessive tearing, and you noted a stare of the eye and the lid lag, which was never noted before.
>
> Assuming that those-- those facts to be correct--...can you tell us, within reasonable medical probability, what the cause of the Graves Disease or the symptoms of the Graves Disease was?
>
> A. The cause was?

---

[3]. This hypothetical was objected to as incomplete and based upon facts not in evidence (R. 174). The JCC never ruled on this objection. Nor is there any suggestion in this record as to what facts are missing or misstated in the hypothetical. The Doctor was never questioned as to whether or not any false or omitted information would change the doctor's opinion. *See: Finney v. Agrico Chemical Co., 599 So.2d 1359 (Fla. 1DCA 1991).* Therefore, the objection is not well taken and should be disregarded by this Court.

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

Q. Well, either the cause of either the condition itself or the onset of the symptoms that had to be treated.

A. ...You know, usually Graves Eye Disease is insidious. It usually has been present for a while before its actually diagnosed. Its something like this which was, you know--to me that it wasn't that subtle. And it may have been beginning to become present in March when the other physician sent him to an opthalmologist because he noticed some swelling, you said, something in the eye...

Q. Regarding the onset of the symptoms--

A. Yeah, he didn't develop symptoms until the trauma occurred.

Q. The trauma to the face.

A. Right.

Q. So with that in mind, can you tell us within reasonable medical probability whether or not the trauma to the eye was an aggravating factor or would have been an aggravating factor to the Graves Disease.

A. I think so. I think that's in reasonable probability.

(R. 172-175)

The doctor's opinion was further clarified during cross-examination.

Q. (By Mr. Morecroft) [B]lased on the history that you had and the exam of the patient, the hypothetical, at least the symptoms that were related to you at least a few weeks before the traumatic event, its your opinion he had probably had the Graves Disease prior to this accident.

A. I think he had the beginnings of it.

Q. Okay.

A. And that it progressed after the accident...

Q. The trauma to the head or the orbit of the eye, in your opinion you said that that in someway aggravated the disease process, correct?

A. I believe so.

Q. Alright. And how so? I mean what's the process?

A. The stress, the stress of the accident and the trauma to the body related to it may have exacerbated the problem.

(R. 183-184)

Contrary to the JCC's findings, there is nothing equivocal in Dr. Gelman's testimony. He was aware that there were sub-clinical effects of the Graves disease prior to the trauma. His opinion is the trauma accelerated or aggravated the underlying Graves disease.

With regard to the sufficiency of Dr. Gelman's opinion on causation, the JCC correctly noted in the order sought review and Dr. Gelman did testify he would change his thinking if the MILLINGER had more advanced symptoms of Graves Disease prior to the accident (R. 186-187, 439). This concession in no way affects the doctor's opinion or causation. Dr. Gelman was not asked whether any omitted factual information would change his opinion. No specific information was furnished by EMPLOYEE/CARRIER to the doctor to establish the doctor's opinion was based upon incomplete information. Even more immportant, there is no evidence establishing more advanced symptoms of Graves Disease as opposed to other symptoms of Graves disease. Dr. Gelman believed the disease was present but subclinical prior to the trauma. Consequently, the attempt by the JCC to utilize this question as a basis for disregarding Dr. Gelman's opinion is as a matter of law, insufficient. The order should be reversed.

C.

Although the JCC relied upon Dr. Tenzel in concluding there was causation between the accident and the Graves Disease, Dr. Tenzel's testimony does not support this finding. Dr. Tenzel admitted thyroid eye disease can be caused by trauma:

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

Q. (By Mr. Berman) Getting back to the very limited question of the cause, either the initial cause or whether whatever caused to activate the symptoms of the systemic disease, the thyroid disease and Graves disease, are you more comfortable deferring your opinion to Dr. Gelman insofar as he is the endocrinologist?

A. I don't know Dr. Gelman, I don't know anything about him. I would say anytime you can defer anything it makes it easier on you and harder on somebody else. I can say for my experience and from my knowledge of thyroid eye disease and thyroid problems, they can be caused by trauma. It can be.

(R. 247)
(Emphasis Added)

He also admitted trauma could cause the condition to worsen (R. 252-253). Unmentioned by the JCC in his order is that Dr. Tenzel agreed he would defer on any opinion on causation to an endocrinologist:

Q: (By Mr. Berman) Again, the simple question is, regarding the cause of the thyroid eye disease or whether it was aggravated or accelerated, are you comfortable deferring your opinion to an endocrinologist to whose expertise thyroid disease falls?

A: I'm referring to Dr. Gelman. I don't know him. I am going to say endocrinologist, yes.

(R. 254-255).

As opposed to the JCC's finding, Dr. Tenzel actually testified he had no opinion on causation one way or the other. He admitted he could not testify one way or the other, as to whether the trauma caused, activated or accelerated MILLINGER's thyroid eye disease:

Q: (By Ms. Wagner) So, it is not true that you cannot state within reasonable medical probability within your field of expertise as an ophthalmologist who specializes in ocular plastics that the incident of March 28, 1991, either caused, aggravated or accelerated Mr. Millinger's thyroid eye disease?

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700

A: That's correct.

(R. 261)

Q: (By Mr. Berman) Whether you defer your opinion regarding the thyroid or not when Ms. Wagner asked you, you can't say one way or the other if the trauma had an effect on it? And you can't say one way or the other, meaning trauma or not?

A: Correct.

(R. 267)
(Emphasis Added)

Dr. Tenzel's testimony is that he could not say one way or the other whether the trauma did or did not accelerate or aggravate the MILLINGER's Graves Disease. Dr. Tenzel clearly testified he would defer to an endocrinologist as to the aggravation question. He further testified the MILLINGER's thyroid eye disease would not necessarily progress in the manner MILLINGER's did without the trauma:

Q: (By Ms. Wagner) Once thyroid eye problems start such as exhibiting themselves with proptosis, isn't it true that even without trauma is consistent to have thyroid eye disease progress as it did and as you saw it progressed in Mr. Millinger's case?

A: No. Its not. Not everyone progresses like that. Some people would have lid retraction and maintain it for thirty years without ever changing. Some people will have just some herniated orbital fat because of the pushing of the eye forward, and that never progressed either.

(R. 265).

The JCC only states in the order sought review that Dr. Tenzel could not relate to the trauma to an aggravation, or acceleration of the MILLINGER's condition. This is a misstatement and/or misinterpretation because as indicated by the above quoted testimony, the doctor had no opinion on causation.

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 270-8700

The record reveals the only medical evidence on causation is the uncontroverted testimony of Dr. Gelman. This testimony establishes the existence of a causal relationship between the accident and MILLINGER's injury. As the JCC's finding of no causation is contrary to this testimony, it is a finding unsupported by competent substantial evidence. *Loughan v. Slutz Seiberling Tire, supra.* The order should be reversed.

This cause is controlled by cases such as *Severini v. Pan American Beauty School,* 557 So.2d 896 (Fla. 1DCA 1990). The Court was also confronted with findings on medical causation based upon deposition testimony. The Court held:

> [O]ur review of the medical testimony reveals a lack of the requisite competent, substantial evidence to support the finding in the appeal order that MILLINGER's herniated disc was not causally related to the December 1987 compensable accident. Contrary to the stated basis for the finding on this issue, Dr. Reitman did not give any opinion with regard to whether MILLINGER's medical problems after March, 1988, were related to the December 1987, accident. The only doctor who did render an opinion on this issie, Dr. Lazar, testified that MILLINGER's herniated disc was related to the December 1987, accident. While the Judge of Compensation Claims has the discretion to accept the opinion of one physician over that of another, [citations omitted], the Judge may not reject unrefuted medical testimony of the parties' expert witness without a reasonable explanation for doing so [citations omitted]. Because Dr. Lazar's testimony regarding causation is unrefuted and the Judge below did not give a reasonable explanation for rejecting it, MILLINGER carried the burden of establishing a logical cause for the injury and condition. The employer did not show a more logical cause by competent, substantial evidence.

The instant cause is controlled by the above reasoning. Here, a review of the medical depositions establishes Dr. Gelman did find the existence of a causal relationship and Dr. Tenzel had no opinion on the issue. Consequently, the unrefuted medical testimony in this cause is Dr. Gelman's opinion there is a causal relationship. There is no testimony to the contrary in this record. *See also: Siegel v. AT&T Communications,* 611 So.2d 1325 (Fla. 1DCA 1993). The order should be reversed.

VII
Conclusion

Based upon the foregoing cases, statutes, arguments and other authorities, APPELLANT, ROY MILLINGER, respectfully requests that this Court reverse the decision of the Judge of Compensation Claims and remand this cause with instructions that the Appellant's eye disease be held compensable and the Judge of Compensation Claims award appropriate temporary and permanent benefits to the MILLINGER.

RICHARD BERMAN, ESQ
4300 North University Drive
Suite B-100
Lauderhill, Florida 33351

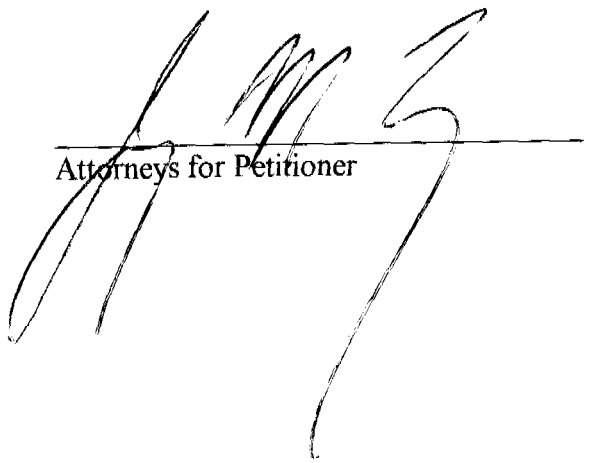
and

JAY M. LEVY, P.A.
6401 S.W. 87th Avenue
Suite 200
Miami, Florida 33173
(305) 279-8700

BY: _____
JAY M. LEVY, ESQ
FLORIDA BAR #: 219754

VIII
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to BARBARA WAGNER, ESQUIRE, 2151 West Hillsboro Blvd, Suite 301, Deerfield Beach, Florida 33442, this 2nd day of May, 1995



Attorneys for Petitioner

JAY M. LEVY, P.A. • 6401 S.W. 87 AVENUE • SUITE 200
MIAMI, FLORIDA 33173 • TELEPHONE (305) 279-8700