IN THE SUPREME COURT
STATE OF FLORIDA

Tandem Staffing and
Specialty Risk Services, Inc.
"Appellants"

and

Division of Workers' Compensation
Intervenors

v.

Ricardo Cagnoli
Appellee

CASE NO.: SC05-220

DCA Case No.: 1D03-5563
OJCC No. #: Not assigned
D/A: 3/13/2003

APPEAL FROM THE ORDER OF DEPUTY CHIEF JUDGE S. SCOTT STEPHENS, DIVISION OF WORKERS' COMPENSATION

APPELLEE'S AMENDED ANSWER BRIEF

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INTRODUCTION

In this Appellee's Answer Brief, the Appellee, Ricardo Cagnoli, will be referred to as the Appellee, the Claimant or by his name (Cagnoli). The "Appellants" who stood in the shoes of the Employer/Carrier will be referred to as the Employer/Carrier or by their names. The Division of Workers' Compensation, intervenor, will be referred to as "Division."

All emphasis added will be that of the Appellee unless designated otherwise. The record, as it was before the First District Court of Appeal, will be cited as: (Vol., p.). At the time of filing, the Clerk of the First District Court had not filed a transcript with this Court. All references to the appendix will be preceded by the alphabetic letter denoting the specific appendix followed by the designation of the page.

STATEMENT OF THE CASE

Ricardo Cagnoli (Cagnoli) was injured in the course and scope of his employment with Tandem Staffing on March 13, 2003 when he fell through a hole in the floor, injuring his low back and right knee. On November 14, 2003, Cagnoli filed a Petition for Benefits with the Employer/Carrier and the Office of the Judges of Compensation Claims (OJCC) as required under F.S. §440.192(1). (Vol. I, p. 2) Upon receipt of the Petition, Deputy Chief Judge of Compensation Claims S. Scott Stephens *sua sponte* entered an order dismissing the Petition for Benefits on the basis that Cagnoli did not include his social security number. (Vol. I, p. 12)

Cagnoli then filed a Motion for Reconsideration asking the Deputy Chief to reconsider his December 1, 2003 Order which struck the Petition for Benefits. (Vol. I, p. 15) In response to the motion, but without a hearing, the Deputy Chief entered an Order on December 31, 2003 denying Cagnoli's Motion for Reconsideration without prejudice. (Vol. I, p. 20)

Cagnoli then filed a timely Notice of Appeal, or in the alternative, a Petition for Writ of Certiorari with the First District Court of Appeal. (Vol. I, p. 23) By Order dated January 28, 2004, the First District Court held that the Deputy Chief JCC's Order was final and thus appealable. The Division of Workers' Compensation filed

their notice of intervention on January 27, 2004. On May 17, 2004, Cagnoli filed a Motion to Expedite the Appeal with the First DCA which was granted by order dated June 2, 2004.

On October 1, 2004, counsel for Appellant (Cagnoli) and Appellees (the Employer/Carrier) presented oral argument before the First District Court of Appeal. The Division was not represented at oral argument, though the Division had submitted a brief for the Court's consideration. On November 5, 2004, the First District Court of Appeal entered its Order reversing the Deputy Chief JCC's order dismissing Cagnoli's Petition for Benefits. (Appendix B, p. 3) The Division sought rehearing which the Court denied. The Division then filed an appeal with this Honorable Court.

STATEMENT OF THE FACTS

Ricardo Cagnoli (Cagnoli) was injured in the course and scope of his employment with Tandem Staffing on March 13, 2003 when he fell through a hole in the floor, injuring his low back and right knee. Cagnoli then retained counsel for the purpose of requesting additional workers' compensation benefits. On November 14, 2003, Cagnoli filed a Petition for Benefits seeking: Temporary Disability benefits; authorization of an alternate orthopedic surgeon; payment of a medical bill; and penalties, interest, costs and attorney fees. This Petition for Benefits (PFB) was sent to the employer, carrier, and the Office of the Judges of Compensation Claims

(OJCC) as required by statute, F.S. §440.192 (1994). (Vol. I, p. 2)

On December 1, 2003, Deputy Chief Judge of Compensation Claims S. Scott Stephens ***sua sponte*** entered an Order dismissing the Petition for Benefits on the basis that Cagnoli failed to include his social security number. The December 1, 2003 Order dismisses Cagnoli's PFB stating:

> The petition is insufficient because it fails to fully identify:
> _____ County of accident.
> _____ Date of accident...
> _____ Employer (with address)
> _____ Benefit must be requested.
> __X__ Valid OJCC No. OR Social Security No. of Claimant (If you do not have a Social Security No., resubmit the petition with an explanation of why you do not have such a number.
> _____ Other.

(Vol. I, p. 12) Deputy Chief JCC Stephens did not afford Cagnoli any opportunity to be heard or present argument before entering the order of dismissal.

Upon receipt of the December 1, 2003 Order of dismissal, Cagnoli filed a Motion for Reconsideration with the Deputy Chief JCC. At the time, the Employer/Carrier were not represented by counsel. Therefore a copy of Cagnoli's Motion was forwarded directly to the employer and the carrier. (Vol. I, p. 15)

Deputy Chief JCC Stephens denied Cagnoli's Motion for Reconsideration, **without a hearing**, by Order dated December 31, 2003. (Vol. I, p. 20) The

December 31, 2003 Order provided that a social security number must be supplied unless the claimant alleges "that he or she has applied for a number and been rejected, or that he or she is unlawfully employed and ineligible to apply for a social security number." Because Cagnoli alleged neither, the Petition was stricken. By filing his initial appeal and this Answer Brief, Cagnoli specifically and expressly does not admit to any criminal activity or illegal residency in the United States.

On December 31, 2003, Cagnoli filed his Notice of Appeal with the First District Court of Appeal. The Notice of Appeal advised the Court that the Order on appeal was nonfinal but submitted that it was nevertheless appealable pursuant to the Rules of Appellate Procedure. However, because the Court may have concluded that the Order was not final and not appealable, Cagnoli requested leave of Court to accept the Notice of Appeal as a Petition for Writ of Certiorari. (Vol. I, p. 23) By Order dated January 28, 2004, the First District Court accepted jurisdiction as a plenary appeal from a final order.

On February 19, 2004, Appellee's counsel filed a public records request with Deputy Chief JCC S. Scott Stephens requesting copies of all Orders entered from October 1, 2003 to the present which *sua sponte* struck petitions for benefits for failure to provide a valid social security number. On April 26, 2004, subsequent to the filing of the Notice of Appeal and the Record on Appeal with the First DCA, counsel

received a response to the public records request. The response provided copies of more than 900 Orders. (A compact disc with copies of the Orders was submitted to the First District Court of Appeal in lieu of providing the Court with an appendix which exceeded 2000 pages). Subsequent to filing the public records request, Appellee's counsel learned that the Office of the Judges of Compensation Claims also will not grant requests for assignment of a case number, as permitted under Rule 60Q-6.105, without a valid social security number or the injured worker's admission of unlawful employment. (This information was also provided to the District Court by way of appendix.)

On appeal, Cagnoli raised several arguments in support of his position that Deputy Chief JCC Stephens' order striking his Petition for Benefits should be reversed. Cagnoli raised constitutional arguments including his right to remain silent in matters which might incriminate him, access to courts, as well as an argument that F.S. §440.192 was preempted by federal law, specifically the Federal Privacy Act.

In response, the Employer/Carrier did not challenge Cagnoli's arguments on appeal. The Employer/Carrier only challenged Cagnoli's entitlement to an Employer/Carrier paid attorney fee under F.S. §440.34.

However, the Division of Workers' Compensation, who intervened, filed a brief challenging Cagnoli's arguments. As an intervenor, the Division was provided an

opportunity to address all of the issues on appeal before the First DCA. In their Answer, the Division did not allege that F.S. §440.192 was valid because it falls within an exception to the Federal Privacy Act.

On November 5, 2003, the First District Court of Appeal issued its opinion and reversed Deputy Chief Judge Stephens' Order. The Court reasoned that F.S. §440.192 violates the Federal Privacy Act by requiring social security numbers to be provided on all claimants' petitions for benefits. (Appendix B, p. 3) The Division, but not the Employer/Carrier, then filed a Motion for Rehearing.

In support of their motion, the Division argued that F.S. §440.192 was eligible for an exception under the Privacy Act. The Division presented documentation which suggested that the Rules of the Florida Industrial Commission and/or Florida Rules of Workers' Compensation Procedure had required a claimant to disclose his or her social security number on a claim for benefits before the Privacy Act was enacted in 1975.

The First District Court of Appeals denied the Division's Motion for Rehearing. The Court issued its Mandate on December 30, 2004. The Division filed their Notice of Appeal before this Honorable Court on or about January 13, 2005. The Employer/Carrier have not appealed the District Court's ruling.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal properly accepted jurisdiction over this case to determine the validity of F.S. §440.192. Deputy Chief JCC Stephens' Order dismissing Cagnoli's Petition for Benefits for failure to include a social security number or admit to unlawful employment put an end to the judicial labor of the case. Cagnoli would not admit to unlawful employment or otherwise explain why he did not disclose his SSN, nor was he required to under law. However, his case could not proceed to a hearing before a judge of compensation claims so long as the Deputy Chief refused to assign a case number.

Alternatively, the First DCA properly accepted jurisdiction because Cagnoli asked for leave of court to accept his Notice of Appeal as a Petition for Writ of Certiorari if the Court determined that the order was nonfinal and nonappealable. Cagnoli's arguments on appeal demonstrated a departure from the essential requirements of the law resulting in irreparable harm which could not be cured by a plenary appeal. Cagnoli could never get a full appealable order without providing a social security number, an explanation, or a confession of a crime. Cagnoli submits that regardless of the manner in which the argument was presented, by appeal or certiorari review, the District Court would have reached the same conclusion.

The First DCA also properly considered the merits of Cagnoli's appeal. Case

law demonstrates that a judge of compensation claims does not have jurisdiction to declare any portion of the workers' compensation act unconstitutional or invalid. Such arguments are properly raised before the First District Court of Appeal.

The Court properly determined that the portion of F.S. §440.192 which required the social security number is invalid because it is preempted by federal law, namely the Federal Privacy Act. No statute nor regulation in existence at the time the Federal Privacy Act was enacted required a claimant to provide his or her social security number for the purpose of verifying the claimant's identity. These are the only exceptions to the Privacy Act and they do not apply in the instant case.

ARGUMENT

POINT I ON APPEAL

The District Court of Appeal properly accepted jurisdiction over the appeal of the Deputy Chief Judge of Compensation Claims' *sua sponte* order striking Cagnoli's Petition for Benefits, even though the order was issued without prejudice.

Standard of Review: **De Novo.** Seven Hills, Inc. v. Bentley, 848 So.2d 345 (Fla. 1st DCA 2003), holding that subject matter jurisdiction is reviewed de novo.

First, Cagnoli challenges the Division of Workers' Compensation's standing to appeal the First District Court of Appeal's decision. The Division intervened in the case before the First District Court. Because the Employer/Carrier did not appeal the

decision, the Division may not have standing to initiate an appeal. "The rights of an intervenor are conditional in that they exist *only so long as* the litigation continues between the parties." See also, Fairfield Communities v. Florida Land & Water Adjudicatory Comm'n, 522 So.2d 1012 (Fla. 1st DCA 1988); Human of Florida, Inc. v. Dep't of Health & Rehabilitative Services, 500 So.2d 186 (Fla. 1st DCA 1986).

Because the Employer/Carrier have not joined the Division in its appeal of the First District Court's decision, Cagnoli respectfully submits that the Division does not have standing to appeal before this Court. Cagnoli first brought this argument to the Court's attention by way of his Motion to Lift Automatic Stay, filed February 3, 2005. The Division filed its response to the Motion on February 18, 2005 without providing any authority suggesting that the Division in fact has standing to appeal the District Court's decision. If this Honorable Court finds that the Division does not have standing, this Court may affirm the District Court's decision and need not reach the merits of the arguments presented below.

The First District Court of Appeal properly accepted jurisdiction over the parties and subject matter. Cagnoli filed his Notice of Appeal on the grounds that the Deputy Chief JCC's Order, though issued without prejudice, in fact put an end to the judicial labor of the case. The Deputy Chief JCC is charged with assigning a case number to every petition for benefits filed with the Division of Administrative Hearings.

Until a case number is assigned, the claim will not be assigned to a judge of compensation claims for consideration of the merits of the case. F.S. §440.192(1); Rule 60Q-6.103 and Rule 60Q-6.105, Florida Rules of Workers' Compensation Adjudications.

However, by dismissing Cagnoli's petition, Deputy Chief JCC Stephens did not assign a case number or refer his case to a judge of compensation claims. Then, when the Deputy Chief JCC denied Cagnoli's Motion for Reconsideration, Cagnoli was stripped of any possibility of challenging the Order other than by appeal to the First DCA, or by Petition for Writ of Certiorari.

The Division argues that Deputy Chief Stephens gave Cagnoli an opportunity to "perfect" his petition for benefits. However, this opportunity presented Cagnoli with a Hobson's choice. Cagnoli could supply a social security number thereby waiving his right to privacy; admit to unlawful employment, arguably subjecting himself to criminal liability; or forego his claim for workers' compensation benefits.

The Division cites the First DCA's opinion in Croes v. University Community Hospital, 886 So.2d 1040 (Fla. 1st DCA 2004) in support of their position that the Deputy Chief's Order was nonfinal and nonappealable. The Division argues that the District Court would not have had the benefit of this 2004 decision when accepting jurisdiction over Cagnoli's appeal, which is true. However, the Croes decision was

not the first of its kind, nor did the Court's opinion explain or raise any unique or novel issues.

In Croes, the District Court concluded that the judge of compensation claims' order was not final and not appealable because it did not "mark an end to judicial labor in this matter." The Croes decision was not the judiciary's first occasion to consider when an order is final and appealable or nonfinal and nonappealable. The concept that an order is appealable if it brings an end to judicial labor was recognized by this Court in 1949. Howard v. Ziegler, 40 So.2d 776 (Fla. 1949). For more than ten years, the First District Court of Appeal has recognized this definition of an appealable nonfinal order in the context of a workers' compensation proceeding. Augustin v. Blount, Inc., 573 So.2d 104 (Fla. 1st DCA 1991); Martinez v. Collier County Public Schools, 804 So.2d 559 (Fla. 1st DCA 2002)(accepting appellate jurisdiction over a nonfinal order dismissing claimant's petition for benefits without prejudice). Accordingly, the District Court was well aware of the definition of an appealable order when it accepted jurisdiction over this case.

The Division now challenges the District Court's jurisdiction to hear Cagnoli's appeal. However, the Division never argued before the District Court that the Deputy Chief JCC's order was nonfinal and nonappealable. The Division submitted a full Answer Brief and a Motion for Rehearing before the First DCA without raising these

issues. Had the Division raised these arguments before the District Court, Cagnoli would have had an opportunity to respond.

Even if the Deputy Chief JCC's Order was nonfinal and nonappealable, Cagnoli requested leave of the District Court to accept the Notice of Appeal as a Petition for Writ of Certiorari. (Vol. I, p. 23) Rule 9.040 of Florida Appellate Procedure provides that "if a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought." Cagnoli alleged irreparable harm as well as a departure from the essential requirements of the law which would have been sufficient to invoke the District Court's certiorari jurisdiction. (Vol. I, p. 24, 37)

For this reason, Cagnoli respectfully submits that the Division's argument is therefore moot as the District Court would have been within its province to accept Cagnoli's appeal as a Petition for Writ of Certiorari. Indeed, the undersigned is aware of proceedings presently before the First District Court of Appeal which seek to invoke certiorari jurisdiction on the exact issues presently before this Court. See, Pedro Mendez v. Shoma Development Corp., 1D05-672. Cagnoli invites this Honorable Court to decide the matter presently on appeal as it will surely be revisited in subsequent appeals.

Cagnoli could have properly invoked the District Court's certiorari jurisdiction. "In order to establish an entitlement to certiorari relief, a petitioner must demonstrate

that the order under review departs from the essential requirements of law and that the order will cause irreparable harm that cannot be remedied on plenary appeal." Chavez v. J&L Drywall, 858 So.2d 1266 (Fla. 1st DCA 2003). Cagnoli met these requirements.

First, Deputy Chief JCC Stephens' order departed from the essential requirements of the law in several respects. The Order which required Cagnoli to admit to unlawful employment was an improper exercise of the Deputy Chief JCC's jurisdiction. Pace v. Miami-Dade County Sch. Bd., 868 So.2d 1286 (Fla. 1st DCA 2004). In addition, the Order denied Cagnoli his constitutional right to access to courts. Article I, §21, Florida Constitution. The Order also violated Cagnoli's constitutional rights to remain silent and refrain from self-incrimination. Fifth Amendment, U.S. Constitution; Article I, §9, Florida Constitution. Furthermore, as outlined in greater detail in Point II below, the Order relied on F.S. §440.192 which itself is invalid as a violation of federal law.

The Workers' Compensation Act expressly provides that its provisions apply to workers who are lawfully or unlawfully employed and includes aliens and minors. F.S. §440.02(15)(a). Consistent with the legislative purpose, the First District Court has routinely held that unlawfully employed workers are entitled to workers' compensation benefits. See Cenvill Development Corp. v. Candelo, 478 So.2d 1168

(Fla. 1st DCA 1985)(explaining that"illegal aliens indeed are entitled under the statute to workers' compensation benefits."); Winn-Lovett Tampa, Inc. v. Murphree, 73 So.2d 287 (Fla. 1st DCA 1954)(explaining that an underage child, though unlawfully employed, is entitled to workers' compensation benefits and therefore subject to its exclusivity provision.)(abrogated on other grounds).

The Workers' Compensation Act is therefore inconsistent in its application. The Act expressly notes that it applies to the unlawfully employed but then also requires every claimant to disclose his or her social security number in order to file a valid petition for benefits. For those who are unlawfully employed and therefore do not have a social security number or otherwise are not inclined to disclose it, the pleading requirements of F.S. §440.192 if strictly applied prevent the injured worker from claiming workers' compensation benefits without violating the worker's privacy or exposing the worker to risk of prosecution or deportation.

Deputy Chief JCC Stephens acknowledged this inconsistency in his Order denying Cagnoli's Motion for Reconsideration. The Deputy Chief noted that "only the class of persons who are not lawfully in the United States would be unable to attain a social security number." (Vol. I, p. 20) Accordingly, the Deputy Chief concluded that an exception to F.S. §440.192 must be created. His solution to bypass the pleading requirements was to "allow" Cagnoli to admit to unlawful employment.

However, such an exception to the pleading requirements is nowhere to be found in the Workers' Compensation Act. The statute does not require a claimant to admit to unlawful employment in order to file a petition for benefits. Furthermore, the statute does not allow a judge of compensation claims to excuse failure to include a social security number on the PFB for any purpose. See also, Kennedy v. Orlando Shader Realty, 711 So.2d 156 (Fla. 1st DCA 1998)(holding strict compliance with F.S. §440.192 is required to file a valid PFB). Rather, Deputy Chief Stephens added his own language to the statute to obtain jurisdiction to perfect or accept petitions where it otherwise does not exist.

A judge of compensation claims' jurisdiction is limited to what is specifically authorized by *Chapter 440*, Florida Statutes. Pace v. Miami-Dade County Sch. Bd., 868 So.2d 1286 (Fla. 1st DCA 2004). As this Honorable Court recognized in Millinger v. Broward County Mental Health Division, 672 So.2d 24 (Fla. 1996), "the JCC derives its very existence and authority from the legislature." Because the legislature has not given the Deputy Chief JCC any authority to require a workers' compensation claimant to admit to unlawful employment before he may file a valid petition for benefits, the Deputy Chief JCC has departed from the essential requirements of the law.

Moreover, Cagnoli should not be required to admit to "unlawful employment,"

in direct violation of his constitutional rights, in order to file a valid petition for benefits. The Fifth Amendment to the United States Constitution, as well as Article I, §9 of the Florida Constitution, provide that: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

Compelling an injured worker to admit to an agency of the State of Florida, i.e. the Division of Administrative Hearings (of which the Office of the Judges of Compensation Claims is a part), that he or she does not have a valid social security number, that a false number was provided to the employer in order to secure employment, or otherwise admit to unlawful employment, is in direct violation of the worker's constitutional right to remain silent. Moreover, the admission is compelled by and made to the Executive Branch of the state government, the very authority charged with enforcing the laws. Article IV, Florida Constitution.

Interpretations of the Workers' Compensation Act which would result in a "chilling effect" on a claimant's ability to challenge the Employer/Carrier's denial of workers' compensation benefits have generally been disapproved. Pilon v. Okeelanta Corp., 574 So.2d 1200 (Fla. 1st DCA 1991). Yet, the OJCC's insistence that an injured worker must expose himself to potential criminal liability in exchange for the right to file a claim for workers' compensation benefits does just that. By admitting

to unlawful employment, a claimant may be subject to criminal liability.

For example, the Internal Revenue Service could subpoena records of all claimants who admit to unlawful employment to determine whether the workers have properly paid taxes and, if not, prosecute for tax evasion. 26 U.S.C. §7201, §7203. The State Attorney's Office could subpoena records of all who admit to unlawful employment to determine whether the injured workers are guilty of identity fraud. The Florida Division of Insurance Fraud may also use the information to determine whether the injured worker may also be exposed to liability under F.S. §440.105 regarding workers' compensation fraud.

Even where no threat of criminal liability exists, some injured workers will face other penalties for admitting to the Executive Branch of the State of Florida that they do not have a valid social security number. The Department of Homeland Security (formerly Immigration and Naturalization Service) may take action against the worker to deport or detain the employee. In addition, the Department of Homeland Security may impose fines or imprisonment for any workers who reside in the country without proper documentation. 8 U.S.C. §1227, §1325.

The potential threat of deportation will have a "chilling effect" on illegal aliens who would otherwise file workers' compensation claims but value their illegal residency in the United States more than entitlement to medical care or lost wages.

The United States Supreme Court has acknowledged that the threat of deportation is in many instances as horrifying as the threat of criminal imprisonment. Writing for the Court, Justice Brandeis explained that deportation may result in the loss of "all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938 (1922). Justice Douglas, also writing for the Court, noted that "although deportation is not criminal punishment, it may nevertheless visit as great hardship as the deprivation of the right to pursue a vocation or a calling." Bridges v. Wixon, 326 U.S. 135, 147, 65 S.Ct. 1443, 1449, 89 L.Ed. 2103 (1945). See also Spevack v. Klein, 385 U.S. 511, 51; 87 S.Ct. 625 (1967)(acknowledging that civil penalties should not be imposed to compel self-incriminating statements.)

The threat of criminal repercussions as outlined above is not illusory or pure conjecture. Deputy Chief JCC Stephens has acknowledged that:

> (2)The SSN [contained in a PFB] may be disclosed in response to a legitimate inquiry from a state or federal agency in connection with matters within its jurisdiction. This specifically includes but is not limited to-
>
> > a) the United States Social Security Administration in connection with any offset or other social security issues;
> > b) the United States Internal Revenue Service with regard to any matters pertaining to taxation;
> > c) any criminal justice agency of the United States or of any State;
> > d) the Department of Revenue of the State of Florida, with regard to any matters pertaining to taxation or to child support obligations; and

> e) the Division of Workers' Compensation of the Department of Financial Services of the State of Florida, as necessary to support the Division's statutory responsibilities.
>
> 3) The SSN is disclosed if so ordered by a court of competent jurisdiction, pursuant to the terms of such order.

OJCC Administrative Order 2005-2, p. 5 (February 24, 2005) at:

http://www.jcc.state.fl.us/JCC/orders.asp.

Because of the very real threat of criminal or punitive consequences associated with admitting to the Division that the injured worker does not have a valid social security number or is unlawfully employed, an injured worker who is not receiving income or medical care from the workers' compensation system will likely seek the benefits from public aid rather than risk imprisonment, legal fines, and/or deportation. In turn, public aid places the financial burden of these injuries on society as opposed to industry, in direct conflict with the fundamental purpose of the workers' compensation act! See Duval County School Board v. Golly, 867 So.2d 491, 492 (Fla. 1st DCA 2004):

> The purpose of the act is to shoulder on industry the expense incident to the hazards of industry; to lift from the public the burden to support those incapacitated by industry and to ultimately pass on to the consumers of the products of industry such expenses. Protectu Awning Shutter Co. v. Cline, 16 So.2d 342 (1944).
>
> The absurdity of requiring an injured worker to incriminate himself in any

fashion in order to obtain workers' compensation benefits is further compounded by the fact that the Division assigns a unique case number to every claim once a Petition is filed! Once an initial Petition for Benefits is filed, the Division of Administrative Hearings (DOAH) assigns a case identification number. That number must appear on all subsequent pleadings, in lieu of the social security number. Pleadings that contain the social security number will be rejected. Rule 60Q-6.103. Such a random identification number issued by DOAH may just as easily be issued without requiring the injured worker to first admit to unlawful employment.

Moreover, the injured worker may not even attempt to circumvent his potential "exposure" by settling his case. In many instances, injured workers choose to accept lump-sum settlements in order to obtain medical treatment on their own. Or, workers whose claims have been denied in their entirety may choose settlement as an alternative to prolonged litigation. But for the unlawfully employed worker, these efforts too will be thwarted.

DOAH rejects any requests for assignment of a case number unless they contain the social security number. Without a DOAH number, the case will not be assigned to a JCC to approve allocation of child support, to approve the settlement for unrepresented claimants, or to approve attorneys fees for claimant's represented by counsel. F.S. §440.20(11). Accordingly, without a DOAH case number, the injured

worker cannot settle the case. This directly conflicts with Florida's long standing public policy of encouraging settlements in civil litigation. JFK Medical Center, Inc. v. Price, 647 So.2d 833, 834 (1994).

Moreover, the OJCC's requirement that an injured worker must submit a social security number in order to simply obtain a DOAH number is not found in the Workers' Compensation Act. Florida Statutes §440.192 only applies to the filing of a valid petition for benefits. The statute does not require an injured worker to disclose his or her social security number in order to obtain a DOAH number. Yet, without a DOAH number, the "case" will not be referred to a local judge of compensation claims to approve the settlement.

The Deputy Chief JCC's Order also departs from the essential requirements of the law because it denies Cagnoli access to the courts, unless he first admits to unlawful employment. The First District Court of Appeal has recognized that "an injured employee's right to receive workers' compensation benefits qualifies as a property interest." Rucker v. City of Ocala, 684 So.2d 836 (Fla. 1st DCA 1997). Accordingly, Cagnoli is guaranteed protection under Article I, §21, of the Florida Constitution and cannot be deprived of his protected workers' compensation rights in derogation thereof. ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.) Because the

Deputy Chief JCC would not assign a case number and refer his claim to a judge of compensation claims, Cagnoli was denied access to the courts.

Access to the courts is violated if the statute obstructs or infringes on the injured worker's rights to any significant degree. Furthermore, this Honorable Court has recognized that "in order to find that a right has been violated it is not necessary for the statute to produce a procedural hurdle which is *absolutely* impossible to surmount, only one which is significantly difficult." Mitchell v. Moore, 786 So.2d 521, 527 (Fla. 2001). The OJCC's practice and procedure of striking the Petitions filed without a valid social security number makes access to the Judge of Compensation Claims significantly more difficult for these injured workers.

Cagnoli raised all of these arguments before the First District Court of Appeal. The Court decided the matter by declaring F.S. §440.192 invalid because it is preempted by federal law, as further detailed in Point II below. Because the Court found that F.S. §440.192 is invalid, by implication the Court would have agreed that Deputy Chief JCC Stephens' order was a departure from the essential requirements of the law. Even had the Court not so found, Cagnoli submits that any of the issues raised above are sufficient to establish certiorari jurisdiction and moreover sufficient for this Court to determine that an injured worker should not be required to admit to unlawful employment in order to file a claim for workers' compensation benefits.

Next, Cagnoli respectfully submits that he will be irreparably harmed if required to admit to unlawful employment. Should Cagnoli be required to provide a social security number or admit to unlawful employment, the proverbial cat will be out of the bag. The harm cannot be "undone" on plenary appeal. See, Chavez v. J&L Drywall, 858 So.2d 1266 (Fla. 1st DCA 2003); Taylor v. Columbia/HCA Doctors Hospital, 746 So.2d 1244 (Fla. 1st DCA 1999).

Furthermore, if admitted, Cagnoli could not then challenge his admission of unlawful employment in any subsequent legal proceedings. When Cagnoli filed his claim, F.S. §440.105(8) required him to acknowledge that "'any person who, knowingly and with intent to injure, defraud, or deceive any employer or employee, insurance company, or self insured program, files a statement of claim containing *any* false or misleading information commits insurance fraud." If Cagnoli attempted to later rescind his admission of unlawful employment, he would be subject to prosecution for fraud. For this reason, the First DCA could have properly granted certiorari review of Deputy Chief JCC Stephens' order if the Court had not otherwise determined that the order was appealable.

POINT II ON APPEAL

The District Court of Appeal correctly determined that F.S. §440.192 is invalid because it is in violation of the Federal Privacy Act.

STANDARD OF REVIEW: **De Novo.**

A. Cagnoli properly raised his constitutional challenge to F.S. §440.192 before the First District Court of Appeal.

In error, the Division argues to this Honorable Court that Cagnoli improperly failed to raise his constitutional challenge to F.S. §440.192 before Deputy Chief JCC Stephens and therefore could not raise it before the First District Court of Appeal. (Brief, p. 9) In so doing, the Division solely relies on case law regarding appeals of circuit court decisions. However, the Division overlooks case law directly on point which holds that a judge of compensation claims is not competent to rule on the constitutionality of the Workers' Compensation Act.

"As administrative officers, deputy commissioners lack jurisdiction to consider claims of the facial unconstitutionality of any section of the Workers' Compensation Act. However, [the First District Court of Appeals] does have jurisdiction to consider such claims and is, effectively, the most suitable court to which a claim of statutory unconstitutionality can be made." Sasso v. RAM Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), *approved* 452 So.2d 932 (Fla. 1984); See also, Harrell v.

Florida Construction Specialists, 834 So.2d 352 (Fla. 1st DCA 2003). Furthermore, in Hensley v. Punta Gorda, 686 So.2d 724 (Fla. 1st DCA 1997), the First District Court held that it has jurisdiction to consider constitutional claims raised in worker's compensation matters in the first instance. Therefore, Cagnoli was not required, nor would it have been appropriate for him, to raise constitutional arguments before the Deputy Chief JCC. Hensley, 686 So.2d at 725.

The Division also argues that Cagnoli should have sought an evidentiary hearing before the JCC to determine whether F.S. §440.192 was preempted by the Federal Privacy Act. (Brief, p. 7) However, Deputy Chief JCC Stephens *twice* denied Cagnoli an opportunity to present argument regarding the merits of his position. The Deputy Chief *sua sponte* dismissed the Petition for Benefits, without first notifying Cagnoli of his intention to do so nor setting a hearing on the matter. (Vol. I, p. 12) Then, after Cagnoli filed his Motion for Reconsideration, JCC Stephens again resolved the matter without conducting a hearing. (Vol. I, p. 20) Of note, the Deputy Chief JCC also faced a Hobson's choice. In order to hold a hearing, he would have had to assign a DOAH case number!

Any argument that the record on appeal is lacking or that an evidentiary hearing should have been held is wholly on the shoulders of the Office of the Judges of Compensation Claims and the Deputy Chief JCC. Cagnoli respectfully submits that

the executive branch may not now complain that they were not provided an opportunity to have a full hearing on the merits of Cagnoli's position when the executive branch is single-handedly responsible for the lack of any record. More importantly, however, is the fact that even if the "parties" had appeared for an evidentiary hearing before the Deputy Chief JCC, the Deputy Chief could not have decided the constitutional issues. Sasso, supra. Deputy Chief JCC Stephens was at all times without jurisdiction to rule on any constitutional challenge to F.S. §440.192.

Moreover, even if a hearing were held before the Deputy Chief JCC, the issues presently on appeal likely would not have been fully fleshed out. Cagnoli's claim is filed against his employer and their workers' compensation carrier. At the time his Petition was dismissed, the Employer/Carrier were not represented by counsel. Accordingly, the Employer/Carrier would not have raised defenses or argument before the Deputy Chief Judge for the purpose of any meaningful hearing.

Cagnoli's Motion for Reconsideration was unopposed at the time it was before Deputy Chief Judge Stephens. The Employer/Carrier never challenged the sufficiency or specificity of Cagnoli's petition for benefits. The Employer/Carrier never filed a motion to dismiss before Deputy Chief Stephens. The Employer/Carrier never argued before Deputy Chief Stephens that F.S. §440.192 was valid despite the Federal Privacy Act. In fact, to date, the Employer/Carrier still do not take a position

regarding any of the issues raised in Cagnoli's appeal. Though, notably, the Employer/Carrier did not appeal the First District Court's decision. For all of these reasons, there was no contrary argument to present before a JCC on the issue of the constitutionality of F.S. §440.192.

Furthermore, Deputy Chief JCC Stephens could not have raised the arguments himself. A JCC may not act as a witness nor provide argument in a proceeding over which he is presiding. Florida Statutes §90.607(1)(a) provides: "Except as provided in paragraph (b), the judge presiding at the trial of an action is not competent to testify as a witness in that trial. An objection is not necessary to preserve the point." A judge is also charged with preserving the integrity and *independence* of the judiciary in order to serve justice. Canon 1, Code of Judicial Conduct. If Deputy Chief JCC Stephens were asked to present argument or record evidence in opposition to Cagnoli's position, then his role would no longer be one of a presiding judge but rather as an adversary.

Similarly, a trial record could not have been created before a judge of compensation claims assigned to adjudicate the merits of Cagnoli's petition for benefits. Deputy Chief JCC Stephens is responsible for assigning cases to a judge of compensation claims for a determination on the merits. F.S. §440.192(1). The Deputy Chief would not assign Cagnoli a case number nor assign his case to a judge of

compensation claims unless Cagnoli first supplied his SSN or admitted to unlawful employment. Such an admission would have defeated the very purpose of Cagnoli's challenge to F.S. §440.192. By refusing to assign his case to a judge of compensation claims, Deputy Chief JCC Stephens eliminated any possibility that a full record as the Division requested could have been prepared, or that a "final" order as defined by the Division could have been obtained.

In addition, the Division was not a party to the case until the appeal was filed before the First District Court. The Division of Workers' Compensation is not authorized by statute to be a party to a workers' compensation claim for purposes of raising arguments before the lower tribunal. They, too, could not have established a trial record. It is for this reason that the Division of Workers' Compensation is afforded an opportunity, as a matter of right, to intervene in *any* existing appeal of a workers' compensation order. Rule 9.180(e) of Florida Appellate Procedure provides:

> (1) *District Court*. Within 30 days from a notice or petition invoking the jurisdiction of the court the division may intervene by filing a notice of intervention as a party appellant/petitioner or appellee/respondent with the court and take positions on any relevant matters.

The Division is afforded an opportunity to intervene for the very purposes of raising issues which are of concern to the executive branch and which may not have been addressed before the lower tribunal. The First District Court of Appeal granted

the Division's status as an intervenor. The Division prepared a full brief on the merits of their position in opposition to Cagnoli's arguments. This was the Division's opportunity to present all arguments which were believed relevant to the merits of the appeal, including their position that the Federal Privacy Act did not preempt F.S. §440.192 by way of exception.

B. The portion of F.S. §440.192 which requests disclosure of the claimant's social security number is not subject to an exception to the Privacy Act because prior to January 1, 1975 the state did not maintain a system of records pursuant to statute or regulation which required such disclosure.

The Division alleges that, had a factual trial record been compiled, evidence would have shown that the executive branch has relied on the social security number as a unique identifier for claimants since 1955. (Brief, p. 10) However, the only "evidence" necessary to prove the Division's point comes in the form of prior case law, prior statutes, and rules of procedure in effect prior to January 1, 1975. The Workers' Compensation Act and applicable rules of procedure as they existed immediately prior to January 1, 1975 are the only relevant "evidence" to consider in determining whether the Federal Privacy Act preempts F.S. §440.192. The Federal Privacy Act provides:

> (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided

by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was **required** under statute or regulation adopted prior to such date to **verify the identity** of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

5U.S.C. 552a, Section 7. Accordingly, the Federal Privacy Act only allows a state to require an individual's social security number if the statute or regulation (1) maintained a system of records in existence as of January 1, 1975; (2) required disclosure; and (3) used the SSN for the purpose of verifying the individual's identity. Cagnoli submits that none of these requirements are met.

First, Cagnoli argues that a statute or regulation requiring the social security number for purposes of verifying the claimant's identity was not in existence as of January 1, 1975. The statute in effect prior to January 1, 1975 provided in pertinent part:

440.19 TIME AND PROCEDURE FOR FILING CLAIMS:

> (1)(c) Such claim shall be filed with the Division at its office in Tallahassee and shall contain the name and address of the employee, the name and address of the employer, and a statement of the time, place, nature and cause of the injury or such fairly equivalent information as will put the Division and the employer on notice with respect to the identity of the parties and the nature of the claim. F.S. §440.19 (1974)

In 1980, the Legislature amended F.S. §440.19 to read: "Such claim shall be filed with the division at its Tallahassee office and shall contain the name, address, and social security number of the employer and employee.... or such fairly equivalent information as will put the Division and the employer on notice." By way of comparison, the statute in effect for Cagnoli's accident provides:

> 440.192 PROCEDURE FOR RESOLVING BENEFIT DISPUTES
>
> (1) Any employee may, for any benefit that is ripe, due and owing, file by certified mail, or be electronic means approved by the Deputy Chief Judge, with the Office of Judges of Compensation Claims a petition for benefits which meets the requirements of this section and the definition of specificity in s 440.02. The department shall inform employees of the location of the Office of the Judges of Compensation Claims for purposes of filing a petition for benefits. The employee shall also serve copies of the petition for benefits by certified mail, or be electronic means approved by the Deputy Chief Judge, upon the employer and the employer's carrier. The Chief Judge shall refer the petitions to the judges of compensation claims.
>
> (2) Upon receipt, the Office of the Judges of Compensation Claims shall review each petition and shall dismiss each petition or any portion of such petition that does not on its face specifically identify or itemize the following:
>
> (a) Name, address, telephone number, and social security

> number of the employee.
> (b) Name, address, and telephone number of the employer.
> (c) A detailed description of the injury and cause of the injury, including the location of the occurrence and the date or dates of the accident.
> (d) a detailed description of the employee's job, work responsibilities, and work the employee was performing when the injury occurred.
> (e) The time period for which compensation and the specific classification of compensation were not timely provided.
> (f) Date of maximum medical improvement, character of disability, and specific statement of all benefits or compensation that the employee is seeking....

Based on the above, the statute in effect prior to January 1, 1975 clearly did not require a claimant to include his social security number on a petition for benefits. Therefore, F.S. §440.192 may only qualify as an exception to the Federal Privacy Act if a regulation existed prior to 1975 which required the social security number for the purpose of verifying an individual's identity.

The Division argues that the executive branch "has long relied on the unique identification properties of the employee's SSN, requiring claimants to identify themselves with that number by statute or rule since at least 1955." (Brief, p. 10) Cagnoli does not dispute that rules of procedure existed prior to 1975 which used the social security number as a claimant's case number. However, Cagnoli does dispute that this in and of itself qualifies for the exception to the Federal Privacy Act.

Initially, all claims for workers' compensation benefits were filed with the Florida Industrial Commission (Commission). F.S. §440.19 (1935). To be valid, the claims must have been "in accordance with the regulations prescribed by the commission." F.S. §440.25 (1943). The Commission then promulgated regulations and rules of procedure to assist with adjudication of workers' compensation claims. Among these was Rule 12.

The Division relies on the existence of Rule 12 to support their position that the social security number was *required* prior to 1975. (Brief, p. 10-1) However, in doing so, the Division curiously omits a rather pertinent part of the rule. Rule 12, in its *entirety*, provided:

> Claims for compensation shall be filed with the Commission, and shall contain the name, social security number, and address of the employee, the name and address of the employer, and a statement of the time, place, nature and cause of the injury or such fairly equivalent information as will put the Commission and the employer on notice with respect to the identity of the parties and the nature of the claim. Such claim may be made on the form prescribed therefor by the Commission, **But any claim in writing setting forth substantially the information required by this regulation shall constitute a valid claim**.

Turner v. Keller Kitchen Cabinets, Southern Inc., 247 So.2d 35, 39 (Fla. 1971). In fact, this Court in Turner held that a handwritten letter from the claimant's wife constituted a sufficient claim for benefits under Rule 12. In the opinion, the Court reproduced the entire letter. Of note, the claimant's social security number was not

included. 247 So.2d at 37. Cagnoli submits that Rule 12 could hardly have *required* the claimant's social security number (as mandated by the Privacy Act) when the Rule itself allowed for substantial compliance. If the letter as reproduced in Turner was sufficient to state a claim for benefits, then the Commission and Division could not have been relying on the social security number at that time to identify all claimants.

Next, the Division argues that the existence of Rule 185W-2.02, promulgated in 1968, supports their position that the Privacy Act does not preempt F.S. §440.192. (Brief, p. 11) Rule 185W-2.02 provided:

> ASSIGNMENT AND USE OF COMMISSION'S FILE NUMBERS.
>
> The Commission file number shall be constituted by the injured employee's social security number and date of accident unless the parties have been or are notified by the Commission of the assignment of an internal file number. The Commission file number shall be affixed to every report and document submitted.

Once again, this Rule did not *require* strict compliance. The Rule allows for assignment of an internal file number which may constitute the case number in lieu of the claimant's social security number. This Rule also demonstrates that the social security number was not used as proof of the claimant's identity but rather was requested only for the purpose of using it as a case number.

Then, in 1973, Rule 12 and Rule 185W-2.02 were replaced by Rules of Procedure approved by this Court at the Commission's request. On November 14,

1973, the Supreme Court approved rules of procedure as submitted by the Industrial Relations Commission. In re Florida Workman's Compensation Rules of Procedure, 285 So.2d 601 (Fla. 1973). These rules governed procedure before the judge of compensation claims from 1973 to 2004. Cagnoli submits that the Rules of Workers' Compensation Procedure were the only rules in effect immediately prior to January 1, 1975.

Rule 5 of Florida Workers' Compensation Procedure (1974) closely followed its predecessor, Rule 12. Rule 5 provided that a claim for benefits should include the name, social security number, and address of the employee. The Rule further provided that "any instrument setting forth substantially the information required by this rule shall constitute a valid claim." Again, a claimant could file a valid claim for benefits without supplying his social security number or admitting to unlawful employment.

On December 2, 2004, this Court issued its opinion rendering the Florida Rules of Workers' Compensation Procedure completely invalid on the grounds that the Court never had the jurisdiction to approve rules applicable to an executive agency. In re Amendments to the Florida Rules of Workers' Compensation Procedure, 891 So.2d 474 (Fla. 2004). This Court acknowledged that it *never* had authority to promulgate rules of workers' compensation procedure and that the rules were repealed

in their entirety. Therefore, because neither statute, nor *valid* rule, existed as of January 1, 1975 which required an injured worker to disclose his or her social security number as part of a valid petition for benefits, F.S. §440.192 does not qualify for an exception under the Federal Privacy Act.

All of the rules of procedure cited in support of the Division's position demonstrate that a claimant who did not provide his social security number was nevertheless able to file a valid claim for benefits without admitting to unlawful employment. Every one of these rules allowed for substantial compliance. In fact, prior to October 1, 2003, the Division of Workers' Compensation allowed a claimant to file a petition without a social security number *and* without any explanation for failure to include a valid SSN. Deputy Chief JCC Stephens acknowledges in his February 5, 2005 administrative order that "for years, the Division of Workers' Compensation would simply issue a new number, employing a process designed to prevent duplication, when it received a Petition claiming 'Alien Status.'" (Appendix A, p.1); OJCC Administrative Order 2005-2, February 24, 2005, p. 9, http://www.jcc.state.fl.us/JCC/orders.asp.

Accordingly, the state did not "maintain a system of records in existence and operating" prior to January 1, 1975 which <u>required</u> disclosure of the social security number. The Commission, and later the Division, had (and still have) alternate means

of establishing a unique case number when the social security number was not available. Fla. Admin. Code. R. 69-3.003(4)(b). All new cases are assigned a unique file number by the Division of Administrative Hearings when the initial petition for benefits is filed. Rule 60Q-6.103.

C. The portion of F.S. §440.192 which requests disclosure of the claimant's social security number is not subject to an exception to the Privacy Act because the state did use the social security number to verify the claimant's identity.

Even if this Court were to find that a regulation did exist prior to 1975 which required a claimant to disclose his or her social security number, Cagnoli submits that such disclosure was not required for the purpose of verifying the claimant's identity. The Division suggests that merely using the social security number as a case number satisfies this requirement. Cagnoli respectfully disagrees.

When the statute does not define a term, this Court should apply its plain and ordinary meaning, which may be obtained by reference to a dictionary. Rollins v. Pizzarelli, 761 So.2d 294, 298 (Fla. 2000). Webster's Dictionary defines "verify" as: "(1)to prove the truth of, as by evidence or testimony; confirm; (2) to ascertain the truth, authenticity, or correctness of, as by examination, research or comparison; (3) to act as the ultimate proof or evidence of; serve to confirm." Random House Webster's College Dictionary, (1995). Similarly, Black's Law Dictionary defines

"verify" as: "to confirm or substantiate by oath or affidavit. Particularly used of making formal oath to accounts, petitions, pleadings, and other papers. The word 'verified,' when used in a statute, ordinarily imports a verity attested by the sanctity of an oath. It is frequently used interchangeably with 'sworn.'" Black's Law Dictionary, Abridged Sixth Ed. (1991).

By way of definition, the Division's argument that a claimant's social security number is necessary to serve as the basis for a unique case number must fail. (Brief, p. 11) Use of the social security number as a case number is insufficient to demonstrate an exception to the Federal Privacy Act. There is no argument presented by the Division, or by the Office of the Judges of Compensation Claims who filed a motion before this Court, that the social security number has *ever* been used to verify the claimant's identity.

The Division of Workers' Compensation and the Division of Administrative Hearings in fact take no steps to confirm, ascertain the truth, or otherwise prove that the SSN on the petition for benefits actually matches the name of the claimant. So long as the social security number is not already being used by another claimant, which would possibly raise a red flag, a claimant using a false social security number could proceed with the merits of his case. Furthermore, the Division and the OJCC already have in place procedures for assigning an internal file number when a social security

number is not available. Fla. Admin. Code. R. 69-3.003(4)(b). Prior to October 1, 2003, a claimant was never asked or required to submit other proof of identity if the social security number was not available. No efforts were taken to confirm the claimant's identity. (Appendix A, p.1)

As noted above, Deputy Chief JCC Stephens acknowledges in his February 5, 2005 administrative order that for many years the Division issued its own number when a claimant did not present a valid social security number on a petition for benefits. OJCC Administrative Order 2005-2, February 24, 2005, p. 9, http://www.jcc.state.fl.us/JCC/orders.asp. Cagnoli submits that the same process used by the Division before October 1, 2003 could be used presently, without infringing on every injured worker's right to privacy.

By way of distinction, Cagnoli does not argue before this Court that the social security number is never relevant in workers' compensation proceedings. Clearly, disclosure of the SSN is absolutely necessary in certain instances. For example, F.S. §440.20(11)(d) requires every judge of compensation claims to consider whether settlement proceeds adequately allocate funds for recovery of child support arrearages. The claimant's social security number is used to determine whether there are such arrearages, but only after the claim is settled.

However, not every claimant will settle his or her workers' compensation claim.

If the occasion arises that an injured workers *chooses* to settle the case, then the injured worker should be compelled to disclose the social security number. But the requirement should not be made at the inception of the case when the relevancy of the number has yet to be determined.

Similarly, the claimant's social security number is relevant for purposes of monitoring a claimant's receipt of social security disability benefits. However, a claimant's receipt of social security disability benefits is only relevant for purposes of calculating an offset taken by the Employer/Carrier. Florida is a "reverse-offset" state. F.S. §440.15(10). The United States government is not entitled to offset disability benefits based upon a claimant's receipt of workers' compensation benefits. In those rare instances when a claimant is determined to be permanently and totally disabled, the Employer/Carrier would be entitled to require disclosure of the claimant's social security number. (Of course, a social security number is necessary to collect social security benefits, rendering the issue moot for the unlawfully employed claimants.) However, any disclosure of the SSN to the Employer/Carrier would not necessarily be made to the OJCC or even the judge of compensation claims. Again, this is not information which the OJCC needs at the inception of *every* workers' compensation case.

For these reasons, Cagnoli submits that the portion of F.S. §440.192 which

requires disclosure of the social security number to file a valid PFB violates not only the express provisions of the Privacy Act, but also the spirit of the Act. In so doing, F.S. §440.192 and Deputy Chief JCC Stephens' interpretation of that section also violate a right to privacy, recognized by and protected under the Florida Constitution. Article I, §23 of the Florida Constitution provides: "every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."

In addition, this Court has consistently protected an individual's right to privacy as guaranteed under the Florida Constitution. See Rasmussen v. South Florida Blood Serv.,Inc., 500 So.2d 533, 536 (Fla.1987); Winfield v. Division of Pari-Mutual Wagering, Dep't of Bus. Regulation, 477 So.2d 544, 548 (Fla.1985)(explaining that "Article I, section 23 of the Florida Constitution specifically provides a constitutional right of privacy broader in scope than the protection provided in the United States Constitution.") The very purpose of the Privacy Act and the Florida Constitution's guarantee of privacy is to prevent government from obtaining and disseminating sensitive information about an individual without a legitimate basis for doing so.

Arguably, the Division and Office of the Judges of Compensation Claims must have a *compelling* state interest in requiring all workers' compensation claimants to provide a social security number as part of a valid petition for benefits or admit to

unlawful employment. Because the Deputy Chief JCC's interpretation of F.S. §440.192 applies to illegal aliens, a protected class, the state must have a compelling state interest to justify limiting their access to the courts or depriving them of a property right. In Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249 (Fla. 1987), this Court recognized that aliens are members of a suspect class and therefore judicial review requires heightened scrutiny.

However, the State's infringement on all injured workers' constitutional right to privacy should not be overlooked. The privacy interests of those who are *lawfully* employed must also be considered. The Legislature has recognized that the social security number may be used to perpetuate fraud against a person which may cause great financial or personal harm to an individual. F.S. §119.0721(7). The constitutional right to privacy applies to any injured worker who seeks to withhold his or her social security number from the Division of Workers Compensation or the Office of the Judges of Compensation Claims to protect his right to privacy, even if for the purpose of avoiding criminal prosecution or deportation. For this very reason, the state should have at the very least a legitimate state interest in asking for the number. Here, no such interest exists.

The Division and the Office of the Judges of Compensation Claims do not have any legitimate state basis for requiring all claimants to release their social security

number in order to file a valid petition for benefits. The OJCC is not charged with defending workers' compensation claims nor with assuring that an injured worker's claims are legitimate. The statute does not confer this authority. The only justification presented by the Division and the OJCC by way of the Deputy Chief JCC's administrative order is that the number is used as a case number and for simplicity with computer programming. This does not rise to the level of a legitimate state interest.

Neither the Division nor the OJCC have a legitimate state interest, sufficient to outweigh Cagnoli's privacy and property rights, to require him to provide a social security number on his Petition for Benefits. Certainly, there can be no general state interest in identifying litigants. An injured person may file a civil action for damages without first providing a social security number. The state recognizes that the parties are able to identify each other without the necessity of government interference. So, too, should it be in the context of a workers' compensation proceeding.

Florida Statutes §440.192, and its predecessor F.S. §440.19, are designed to put the Employer/Carrier on notice of an injured worker's claims. The concept of identifying the parties is to provide the Employer/Carrier with enough information to investigate a claim. Surely an employer would know whether the claimant seeking benefits was actually an employee at one time. In the unlikely event that the employer

did not have that information, the Employer/Carrier could file a Motion to Dismiss the Petition for lack of specificity. Straw v. Steve Moore Chevrolet, 651 So.2d 708 (Fla. 1st DCA 1995)(explaining that 1991 statute contemplates that a non-specific claim will be met with a motion to dismiss from the Employer/Carrier).

The First District Court of Appeals has acknowledged that the specificity requirements of the statute were initially designed "to protect an employer from being unfairly disadvantaged in defending a claim for benefits." It is the employer, not the OJCC, who must have sufficient notice to identify the claimant and the benefits being claimed. The District Court explained that strict compliance with the specificity requirements, when the employer in fact has notice of the parties and claim would "thwart one of the most cardinal principles underlying the enactment of the Workers' Compensation Act: to put needed benefits speedily into the hands of the injured employee." Mays v. Packers, 677 So.2d 992 (Fla. 1st DCA 1996).

The District Court's holding is in keeping with the stated legislative purpose of the Workers' Compensation Act:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted to as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful employment at a reasonable cost to the employer. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits....It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore,

> an efficient and self-executing system must be created which is not an economic or administrative burden. F.S. §440.015.

Strict compliance with F.S. §440.192 specificity requirements subjects claimants to an unreasonable hurdle to overcome before the merits of the claim may even be determined. The OJCC reviews all claims that come in and must consider whether, on its face, the petition meets the specificity requirements. If not, the statute requires the Deputy Chief JCC to dismiss the petition. What, then, becomes of the claimant who does not have a phone number? What becomes of the claimant who is homeless and does not have an address? What becomes of the illiterate worker who is unable to satisfactorily describe his accident? Are these claims to be summarily dismissed because they are not in strict compliance with the statute?

In order to further the very purpose of the workers' compensation law, i.e. to provide benefits promptly to injured workers, substantial compliance with F.S. §440.192 must be permitted. There is no logical basis for a claim to be prescreened by the OJCC before it will be referred to a judge of compensation claims for a determination on the merits. The prescreening process unnecessarily delays and protracts litigation, in direct dereliction of the express purpose of the workers' compensation law. For this reason, Cagnoli respectfully asks this Honorable Court to disapprove of the District Court's holding in Kennedy v. Orlando Shader Realty,

711 So.2d 156 (Fla. 1st DCA 1998)(holding strict compliance with F.S. §440.192 is required to file a valid PFB.)

Accordingly, the portion of F.S. §440.192 which requires the provision of a social security number should be stricken as a violation of federal law and a violation of the right to privacy as guaranteed by the Florida Constitution. Strict compliance with F.S. §440.192 should, therefore, not be required.

CONCLUSION

For all of the foregoing reasons, Cagnoli respectfully asks this Court to affirm the District Court's opinion reversing Deputy Chief Judge S. Scott Stephens' Order *sua sponte* striking his Petition for Benefits. Further, Cagnoli respectfully asks this Court to mandate the Division of Workers' Compensation to issue DOAH case numbers and Docketing Orders to all petitions for benefits which otherwise meet the requirements of F.S. §440.192 and strike that portion of F.S. §440.92 which requires an injured worker to provide his or her social security number as part of the Petition for Benefits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by US Mail on March 24, 2005 to: Thomas Hodas, Esquire, counsel for the Employer/Carrier, 250 Tequesta Drive, Suite 301, Tequesta, FL 33469; Daniel Y. Sumner, Esquire and David D. Hershel, Esquire, Division of Workers' Compensation, 200 E. Gaines Street, Tallahassee, FL 32399-4229; and JoNel Newman, Esquire, amici curiae, 3000 Biscayne Blvd., Suite 450, Miami, FL 33137.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the font requirements of Rule 9.210(a) Rules of Appellate Procedure have been complied with in this Amended Answer Brief on March 24, 2005.

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