SUPREME COURT OF FLORIDA

DIVISION OF WORKERS' COMPENSATION

Appellant,

vs. **CASE NO. SC05-220**

RICARDO CAGNOLI, ET AL.

Appellees.
_____/

INITIAL BRIEF OF APPELLANT DIVISION OF WORKERS' COMPENSATION

On Appeal of a Decision of the
District Court of Appeal
First District, State of Florida

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STATEMENT OF THE CASE AND FACTS

This case is before the court to consider whether the district court had an appealable final order before it, and a sufficient factual record upon which to invalidate Section 440.192(2), Fla. Stat. (2003), holding this statute violates section 7 of the federal Privacy Act of 1974, 5 U.S.C. s. 552a note. The Division of Workers Compensation intervened below pursuant to Fla. R. App. P. 9.180(e), and now appeals the adverse decision by the district court.

Ricardo Cagnoli filed a Petition for Benefits ("Petition") on November 24, 2003, claiming his employer failed to provide the workers' compensation benefits Cagnoli asserts were due to him. R. 2. His Petition states he was injured in a job-related accident on March 13, 2003. Id. The Petition did not contain a social security number. *Id*.

The statutory scheme for initial processing of Florida workers' compensation claims is governed by section 440.192, Fla. Stat. (2003). The petition is filed in Tallahassee with the Office of Judges of Compensation Claims (OJCC). Pursuant to section 440.192(2), Fla. Stat., the OJCC has a duty to review petitions upon receipt, and "shall" dismiss any petitions that do not contain all of the statutorily required information, including the employee's social security number ("SSN"). Section 440.192(2), Fla. Stat.

(2003), further provides that the dismissal of any petition or portion of a petition under this section is without prejudice and does not require a hearing. Petitions that are determined by the initial screening not to meet the requirements of section 440.192(2), Fla. Stat., are returned with directions to correct the defect and re-file. R. 12.

Cagnoli's Petition was initially returned with an order dated December 1, 2003, directing him to re-file the Petition with his SSN or, if the number was unavailable, to submit an explanation of its unavailability. *Id*. Cagnoli did not re-file the Petition pursuant to the Order. Rather, on December 24, 2003, counsel for Cagnoli filed a Motion for Reconsideration arguing that the explanation directed by the Order would violate Cagnoli's fifth amendment rights, and arguing that illegal aliens are entitled to workers' compensation benefits equally with legally employed workers. In the Motion for Reconsideration, counsel for Cagnoli characterized the Order of December 1, 2003, as "nonfinal" and "non-appealable." R. 15-16. The Deputy Chief Judge issued an Order on December 31, 2003, denying the Motion for Reconsideration. R. 20. The Deputy Chief Judge's Order of December 31, 2003, crossed in the mail with Cagnoli's Notice of Appeal, which was received the same day.

The appeal was styled as a Notice of Appeal, and in the alternative a Petition for Writ of Certiorari. R. 23. The district court determined to treat the case as an appeal from a final order. R. 40. The Division of Workers' Compensation filed a notice of intervention on January 27, 2004, and became a party to this action by operation of section 440.271, Fla. Stat. (2003), and Fla. R. App. P. 9.180(e). Florida Legal Services moved for leave to appear as *amicus curiae* on May 3, 2004, and the district court granted that motion on May 10, 2004.

In his brief before the district court, Cagnoli raised a new argument not addressed below - that the federal Privacy Act of 1974, 5 U.S.C. s. 552a note (2002), prohibits states from requiring SSN's as a condition of receiving workers' compensation benefits. Cagnoli's Amended Initial Brief at 16. However, there is a "grandfathering" exemption for state systems that required SSN's prior to 1975 either by "statute or regulation." 5 U.S.C. s. 552a note (2002). The district court, looking only to a 1980 statute as the basis for the Florida SSN requirement, held section 440.192(2), Fla. Stat., invalid under the federal Privacy Act of 1974. *Cagnoli v. Tandem Staffing*, 29 Fla. L. Weekly D2500 (Fla. 1st DCA Nov. 5, 2004). On November 19, 2004, the Division of Workers' Compensation, as intervenor filed a Motion for Rehearing, adverting to archival documents that indicated the SSN

requirement preceded the 1980 law, and had been in effect pursuant to administrative regulation well before 1975. The district court denied the Motion for Rehearing without comment on December 14, 2004. This appeal follows.

SUMMARY OF ARGUMENT

The district court accepted Cagnoli's appeal as one from a final order. However, applying *Croes v. Univ. Community Hosp.*, 886 So. 2d 1040, (Fla. 1st DCA 2004) the OJCC's Order of December 31, 2003, was nonfinal and the appeal was premature. Further, the district court applied the federal Privacy Act to invalidate section 440.192(2), Fla. Stat., without development of a trial court factual record as to whether the "grandfather" exemption provided for in the federal Privacy Act applies to Florida. There was no trial court factual record because the issue of the federal Privacy Act was first raised by Cagnoli before the district court.

The federal Privacy Act prohibits a state from creating a post- 1974 system that requires participants to supply SSN's, but specifically "grandfathers" (protects continuation of) systems that required SSN's by statute or regulation prior to 1975. 5 U.S.C. s. 552a note. Due to lack of development of a factual record below, the district court looked only to a 1980 law as the basis for Florida's SSN requirement, without considering

whether the requirement had an earlier basis in administrative rule that would also invoke the exemption in the federal Privacy Act.

In order to have a sufficient factual record to properly apply the Federal Privacy Act, the district court should have remanded the case for issuance of a final order and development of a trial court record that would have permitted the OJCC to hear evidence and determine whether the federal Privacy Act "grandfather" exemption was invoked in Florida by pre-1975 rule.

I THE DISTRICT COURT ERRED IN TREATING THE ORDER OF DECEMBER 1, 2003, AS AN APPEALABLE FINAL ORDER.

Standard of Review: De Novo

The OJCC's Order of December 1, 2003, was not an appealable final order. Although the Petition was "stricken," by the Order it was done without prejudice and the Order specifically stated that: "If you do not have a Social Security No., resubmit the petition with an explanation of why you do not have such a number." R. 12. Cagnoli acknowledged the option to resubmit the Petition in its Motion for Reconsideration. R. 15. Also in the Motion for Reconsideration, counsel for Cagnoli represented the Order of December 1, 2003, as a "nonfinal, nonappealable Order." R. 16. In denying the Motion for Reconsideration, again without prejudice, the OJCC afforded

Cagnoli further guidance and the opportunity to provide an explanation as to why he did not have a SSN by stating:

> A petition in the [Cagnoli] case was filed without a social security number as specifically required by statute. Section 440.192(2)(a)….Accordingly only the class of persons who are not lawfully in the United States would be unable to attain a social security number. Yet, under Section 440.02(15)(a), Florida Statutes, employment is covered whether legal or illegal. This provision thus requires that an exception be made to the requirements of Section 440.192(2)(a). Because of crucial identity verification functions of social security number, the exception is made only when strictly necessary. To be exempt from the [SSN] requirement a claimant will need to allege that he or she has applied for a [social security] number and been rejected, or that he or she is unlawfully employed and ineligible to apply for a social security number. Since the claimant in this case has done neither, the order striking the petition stands and the motion to vacate is denied without prejudice.

R. 20.

Rather than await this Order, Cagnoli filed an appeal with the district court and in essence ignored the option to cure the defect and refile in keeping with the OJCC's Order. Both of the OJCC's orders were nonfinal in nature, and were rehabilitative in that they provided Cagnoli guidance for perfecting his petition.

There has been recent case law that addresses whether dismissal of a workers' compensation petition for benefits is an appealable final order. In

Martinez v. Collier County Pub. Schools, 804 So. 2d 559 (Fla. 1st DCA 2002), the district court held in this workers' compensation case that an order dismissing a petition for benefits without prejudice could be considered final because it was uncontested that the petition would be time-barred if the claimant attempted to re-file it. *Id.* at 560. However, in *Croes*, the court, specifically reconsidering the application of the *Martinez* decision, held an order of a Judge of Compensation Claims dismissing the claimant's petition for benefits with leave to re-file was not a final order because:

> By operation of rule 60Q-6.105(2), Florida Administrative Code, n1 the refiled petition is docketed under the existing case number in which the order being appealed herein was rendered, and again given the pendency of the refiled petition and the fact the viability of any statute of limitations defense remains to be determined in further proceedings before the JCC, it is apparent that the order at issue here does not mark an end to judicial labor in this matter.

Croes at 1041. Thus, under *Croes* an order granting leave to re-file would not be treated as final if there is further "judicial labor." In the present case, the judicial labor was clearly continuing with regard to efforts to cure defects in the Petition, and the judicial labor of the JCC in this case should have included an evidentiary hearing to address the applicability of the federal Privacy Act to the requirement of SSN under section 440.192(2), Fla. Stat. It should be noted that the *Croes* opinion was filed on November 15,

2004, which was ten days after the district court opinion was filed in the *Cagnoli* case. Thus, this significant decision regarding the non-finality of orders dismissing workers' compensation petitions for benefits with prejudice had not been rendered when the Division of Workers' Compensation submitted its brief to the district court.

II THE DISTRICT COURT ERRED IN INVALIDATING SECTION 440.192(2), FLA. STAT., WITHOUT DEVELOPMENT OF A TRIAL COURT FACTUAL RECORD TO DETERMINE IF FLORIDA'S SYSTEM IS "GRANDFATHERED" UNDER THE FEDERAL PRIVACY ACT

Standard of Review: De Novo

The district court held the Florida workers' compensation system's SSN requirement invalid under the federal Privacy Act, 5 U.S.C. s. 552a note.[1] The Privacy Act prohibits states from creating post- 1974 systems

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[1] Section 7 of the Privacy Act provides, in relevant part, as follows:
(a)(1) It shall be unlawful for any Federal, State, or local government agency to deny 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--
....
(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

that require participants to supply SSN's. However, section 7(a)(2)(B) of the Privacy Act specifically "grandfathers" systems, like Florida's, that required SSN's by statute or regulation prior to 1975. 5 U.S.C. s. 552a note. Due to the lack of development of a factual trial court record (because the Federal Privacy Act was first raised on appeal) the district court assumed the 1980 amendment to section 440.192, Fla. Stat., created a new, post- 1974 SSN requirement.

Since Cagnoli raised the federal Privacy Act for the first time on appeal, there was no opportunity for interested parties to present evidence and for the Deputy Chief Judge to address the applicability of the federal Privacy Act in a final order. In *Hartford Fire Insurance Company v. Hollis*, 50 So. 985 (Fla. 1909), this Court stated, "It will readily be seen from an examination of the authorities which we have cited that it is the declared policy of this court to confine the parties litigant to the points raised and determined in the court below and not to permit the presentation of points, grounds or objections for the first time in this court when the same might have been cured or obviated by amendment if attention had been called to

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January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.
5 U.S.C. § 552a note.

them in the trial court." *Hartford* at 989. *See also Dober v. Worrell*, 401 So. 2d 1322, 1323 - 1324 (Fla. 1981), where this Court stated:

> In other areas of the law we have previously held it inappropriate to raise an issue for the first time on appeal. For example, an appellate court will not consider issues not presented to the trial judge either on appeal from an order of dismissal, *Lipe v. City of Miami*, 141 So. 2d 738 (Fla. 1962), or on appeal from final judgment on the merits, *Cowart v City of West Palm Beach*, 255 So. 2d 673 (Fla. 1971); *Mariani v. Schleman*, 94 So. 2d 829 (Fla. 1957); *Jones v. Neibergall*, 47 So. 2d 605 (Fla. 1950). We now add to this list and hold it inappropriate for a party to raise an issue for the first time on appeal from a summary judgment.

Generally, if a claim is not raised in the trial court, it will not be considered on appeal. *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999).

The Division of Workers' Compensation submits that development of a factual trial record will demonstrate that the arm of the executive branch responsible for adjudicating workers' compensation disputes 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. In 1955, the Florida Industrial Commission adopted Rule 12, requiring that a workers' compensation claimant provide a SSN on the document filed to commence administrative litigation of a disputed workers' compensation claim. *See* Rule 12, Florida Industrial Commission Rules of

Procedure (Adopted October 17, 1955); *L. Alpert, Florida Workmen's Compensation Law* section 22:3 at 577 (1st ed. 1966); The Workmen's Compensation Law, Florida Industrial Commission (As Amended 1965) (1965) at 77. From that date forward, there has been an unbroken chain of reliance on the SSN to uniquely identify an employee/claimant by the Florida authority charged with adjudicating those claims.

In a case that was commenced with the Industrial Relations Commission in 1966, the Supreme Court of Florida cited Rule of Procedure No. 12:

> The applicable portions of the Workmen's Compensation Law support this indication. Rule of Procedure No. 12… states: '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....'

Turner v. Keller Kitchen Cabinets, Southern, Inc., 247 So. 2d 35, 39 (Fla. 1971) (emphasis added).

Beginning in 1968, the Commission relied on the social security number's unique identification function by using it as the employee's case number. It adopted Rule No. 185W-2.02: "The Commission file number shall be constituted by the injured employee's social security number and the 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" (emphasis added). This rule was provided to the district court from the archives of the Secretary of State in support of the Division's Motion for Rehearing, and is thus in the record before this court.

By 1974, the name and form of the Commission had changed but the Industrial Relations Commission continued to require the employee's SSN. In a 1976 case pertaining to a 1974 order, the court quoted the text of former rule 12 which by then had been renumbered:

> Rule 5 of the Florida Workmen's Compensation Rules of Procedure provides: 'Claims for compensation shall be filed with the Bureau (of Workmen's Compensation), 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 Bureau and the employer on notice concerning the identity of the parties and the nature of the claim. . . .'

*Bay Plumbing Co., Inc. v. Harbin***,** 337 So.2d 799, 800 (Fla. 1976) (emphasis added).

When the Division of Workers' Compensation was re-created in 1979, it adopted some "emergency" rules on the theory that its predecessor in function had been abolished as an agency and therefore its rules were no longer in effect, leaving a vacuum. The second district rejected that theory in *Krajenta v. Div. of Workers' Comp.*, 376 So.2d 1200 (Fla. 2d DCA 1979), invalidating the Division' s "emergency rules," holding the change in the

name and form of the administrative agency did not create an emergency because the predecessor rules remained in effect. The predecessor rules included Fla. R. Work. Comp. P. 4, which was specifically cited by the court:

> Claims for compensation shall be filed with the Bureau, 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 (including county), nature and cause of the injury or such fairly equivalent information as will put the Bureau and the employer on notice concerning the identity of the parties, claimants, and the nature of the claim.

Id. at 1201 (emphasis added).

CONCLUSION

When counsel first raised the federal Privacy Act at the district court upon premature review of a nonfinal order, the district court was deprived of a trial court factual record addressing the applicability of the Federal Privacy Act to Florida's workers' compensation system SSN requirement. It is respectfully submitted that this matter should be remanded to the trial court for development of a full factual record and issuance of a final order.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the parties listed below, this _____ day of March, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief of the Department of Financial Services, Division of Workers' Compensation, filed on _____ March, 2005, in this matter, complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Respectfully submitted

_____
Daniel Y. Sumner, Esq.