

IN THE FLORIDA SUPREME COURT
STATE OF FLORIDA

Robert Flamily
Petitioner/Appellant below

Case No.: **SC06-847**
DCA Case No.: 1D04-2453

v.

JUDGE : David Langham

City of Orlando and
City of Orlando Risk Management
Respondents/Appellees below,

Florida Worker's Advocate Amicus.

<p>BRIEF OF AMICUS CURIAE FLORIDA WORKERS' ADVOCATES FILED ON BEHALF OF PETITIONER ROBERT FLAMILY</p>
--

MARK L. ZIENTZ, ESQUIRE
and ANDREA COX, ESQUIRE
Law Offices of Mark L. Zientz, P.A.
Two Datan, Suite 1619
9130 South Dadeland Boulevard
Miami, Florida 33156
(305) 670-6275
Fla. Bar Nos: 150168 / 173495

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

INTRODUCTION.....1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT.....3

**The Judges of Compensation Claims should either have
unrestricted power to consider all workers’ compensation
settlements or the JCCs should be removed from the process
altogether.**

CONCLUSION.....8

CERTIFICATE OF SERVICES.....9

CERTIFICATION OF TYPE SIZE AND
STYLE.....9

TABLE OF AUTHORITIES

PAGE

CASES:

Brewer v. Laborfinders of Tampa,
31 Fla. L. Weekly D2915 (Fla. 1st DCA December 27, 2006).....3,4,7

Jacobsen v. Ross Stores,
882 So.2d 431 (Fla. 1st DCA 2004).....3,6

Marchenko v. Sunshine Companies,
894 So.2d 311 (Fla. 1st DCA 2005).....5,6

Patco Transport, Inc. v. Esupinan,
917 So.2d 922 (Fla. 1st DCA 2006).....3,4,7

STATUTES:

F.S. §440.015.....7

F.S. §440.20(11)(a) and (b) (2006).....3,4

F.S. §440.20(11)(c) (2001).....6

INTRODUCTION

This brief is filed on behalf of a Florida Workers' Advocates, Inc., amicus curiae for Petitioner Robert Flamily. By Order dated January 19, 2007, this Court granted the motion of Florida Workers' Advocates seeking leave to appear as amicus curiae aligned with the Petitioner.

Florida Workers' Advocates, Inc. is a non-profit corporation dedicated to preserving and enhancing the rights of those unfortunate enough to be injured while employed in occupations covered by the Florida Workers' Compensation Act, Chapter 440 F.S. Chapter 440 provides the exclusive remedy for redress of losses caused by injury arising out of and in the course and scope of employment.

All emphasis added will be that of amicus, unless designated otherwise.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal held that a Judge of Compensation Claims (JCC) does not have subject matter jurisdiction to set-aside a settlement agreement entered into by a claimant who was represented by counsel. Petitioner Family addressed the legal ramifications of this specific issue.

As Amicus, Florida Workers' Advocates (FWA) will cite authority addressing how the District Court's ruling creates a procedural conundrum and apparently conflicts with prior decisions of the Court. If a JCC has authority to determine whether the parties reached a "valid" and binding agreement, the JCC cannot then be restricted from determining whether the agreement was procured by fraud, overreaching, or material misrepresentation.

FWA will also cite authority from the First DCA which allows a claimant to waive all rights of workers' compensation benefits by simply signing a general release. The JCC is never involved. If this is the intent of the law, then the JCC should be excluded from *all* settlement related procedures.

The overall spectrum of cases regarding settlement requires some guidance

from the Court.

ARGUMENT

The Judges of Compensation Claims should either have unrestricted power to consider all workers' compensation settlements or the JCCs should be removed from the process altogether.

STANDARD OF REVIEW: **De Novo.** Subject matter jurisdiction is reviewed *de novo*. Jacobsen v. Ross Stores, 882 So.2d 431 (Fla. 1st DCA 2004).

Recent decisions from the First District Court of Appeal have interpreted the Workers' Compensation Act in a way that has left practitioners befuddled, and in some cases, has left claimants without recourse. These recent cases are creating a black hole in the workers' compensation practice regarding settlement of claims.

For example, claimants who are not represented by counsel are supposed to be protected by a JCC. The statute *requires* the JCC to assure that the settlement is in the claimant's best interest. F.S. §440.20(11)(a) and (b) (2006). And, yet, the DCA has allowed unrepresented claimants to sign away all of their workers' compensation rights, without JCC approval, if the employer simply drafts the

settlement in the form of a general release. Brewer v. Laborfinders of Tampa, 31 Fla. L. Weekly D2915 (Fla. 1st DCA December 27, 2006); Patco Transport, Inc. v. Esupinan, 917 So.2d 922 (Fla. 1st DCA 2006).

In fact, the Brewer decision enforced a “general release” settlement that a claimant entered into even though he was represented by counsel in his workers’ compensation case. The Court held that the claimant waived his entitlement to any future workers’ compensation benefits, even though the attorney was oblivious to the fact that the employer asked his client to sign the document.

These cases appear to be in direct conflict with the legislative intent expressly stated in Chapter 440. The legislature designed F.S. §440.20(11)(b) to afford some protection to injured workers, providing:

The judge of compensation claims shall make or cause to be made such investigations as she or he considers necessary...to determine whether such final disposition will definitely aid in the rehabilitation of the injured worker or otherwise is **clearly for the best interests** of the person entitled to compensation....

But, employers have found a loophole which now thwarts that purpose. Under the Brewer and Patco cases, the JCC never determines whether the settlement is in the unrepresented claimant’s best interests. And, even claimants who are represented by counsel (who would presumably consider the claimant’s best interests) can waive their rights to benefits without their attorney’s knowledge.

The Flamily decision essentially has the same effect. The Court held that a claimant can never ask a JCC to set aside the settlement. What then happens if the employer induced the settlement by fraud unbeknownst to the claimant or his attorney? The JCC is seemingly powerless. Even the unrepresented claimant who the JCC is supposed to protect cannot have the settlement set aside.

The practical effect of these decisions is that the claimants must seek redress elsewhere. A circuit court might have jurisdiction to determine whether a contract (general release) was procured by fraud, overreaching or material misrepresentation. Thus, the workers' compensation claimant would seek review of the workers' compensation settlement agreement before a circuit court that has no relation to the subject matter or the parties whatsoever.

If a circuit court does not have jurisdiction to review a workers' compensation settlement procured by fraud or misrepresentation, then the Employer/Carrier (E/C) have the power to successfully dupe the claimant and enjoy the windfall. Under Flamily, the JCC cannot help the claimant even if the settlement clearly was not in the worker's best interest. See also Marchenko v. Sunshine Companies, 894 So.2d 311 (Fla. 1st DCA 2005).

When looking at these cases individually, no one case creates a particular problem. But, when looking at the cases together, the ultimate effect results in a

procedural nightmare. Consider the following:

The claimant and the Employer/Carrier mediate a claim and enter into a settlement agreement. Then the claimant learns that the E/C materially misrepresented facts or induced the settlement by fraud. The claimant refuses to execute the formal settlement papers. The E/C then move to enforce the settlement with the JCC. The JCC has jurisdiction to determine whether the claimant voluntarily entered into a “valid” and binding agreement, but nothing more. Jacobson, supra.

What, then, does it mean when the Court says the JCC may determine whether a “valid” settlement agreement was reached? Under Flamily and Marchenko, the JCC does not have jurisdiction to approve or disapprove of the terms of the settlement. The JCC only has the power to review the amount of the attorney fee being paid and whether proper reimbursement for child support arrearage is provided. F.S. §440.20(11)(c) (2001). If the attorney fee and child support pass muster, then the agreement is presumed valid. No inquiry into the terms is permitted.

If the JCC finds that at the time of the mediation the claimant voluntarily entered into the agreement, the JCC must enforce the terms of the agreement. The JCC cannot determine whether the agreement should be void because it was

procured by fraud or is not in the claimant's best interest. How then can Jacobson and Flamily be reconciled? The settlement should not be "valid" if it was procured by fraud. But Flamily appears to deprive the JCC from making that inquiry and determination.

Following the example to conclusion, the Employer/Carrier has an Order from the JCC enforcing the terms of the settlement agreement. Since the JCC cannot determine whether the settlement was procured by fraud, the claimant must then turn to the circuit court. If the circuit court finds that the settlement agreement should be vacated, then the parties return to the JCC to proceed on the merits of the case. If the circuit court finds that the agreement is valid, the parties *still* return to the JCC! The attorney fees and child support provisions must still be approved.

The legislature has expressly stated its intent for the Workers' Compensation Act to be applied in a manner that is not an economic or administrative burden. F.S. §440.015. The terms of the Act are intended to be administered by a JCC. The resolution of workers' compensation settlements should not be an exception to that rule. The most economical and rational solution to this problem would be to allow the JCC to make a final determination in one proceeding regarding whether an agreement was reached and, if so, whether it should be set aside because of

fraud, overreaching, or material misrepresentation.

Florida Workers' Advocates encourages the Court to intervene in order to provide claimants, practitioners, and JCCs guidance regarding workers' compensation settlements. Under Brewer and Patco, there is authority to eliminate the role of the JCC from every aspect of settlements. But, if the JCC must have some control over the settlements, that control should be broad and include the power to determine whether the settlement agreement should be vacated.

Respectfully, this Court should reverse and issue an opinion that will resolve the conflict regarding settlement of workers' compensation claims.

CONCLUSION

For the reasons stated herein and based upon the statutory language and the intent of the legislature, the judgment of the District Court must either be reversed or the Court should give guidance regarding the proper procedure for settling workers' compensation claims that will not abandon the intent of the Florida Legislature.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing has been furnished by US Mail this _____ day of _____ 2007, to: Geoffrey Bichler, Esquire and Todd J. Sanders, Esquire, counsel for Petitioner, 533 West New England, Suite C, Winter Park, FL 32789; Barbara Eagan, Esquire, 445 W Colonial Dr, Orlando, FL 32804.

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 Amicus Brief on this ____ day of _____, 2007.

LAW OFFICES OF MARK L. ZIENTZ
9130 SOUTH DADELAND BOULEVARD
SUITE 1619
MIAMI, FLORIDA 33156
(305) 670 6275

By:

Mark L. Zientz
Florida Bar No.: 150168

Andrea Cox
Florida Bar No.: 173495

Amicus Attorneys for the Florida Worker's Advocates