**IN THE SUPREME COURT OF FLORIDA**

**Case No. SC06-847**

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**Robert Flamily,**

**Petitioner,**

**v.**

**City of Orlando and Unisource Administrators, Inc.,**

**Respondents.**

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# RESPONDENTS' AMENDED ANSWER BRIEF ON THE MERITS

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**On Review from the District Court of Appeal,**
**First District State of Florida**

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## PRELIMINARY STATEMENT

Herein, Respondents' Appendix will be referred to as "RA"; Petitioners Initial Brief on the Merits will be "PB"; Respondents will be the "City".

## STATEMENT OF THE CASE AND FACTS

This case in the First District Court of Appeal ("First District") involved an appeal and cross-appeal of a workers' compensation order entered April 16, 2004. The judge of compensation claims ("JCC") denied Claimant's petition for compensation of hepatitis C; and, granted his motion to set aside the December 13, 1996 Order and joint stipulation for complete settlement. (*See* RA4) The First District affirmed in part and reversed in part, in favor of the City. *See Flamily v. City of Orlando*, 924 So. 2d (Fla. 1st DCA 2006).

### The Facts

The City hired Claimant as a firefighter/paramedic in December of 1973. (R V7-1368) Claimant was not tested for any form of hepatitis at that time. (R V7-1369) During his twenty-three years of employment with the City, Claimant had annual physicals. (R V6-1001-1200; V8-1437) For contract years 1977 through 1978, lab work was mandatory for all firefighters. (R V6-1003) For union contract years 1978 through 1987, lab work was optional for firefighters under the age of 40. (R V6-1004-1115) Claimant testified in deposition that he only had lab work "every couple of years", at his request. (R V7-13761519-1522).

In 1978, Claimant was advised of abnormal lab work and signed a form acknowledging these results. (R V9-1638-1639) Claimant was again notified of abnormal lab work on February 5, 1992. (R V17-3304) Claimant's physician advised him of elevated liver enzymes in 1997, 1998, and 1999. (R V8-1542-1543) Claimant did not seek follow-up evaluation and/or treatment because he "did not think anything of it" and "felt fine". (R V7-1382)

In October 1995, Claimant experienced chest pain and elevated blood pressure during a normal shift. (R V17-3295) He was diagnosed with coronary artery disease and hypertension. (R V7-1397) Claimant retired with line-of-duty disability on January 16, 1996. (R V7-1375) The parties attended workers' compensation mediation with Herbert Hill, Esquire, representing Claimant, and W. James Condry, Esquire, representing the City. (R V1-133) Attorney Hill recommended settlement of the cardiac claim. Claimant testified he had confidence in this recommendation and that he understood the terms of the agreement. (R V8-1593-1594)

On November 14, 1996, Attorney Condry prepared settlement paperwork, except for information regarding date of Maximum Medical Improvement, Permanent Impairment Rating, permanent work restrictions, and estimated cost of future medical treatment. Mr. Condry requested this information from Claimant's attorney, Mr. Hill. (R V16-2908-2910, 2950) Attorney Hill requested the

information from Claimant's treating physician. (R V1-100) The physician opined that Claimant reached MMI on July 22, 1996: he did not provide the other information. (R V1-101) Mr. Hill's paralegal inserted the MMI date in the settlement documents, and also inserted "zero percent Permanent Impairment Rating", "no permanent work restrictions"; and, that the "future medical costs" were estimated to be "$3,000 per visit". (R V1; 106-108) Attorney Hill testified his office inserted the information after Claimant signed the agreement. Claimant, however, testified he read information regarding maximum medical improvement, permanent impairment rating, permanent work restrictions, and estimated future medical costs, prior to signing; and, spoke with his attorney (Hill) regarding same. (R V1-104; V8-1597, 1599, 1600) The physician's response to Attorney Hill's information request was attached to the executed agreement. (R V15-2926) Judge Willis approved the settlement on December 13, 1996. (R V9-1653) Claimant received and cashed the settlement check. (R. at V1-133; V3-401-403; V8-1598) In 2002, Claimant moved to set aside the settlement alleging mistake of fact, misrepresentation, and detrimental reliance. (R C1V, 729, 32).

Attorney Hill testified future medical costs in the settlement paperwork were changed from $3,000, per visit, to $3,000, *per lifetim*e, when approved by the JCC. (R V1-116) He did not know who changed the settlement documents. (R V1-136, 141)

On September 11, 2000, Dr. John Walker diagnosed Claimant with hepatitis C. (R V7-1416) Claimant postulated he contracted hepatitis C during his employment. (V7-1417) However, Claimant had not filed any incident reports for potential exposure to hepatitis during his employment. (R V9-1618-1620) This would be in direct violation of the City's Occupational Safety and Health Plan. (R V18-3483-3526; R V11-2185; V12-2249-2250) The evidence, however, revealed Claimant had been exposed to blood and blood products in Vietnam. (R V8-1496-1497) Claimant denied this exposure to his infectious disease specialist. (R V2-294-295) While in Vietnam, Claimant had unprotected sex with prostitutes and contracted gonorrhea. (R V2-238-239) Claimant also asserted he frequently used "pot, marijuana, hashish, and grass" in Vietnam only; as well as cocaine, LSD and opium. (R V9-1648; V19-3706-3709; V20-3845-3858) Claimant later testified that he never used illegal drugs. (R V8-1482, 1548)

Dr. Gary Rischitelli, testified that the major risk factor for hepatitis C is intravenous drug abuse. (R V4-622) The next highest risk factor for hepatitis C is high risk sexual behavior. (R V4-623) He also testified approximately 1.8% of cases are caused by percutaneous needle sticks with infected blood. (R V4-611) Dr. Rischitelli testified that hepatitis C is an "ordinary disease of life"; and, approximately 5% of a primary care physician's patients would have hepatitis C.

(R V4-616-617) Dr. Rischitelli testified no higher incidences of the disease exist in firefighters. (R V4-594, 599-600, 607, 619-20, 635)

## The Case

By way of background, in 1995, Claimant was diagnosed with cardiac problems. (R V1-175) The City accepted Claimant as permanently and totally disabled on September 24, 1996. (R V1-177) The parties mediated the cardiac claim on November 14, 1996. (RV1-133) It settled in its entirety for $110,750.00. (R V1-133; V3-401)

The City received notice of Claimant's hepatitis C claim on January 11, 2001. (R V3-404, 418) The City denied the daim. (R V1-50) The City also opposed Claimant's request to have the prior cardiac settlement set aside. This based upon expiration of the two-year limitations period in section 440.28, Florida Statutes, among other things. (R V4-714-715)

Judge David Langham heard the case on March 19, 2004. (R V1-1-200; V2-201-400; V3-401-600; V4-601-702) Judge Langham adjudged as follows:

> A. Claimant's claim for compensability of Hepatitis C virus infection and the benefits flowing therefrom are denied . . .
>
> B. Claimant's Motion to Set Aside the December 13, 1995 Order and Joint Petition is granted.

(R V21-4082-4083; RA 4)

Claimant filed Notice of Appeal on May 21, 2004. (R V21-4092-4093) The City cross appealed the Order setting aside the 1996 settlement. (R V21-4096-4098) On appeal, the First District affirmed denial of compensability and treatment and reversed the settlement set aside. (*Id.)* It denied Claimant's motions for rehearing, re-hearing en banc and clarification. (R SCT 73)

## SUMMARY OF THE ARGUMENT

This Court, respectfully, does not maintain jurisdiction as the *Flamily* decision does not expressly and directly conflict with decisions of other district courts of appeal or this Court on the same point of law. Decisions relied upon by Claimant are different in context and content. They are not irreconcilable with the decision in *Flamily* as discussed in *Aravera v. Miami Dade*, 928 So. 2d 1163 (Fla. 2006).

As to the substantive issues in the case, contrary to Claimant's position legislative reform in regard to lump-sum settlements removed the JCC's subject matter jurisdiction to approve settlements of represented Claimants; and thus, the JCC does not have jurisdiction to disapprove a valid settlement by setting it aside. Subsection 440.20(11), paragraph (c), Florida Statutes, bestows jurisdiction only for entry of orders on attorney's fees agreements of the claimant. In sum, once the parties agree to settlement terms, have no dispute regarding the construction of the terms, and each party performs as agreed, the parties' agreement stands outside the

preview or the judge of compensation claims. This legislative intent is evidenced by the marked change of language in the 2002 statutory provisions; and, acknowledged by the implementing DOAH rules. Settlement agreements in workers' compensation are now akin to any private settlement agreement in any other legal context.

Additionally, the current changes, since they involve jurisdiction (that is, the authority and power vested in the quasi-judicial tribunal), do not implicate substantive rights of the parties. The provisions at issue, therefore, are applicable to all dates of accident and apply to the case at bar even though the accident far preceded the enactment. Further, the statutory revisions are retroactive by express legislative pronouncement.

The First District has recognized all of these principles in rendering its many post-amendment decisions discussed herein. It expressly recognized the lack of adjudicatory authority in recent decisions concerning represented settlement agreements in the *Marchenko* and *Flamily* case decisions. The *Flamily* decision is neither "illogical" nor "insupportable" as Claimant contends. It is, instead, a correct decision of law based upon appropriate statutory construction principles and the interrelationship of all the provisions of the workers' compensation law.

As to Claimant's equal protection clause argument, Claimant did not raise constitutional issues in the First District. Claimant, therefore, cannot now present

such argument in this Court. Further, the decision rendered below does not implicate equal protection clauses of either the Florida or United States constitutions. Claimant is not an individual treated dissimilarly from those similarly placed, by the statutory revisions codified in §440.20(11), Florida Statutes (2002). Claimant has also not been "injured" by the statute as the threat of additional litigation costs is not the "injury" contemplated by equal protection principle. Finally, a rational basis analysis would apply to any cognizable equal protection argument that could be raised in this case. Claimant has not overcome his extraordinarily high burden of showing there would be no rational basis for the legislative action and its application to streamline workers' compensation proceedings.

Finally, Claimant has not shown any foundation in the record to support his argument, that the City should be estopped from denying his hepatitis C claim. There were no findings of fraud or misrepresentation, detrimental reliance, or otherwise, to support the elements necessary to invoke this equitable remedy. For these reasons, the well-reasoned decision of the First District, respectfully, should stand undisturbed in this Court.

## ARGUMENT

### POINT I. THE COURT DOES NOT HAVE JURISDICTION TO HEAR THIS CASE ON THE MERITS

## A. No Express and Direct Conflict Exists.

Claimant contends "the decision expressly and directly conflicts with the decisions of other District Courts of Appeal, as well as this Court, on the same question of law" (*citing Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), *quashed*, 729 So. 2d 396 (Fla. 1999); *Covert v. Hall*, 467 So. 2d 372 (Fla. 2nd DCA 1985) *reh'g denied* (March 31, 2006); *Liberty Mutual Ins. Co. v. Steadman,* 895 So. 2d 434 (Fla. 2d DCA 2005), *quashed*, 2006 WL 1375226 (Fla. May 18, 2005); *Southeast Administrators,. Inc. v. Moriarty*, 571 So. 2d 589 (Fla. 4th DCA 1990); *and FCCI Ins. Co. v. Horne*, 890 So. 2d 1141 (Fla. 5th DCA 2004)).

Pursuant to Article V, § 3(b)(3), of the Florida Constitution, this Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with the decision of this Court or another district court of appeal. *See also* Fla. R. at App. P. 9.030(a) (2) (A) (iv). The conflict must be both *expressed and* direct. *See St. Paul Title Ins. Corp. v. Davis*, 392 So.2d 1304 (Fla. 1980). The authorities cited by claimant for this proposition, *supra*, do neither: The fact patterns are wholly different and the principles enunciated regarding exclusivity of remedy are not irreconcilable with the decision at bar.

For example, Claimant cites *FCCI Ins. Co. v. Horne., supra.* The *Horne* case involves a wrongful death action involving intentional tort allegations and workers' compensation immunity. 897 So. 2d at 1142-43. In sum, this case

discusses an instance where an action, while implicating workers' compensation, is still removed from the quasi-judicial tribunal - - the exact effect of the decision at bar in regard to subject matter jurisdiction.

Likewise, Claimant's authority, *Southeast Administrators, Inc. v. Moriarty*, *supra*, does not present expressed and direct conflict. It involves a lawsuit in the circuit court raising intentional infliction of emotional distress for a Carrier's failure to pay a workers' compensation claim. 571 So. 2d at 589 (Fla. 4th DCA 1990). The court recognized that the matters at issue concerned payment of workers' compensation which lies exclusively within the Workers Compensation Law. In the case at bar, the statute removes the matter of represented settlements from workers' compensation and does not conflict as it does not involve workers' compensation payments.

Similarly, *Turner v. PCR, Inc.*, *supra*, concerns the principles behind workers' compensation, that is, renunciation of common law rights for quick and efficient delivery of benefits to an injured worker on a no-fault basis. (754 So. 2d at 683) The case at bar involves an effort by the legislature to streamline workers' compensation proceedings by allowing represented parties to privately settle a case. For these reasons, this Court, respectfully, does not maintain jurisdiction.

**B. <u>Additionally, this Court Should Not Exercise Jurisdiction as Limitations Periods Expired before Claimant Moved to Set Aside his Agreement</u>**

Claimant settled with the City and the settlement became final in 1996. Although, little discussion exists concerning the time limits that would apply to prior actions to set aside orders approving settlements, it has been implied that a two-year limitation period would apply. *See D'Amico v. Marina Inn & Yacht Harbor, Inc.*, 444 So. 2d 1038, 1039 n.2. (Fla. 1st DCA 1984). *See also Smith v. Rose Auto Stores*, 596 So. 2d 809 (Fla. 1st DCA 1992) (1 month); *Pruett- Sharp Const.v. Hayden*, 654 So. 2d 241, 242 (Fla. 1st DCA 1995) (within 2 years); *Steele v. A.D.H. Bldg. Contractors,*. 174 So. 2d 16 (Fla. 1965) (within six months); *Morgan Yacht Corp/Beatrice Foods. v. Edwards*, 386 So. 2d 883 (Fla. 1st DCA 1980) (within 2 years); *State v. Fla. Indus. Comm.*, 151 So. 2d 636 (Fla. 1963) (one year). A six-year period had expired in the instant case before Claimant took any action. Further, any other limitations period would also have expired including the one for; actions on written contracts and decrees pursuant to section §95.11(2), Florida Statutes (five years); and actions for modification of orders pursuant to section 440.28, Florida Statutes (two years).

The City respectfully suggests that jurisdiction has been improvidently granted in this case and suggests the case, therefore, should be dismissed.

**POINT II. THE FIRST DISTRICT CORRECTLY CONSTRUED SUBSECTION 440.20(11), FLORIDA STATUTES (2002) AND CORRECTLY DETERMINED THE JUDGE WAS WITHOUT SUBJECT MATTER JURISDICTION TO SET ASIDE THE SETTLEMENT AGREEMENT.**

## A. Standard of Review

The construction of a statute and workers' compensation law is a question of law subject to a *de novo* standard of review, as argued by Claimant.

## B. Argument on the Merits

**1. Introduction:** Claimant appears to suggest that the exclusivity provisions in workers' compensation law work to eradicate, *in all instances*, common law rights of claimants and employers involved in a workers' compensation proceeding. (PB 18) The workers' compensation exclusivity provisions, however, are defined by statute and apply to compensation and liability for work place injury. Unless expressly defined, Workers' Compensation Law (Chapter 440) does not apply to collateral issues which may arise such as those in this case where a settlement agreement entered by the parties represented by counsel is subject to "second thoughts". Prior to the settlement procedure amendments (§440.20(11)(c)) at issue in this case, the JCC was required to perform an evaluation of the parties' agreements, determine the claimant's best interests, and enter an order approving settlement. Under the former provisions, the JCC had authority, as the JCC had with all orders, to set it aside pursuant to the general powers, granted in subsection 440.33(1), Florida Statutes, to do all things necessary to perform appointed duties. *Morgan Yacht v. Edwards*, 386 So. 2d 883

(Fla. 1st DCA 1980). Now such jurisdiction is divested. No evaluation and no order of approval are permitted on represented parties' private settlements, and the JCC has no jurisdiction to interfere with agreements entered by represented parties as stated in *Marchenko v. Sunshine Companies*, 894 So. 2d 311 (Fla. 1st DCA 2005).

As explained in section 440.11, Florida Statutes, the liability of the employer and carrier *for compensation* (for workplace accidents, negligence and injury) "as described in section 440.10", is the subject matter to which the exclusivity provisions apply. The workers' compensation law does not preclude recourse to courts of law or equity except as to those circumstances confined within Chapter 440. In the case at bar, the First District correctly recognized, given the recent amendments designed to streamline workers' compensation settlements, that the JCC did not have the power or authority to set aside a settlement agreement entered by parties represented by counsel. *See Flamily v. City of Orlando*, 924 So. 2d 78 (Fla. 1st DCA 2006) As the amendments are procedural in nature, the First District in *Flamily* reversed the final order of the JCC below setting aside the settlement agreement, which was almost a decade old. *Flamily*, 924 So. 2d at 80.

As discussed in numerous authorities, it is a well established principle that "[the] JCC is empowered only to the extent [the workers' compensation] statutes provide". *See, e.g., Marchenko v. Sunshine Comp.* 894 So. 2d 311 (Fla. 1st DCA

2005) (*citing*, *Pace v. Miami-Dade County School Bd.*, 868 So. 2d 1286, 1287 (Fla. 1st DCA 2004)). "Unlike the court of general jurisdiction, a judge of compensation claims does not have any inherent judicational power to enter orders but only the power expressly conferred by Chapter 440" (and its implementing rules). *See Id.* at 311. Following *Marchenko*, the *Flamily* court recognized the statutory provision at issue here, expressly provides the JCC, as to settlements, the power and authority *only* to enter orders on attorney's fees agreements between claimant and claimant's counsel (paragraph C) and to consider whether child support arrearages are addressed (paragraph D) in the motion for approval of attorney's fees that includes a status letter addressing child support arrearages. *Compare* §440.20(11) (c) (d) & (e), Fla. Stat. (200*2);* Fla. Admin. Code R. 60Q-6.123(2) (2006) (RA 8); *with* Fla. Rule Work. Comp. P. 4.143 (2001) (RA 9) No departure from precedent occurred below, as Claimant contends.

**2) <u>The First District Followed Longstanding Precedent:</u>** By way of background, prior to the statutory revision, the judge of compensation claims, upon joint petition of the parties, was charged with evaluating the claimant's best interests, among other things, and was empowered by express statutory terms to *enter order approving or disapproving* the discharge of liability of the employer by the payment of a lump sum settlement. *See, e.g.*, 440.20(11) (b) Fla. Stat. (1994), which provided:

> Upon joint petition of all interested parties, a lump-sum payment in exchange for the employer's release from liability for future medical expenses, as well as future payments of compensation and rehabilitation expenses, and any other benefits provided under this Chapter, may be allotted at any time in any case after the injured employee has attained maximum medical improvement (…) a compensation order so entered upon joint petition of all interested parties shall not be subject to modification of review under § 440.28. (…) The Judge of Compensation Claims shall make or cause to be made such investigations that he considers necessary in each case in which the parties stipulated that a proposed final settlement of the employer for compensation shall not be subject to modification or review under s. 440.28, to determine whether such final disposition will definitely aid the rehabilitation of the injured worker (…) When the Claimant is represented by counsel or when the Claimant and carrier for employer are represented by counsel, final approval of a lump-sum settlement agreement, is provided for in an joint petition and stipulation, shall be approved by entry of an order within seven (7) days after the filing of such joint petitions and stipulations without hearing, unless the Judge of Compensation Claim determines in its discretion, that additional testimonies are needed before such settlement can be approved or disapproved (…)

(R.A. 5) Subsection 440.20(11) paragraph (c), pertaining to represented settlements, along with paragraphs (d) and (e), now provides:

> (c) (…) Notwithstanding s. 440.21(2), when a claimant is represented by counsel, the claimant may waive all rights and all benefits under this chapter by entering into a settlement agreement releasing the employer and the carrier from liability for workers' compensation benefits in exchange for a lump-sum payment to the claimant. The settlement agreement requires approval by the judge of compensation claims only as to the attorney's fees paid to the claimant's attorney by the claimant. The parties need not submit any information or documentation in support of the settlement, except as needed to justify the

> amount of the attorney's fees. (…) Any order entered by a judge of compensation claims approving the attorney's fees as set out in the settlement under this subsection is not considered to be an award and is not subject to modification or review. (…) Settlements entered into under this subsection are valid and apply to all dates of accident.
>
> (d) 1. With respect to any lump-sum settlement under this subsection, a judge of compensation claims must consider at the time of the settlement, whether the settlement allocation provides for the appropriate recovery of child support arrearages.
>
> 2. When reviewing any settlement of lump-sum payment pursuant to this subsection, judges of compensation claims shall consider the interests of the workers and the worker's family when approving the settlement, which must consider and provide for appropriate recovery of past due support.
>
> (e) This section applies to all claims that the parties have not previously settled, regardless of the date of accident.

In other words, prior to the amendment at issue in this case, the judge of compensation claims maintained a duty to perform an evaluative process and was expressly empowered *to approve or disapprove* the settlement on petition of represented parties, and enter orders as necessary. Now as to represented claimants, the JCC only has authority to enter orders on attorney's fees based upon assurances that child support arrearages are addressed. Florida Administrative Code Rule 60Q-6.123(2)(2006), describes how this is accomplished. (RA7)

Put simply, the *Flamily* court aptly recognized the maxim that the judge of compensation claims presides over a tribunal of "limited jurisdiction" expressly defined by legislation. *See Pace v. Miami-Dade,* 858 So. 2d 1286, 1287 (Fla. 1st

DCA 2004). The implementing procedural rules, both pre- and post-amendment, clearly delineate the differences. Former Florida Rule of Workers' Compensation Procedure 4.143, required the parties' agreement be submitted to the JCC along with eight specific documents. A resulting order "approving or disapproving" the proposed settlements was mandated in the form provided by the Rule. *See* Fla. R. Work Comp. P. 4.143 (2001). The current Rule pertaining to settlements under 440.20(11)(c), merely provides for the filing of a motion for approval of all attorney's fees, which includes attorney's fee data sheet *as well as* a status letter as to whether the Claimant has child support arrearages. *See, e.g.*, .Fla. Admin. Code R. 60Q-6.123(2) (2006). Numerous cases have been decided on appeal which concern the authority and power (and its limitations) encompassed by the amendment at issue here, as well as pre-amendment differences.

By way of history, in *Cordell v. Pittman Building. Supply,* 470 So. 2d 865 (Fla. 1st DCA 1985), the court recognized that pursuant to the 1980's scheme, section 440.20 was construed to permit the setting aside of agreements where the record revealed an overwhelming lack of essential information resulting in a total inability of the judge of compensation claim to perform his statutory duties. In *Cordell*, the claimant, an illiterate laborer, injured his back in an industrial accident. *Id.* at 866. He retained counsel who bargained with the employer for a lump-sum settlement of all medical expenses. The Deputy Commissioner

approved the joint petition. Later, newly retained counsel petitioned to set aside the order of approval and joint petition alleging mutual mistake of material facts and/or overreaching and/or material misrepresentations by omission and/or concealment. This the Commissioner denied.

On appeal, the *Cordell* court recognized that the petition did not reveal the claimant's illiteracy, the extent of his physical limitations, the permanent impairment, the psychiatric needs, or the doctor's description of the claimant as in need of rehabilitation. *Id.* at 867. The court found that both parties had colluded to keep the Commissioner "in the dark". Since the parties failed to present the material facts to allow the Deputy to perform his duties under extant law, the *Cordell* court recognized the parties thwarted public policy considerations. The court ruled, "[I]t is this statutory duty and the public policy represented thereby which distinguish settlements under Chapter 440 from most other settlements". *Id.* at 868.

By amending the statute, significantly, the legislature has now announced a marked change in public policy making represented settlements akin to those in other civil contexts. General legal principles apply as they would to any other private agreement. *See, e.g., Boole v. Fla. Power & Light, Co.,* 147 Fla. 589, 3 So. 2d 335 (1941) (discussing setting aside agreements based upon mutual mistake of fact).

The post-amendment cases have explored the parameters of the JCC's authority where the claimant is represented by counsel. In *Flamily,* the First District determined:

> The statutes give the JCC neither the authority to approve settlements . . ., nor the power to vacate or set aside a settlement reached privately between the parties under the statute.

924 So. 2d at 80 (*citing Marchenko* at 31). In other words, these executed settlements are now private in nature and outside the province of the JCC, just as other issues collateral to workers' compensation. *See Marchenko v. Sunshine Companies,* 894 So. 2d 311, n.1 (Fla. 1st DCA 2005). The *Marchenko* court affirmed the JCC's determination that the tribunal lacks jurisdiction to set aside a stipulated settlement agreement. *Id. Marchenko* at 311. The *Marchenko* court admonished:

> This Court has recognized the JCC's limited authority on numerous occasions [such as no authority to sanction attorneys, no jurisdiction to enforce a prior compensation order, and lack of power to award treatment or care outside an authorized care arrangement] for want of express statutory authority.

*Id.* (*citing Pace v. Miami-Dade, ,* 868 So. 2d at 1286; *Salony v. S. Fla. Pub. Communication,* 734 So. 2d 544, 545 (Fla. 1st DCA 1999); *Farhangi v. Dunkin Donuts,* 728 So. 2d 772, 773 (Fla. 1st DCA 1999)). The JCC also must refer a contempt proceedings or discovery order violation to a court of competent jurisdiction. §440.33 (2), Fla. Stat. (2002). The Office of the Judge of

Compensation Claims is, simply, a quasi-judicial tribunal with limited authority. The recognition of this principle by the *Flamily* court is well aligned with existing precedent.

As recognized by this Court in *Aguilera v. Inservices, Inc.*, 905 So. 2d 84 (Fla. 2005), the workers' compensation law does not give rise to blanket exclusivity and immunity to all forms of conduct committed by the parties. Immunity extends only to accidental injury or death arising out of work performed in the course and scope of employment. The compensation law in no way precludes other actions which might implicate workers' compensation. *Id.* at 90. Independent actions may be pursued in the circuit court, the federal court or elsewhere. *Id.* at 92. *See also Sibley v. Adjustco, Inc.*, 596 So. 2d 1048, 1050-51 (Fla. 1992) (workers compensation law does not preclude common law actions for intentional fraudulent acts of carrier during claims process). The changes to subsection 440.20(11) are procedural changes, "which apply retroactively regardless of the date of accident". *Flamily, citing, Ace Disposal v. Holley*, 668 So. 2d 645, 646 (Fla. 1st DCA 1996); *Russell Corp. v. Jacobs*, 782 So. 404 (Fla. 1st DCA 2001), *and Fla. Birth Related Neurological Injury Compensation Association v. DeMarko*, 640 So. 2d 181 (Fla. 1st DCA 1994.) The construction and evaluation of this statutory provision by the *Marchenko* and *Flamily* courts, we submit, presents an accurate representation of its effect, import and purpose.

In a series of cases commencing with *Jacobsen v. Ross Stores*, the appellate courts, including the Eleventh Circuit Court of Appeals, have discussed the powers still maintained by the judges of compensation claims. 882 So. 2d 431 (Fla. 1st DCA 2004); *Gerow v. Yesterday's*, 881 So. 2d 94, (Fla. 1st DCA 2004); *Borque v. Trugreen, Inc*, 389 F.3d 1354 (11th Cir. 2004); *Chubb Group v. Easthagen*, 889 So. 2d 112 (Fla. 1st DCA 2004); *Gunderson v. Sch. Dist. of Hillsborough County*, 937 So. 2d 777 (Fla. 1st DCA 2006); *Cartaya v. Coastline Dist.*, 937 So. 2d 700 (Fla. 1st DCA 2006). *See generally* 10 Fla. Prac., *Workers' Comp. Settlement and Offers to Settle* §26:8 (2007). These opinions arose during the same time period in which the *Marchenko* and *Flamily* courts were beginning the discussion of the judge of compensation claims' lack of jurisdiction to set aside executed agreements. They involved some of the same sitting judges. As will be shown, these cases are not "confusing" in light of one another, as Claimant here contends.

First, in *Jacobsen v. Ross Stores, supra*, the court decided "whether the amendments to 440.20(11)(c) eliminated the previously existing jurisdiction of the Judge of Compensation Claims to construe or enforce settlement agreements, or to determine whether a settlement was reached." 882 So. 2d at 432. The *Jacobsen* court explained that the amendments did not alter the JCC's power to construe a settlement agreement or to determine that a settlement had been reached *or to enter order* adjudicating same. *Id.*at 433. *See also* Fla. Admin. Code R. 60Q-6116(5)

(pertaining to immediate enforcement). The powers that have been abolished under the amendments, are the powers to examine or disapprove *executed* settlements privately entered by represented parties and to enter orders setting aside already executed, defined and formed private agreements indisputably agreed upon by the parties.

In *Borque v. True Green Inc.*, the Eleventh Circuit decided, under Florida law, that language in a broad release in a workers' compensation settlement absolved the employer from retaliatory discharge claim. 389 F.3d at 1355. The *Borque* court recognized the 2001 amendments limited the JCC's power of approval over represented parties' settlements to the attorneys' fees paid. *Id.*at 1357. The court (citing *Jacobsen)*, ruled that jurisdiction of the claims judge exists only if a party contends the settlement agreement is not binding. In other words, jurisdiction would not extend to approval of settlements entered by represented parties but jurisdiction exists where there is a dispute as to construction of terms. *Id.* Similarly, in *Divosta Building Corp. v. Rienzi,* the First District reiterated that it is within the province of the JCC to determine whether settlement has been reached. 892 So. 2d 1212 (Fla. 1st DCA 2005). Therefore, it follows a JCC, for example, could determine a purported agreement void *ab initio* based upon fraud. *See also Cartaya v. Coastline Dist.*, 937 So. 2d 700 (Fla. 1st DCA 2006) (JCC maintains power to construe settlement agreement); *Gunderson v. Sch. Dist. of*

*Hillsborough County*, 937 So. 2d 777 (Fla. 1st DCA 2006) (JCC has authority to enter order enforcing binding settlement agreement). The *Marchenko* and *Flamily* cases differ in that the JCC did not construe or enforce an agreement or determine whether an agreement was entered in face of dispute. In sum, the cases discussed are not "puzzling" in light of *Flamily*, as claimant asserts. The issues are analytically distinct.

Claimant requests this Court decide this case upon what Claimant describes as a "logical conclusion", based upon exclusivity provisions. Claimant decries the *Flamily* decision; seemingly, because Claimant envisions he would have no remedy in situations, such as here, where parties seemingly made a mutual mistake, recognized years after the fact. This "logical view" misses the mark, as the cases and rules delineate and explain. This Court held long ago that when parties agree to facts, and induce the entry of an order because of confidence in their joint representation, all of them are in a poor position later to represent that they were mistaken about those facts, in the absence of fraud, overreaching or some other such element. *Steele v. A.D.H Bldg. Contractors, Inc., supra,* 174 So. 2d at 16. Therefore, the first thing "logic" and legal principals would show is that this mediated settlement was not subject to being set aside -- even if the JCC maintained the power or authority to approve what is now considered a private settlement. The represented parties drafted the argument. The mistake was made

by one or both of the parties. Additionally, a mediated settlement is indisputably an agreement (a contract) between parties. There is nothing in case law or statutory law, or the exclusivity provisions of the workers' compensation law, that would preclude a proceeding for rescission, for example, in a court of equity; or, a potential myriad of actions at law, subject to existing limitation periods.

As has been recognized, settlements now are legislatively designed to be the equivalent of a private contract in the civil law context, and thus the settlement process designed to expeditiously bring to a conclusion workers' compensation claims proceedings, where parties dealing at "arms length" through counsel, reach resolution. Such agreements are binding as to all essential terms when signed by the parties. The only order on such agreements which the JCC may enter is one to approve attorney's fees, as provided by statute and Rule. Otherwise, post-formation disputes move from the quasi-judicial administrative forum to the civil circuit or federal courts. *See generally* Jana E. McClonnaughay, Dion J. Monic, *Wkrs. Comp. on Settlement*s: *The Next Generation*, Fla. Bar Jour. 71 (2002). These private contracts will be given full force and effect even in circumstances where one party improvidently emerges in superior position due to the other parties' failure to investigate, mistake, or otherwise. *See, e.g., Amerifirst Federal Savings & Loan Ass'n. v. Cohen*, 454 So. 2d 626 (Fla. 3d DCA 1984); *Sponga v. Warro*, 698 So. 2d 621 (Fla. 5th DCA 1997).

Claimant also contends that subsection 440.20(11) paragraph (d) supports his argument. (PB 21-22) First, paragraph (d), subparagraph 1, refers to child support arrearages and lump sum settlements under the entire subsection, that is, 440.20(11), which include settlements of unrepresented parties (paragraph b). *See, e.g.*, Linda Jessen, *Preface to Vol. 3,* Fla. Stat. Ch. 384-499, at V11 (2004). The administrative rule of procedure describes how arrearages are addressed in relation to represented parties. The information is submitted as part of proceedings for orders approving attorney's fee. *See* Fla., Admin Code R. 60Q-6.1233(2) Subparagraph 2 of the statute merely sets forth considerations for "reviewing" any lump-sum payment as required by the subsection, that is, as to unrepresented parties. § 440.20(11)(d)2. These provisions do nothing to disturb the jurisdictional determination over represented parties' settlements.

Claimant also asserts (PB 22) that the decision in *Watson v. Waste Management*, 32 Fla. L. Weekly D293 (Fla. 1st DCA 2007) has "inserted confusion" into the issue of the judge's power. The *Watson* court does nothing more than reiterate the powers vested in the JCC as of the October 1, 2001 effective date for subsection 440.20(11) paragraph (c), as amended by Chapter 2001-91, Section 17, Laws of Florida. It does not create confusion.

Claimant also cites a plethora of older authorities discussing, prior to the amendments at issue, the power of a JCC to set aside a settlement. (PB 24,n2)

The very first case cited by Claimant was decided in 1980. It involves an unrepresented, illiterate Claimant. *East v. Pensacola Tractor & Equipment Company, Inc.*, 392 So. 2d 1377 (Fla. 1st DCA 1980). The *East* court recognized the JCC did not receive the information necessary to fulfill his obligations through employer fault. The record also did not reveal the JCC reviewed the file before approving the settlement. This case is not apposite as it predates the amendments and springs from a time when JCC contemplation of the claimant's best interests was necessary. Likewise, with Claimant's authority, *CFM Distributing v. Alpert*, 453 So. 2d 169 (Fla.1st DCA 1984). In *Alpert,* the claimant had not reached MMI as required at the time. Therefore, it was not proper for the JCC to approve the settlement. *See also D'Amico v. Marina Inn & Yacht Harbor, Inc.,* 444 So. 2d 1038 (Fla. 1st DCA 1984); *Cordelle v. Pittman, supra* (failure to present accurate information to JCC prevented JCC from performing statutory duties); *Gilliand v. Wood ' N You*, 626 So 2d 309 (Fla. 1st DCA 1993) JCC did not perform evaluation as required); *Pruett-Sharp Construction v. Hayden*, 654 So. 2d 241, Fla. 1st DCA 1995) (JCC did not have accurate information), *Brevard County Bd. Of County Com'rs. v. Williams*, 715 So. 2d 1100 (Fla. 1st DCA 1998) (invalid provision of settlement agreement should be severed). These cases are not "baffling in light of the current *Marchenko* and *Flamily* decisions", as Claimant contends. (PB 24). These cases simply reveal circumstances pre-amendment wherein the JCC

maintained significant statutory duties as to settlements, and did not fulfill thpse duties.

The question in this case is not whether the JCC had authority to entertain Claimants' motion to set aside his settlement agreement prior to the amendments effective date, or whether the previous JCC maintained statutory duties. The question in this case is whether the JCC, under current statutes and rules, did not have authority or power to entertain the motion to set aside and to enter order after October 1, 2001. Construe it yes, determine the requisites for settlement were met, yes, enforce it, yes; set it aside, no. The *Flamily* court, we submit, correctly construed the statutory provisions.

**3**. **The JCC Correctly Determined the Purpose of the 2001 Amendment:** In *Jacobsen v. Ross Stores,* the court's opinion, in its explanatory text, draws an appropriate analytical distinction between the tasks of construing an agreement under circumstances where one party asserts it means one thing and the other, another; or, where one party asserts settlement has been reached, and the other asserts it has not, or to enforce valid agreements, with these circumstances where parties reach a private agreement and a party later decides to back out. The statute at issue has no language that would abrogate such authority. Finally, contrary to Claimant's contentions, the legislative history does not provide support. For example, in the House of Representative Committee on Insurance Final Analysis

(RA 6) it is recognized that judges of compensation claims preside over the "formal dispute resolution process" (p 3). As to dispute resolution it recognizes changes in resolution of *denied* claims and the running of the 120 day requirement, *as well as* the JCC would no longer be required to approve settlements except attorney's fees.

> *In those instances where judges of compensation claims are required to review and approve lump sum settlements judges would be required to consider whether or not the allocation of the lump sum settlement would provide for recovery of child support arrearages (emphasis supplied)*

Simply stated, the analysis recognizes the bill would provide for two separate and distinct scenarios depending upon whether Claimant is or is not represented. The relevant section by section analysis, at section 17, p 11, also recognizes, "when an attorney represents the claimant, judges would no longer have to approve lump sum settlements, except to approve attorney's fees". The analysis goes on to assess what would occur as to unrepresented claimants and child support arrearages.

The bill was adopted in Chapter 2001-91, Laws of Florida, which also included an addition to section 61.14, Fla. Statutes and providing:

> (8)(a) When reviewing and approving any lump sum settlement *under S. 440 (20)(11)(a)and (b)*, a judge of compensation claims must consider whether the settlement serves the interest of the worker…whether the settlement provides for appropriate recovery of child support arrearages *(emphasis supplied*)

In 440.20(11) (c), the word "only" is used in the following context: "[t]he settlement agreement requires approval … *only* as to the attorney's fees paid to the claimant's attorney by the claimant (emphasis supplied)." The word "only" sets limits and is defined as "solely", "exclusively"; and, the word, "only", as a matter of construction, "tends to be placed immediately before the word or words it modifies." *See Webster's New Collegiate Dict.*, 825 (9th ed 1989). The use of "only" in the statute right before "attorney's fees" would support the determinations below that the JCC has approval jurisdiction only as to that portion of the agreement pertaining to attorney's fees.

It is a long held maximum of statutory construction that amendments, including deletion or addition of text or terms, are presumed to have a purpose and meaning. *See, e.g., Nationwide Mutual Fire Insurance Co. v. Hild.,* 818 So. 2d 714 (Fla. 2d DCA 2002); *Fla. Dept. v. Inv. Corp. of Palm Bch.,* 747 So. 2d 374 (Fla. 1999) (deletion of word changed meaning). These principles were obviously grasped by the *Jacobsen*, *Flamily*, and *Marchenko* courts. Accordingly, the parties are free to agree privately through counsel to whatever terms they see fit including waiving all rights to any and all benefits; and, the JCC has no authority to disturb such contracts once agreed and executed. *Compare Quinlan v. Ross Stores,* 932 So. 2d 428 (Fla. 1st DCA 2006). *with Patco Transp., Inc. v. Estupinan*, 917 So. 2d

922 (Fla. 1st DCA 2005), *rev. denied*, 932 So. 2d 192 (Fla. 2006) (general release executed in civil case also settled workers' compensation claim).

Respectfully, Claimant's contention that the statutory revisions include an obligation for the JCC to ensure interests of claimants are protected or provides power to set aside agreements at the behest of one, or both parties, is not correct.

**POINT III: THE 2001 AMENDMENT CODIFIED IN §440.20(11) (c), APPLIES RETROACTIVELY**

**A. Standard of Review**

Claimant is correct that the standard of review is de novo. *See Russell Corp. v. Jacobs*, 782 So. 2d. 404 (Fla. 1st DCA 2001)

**B. Argument on the Merits**

The City respectfully submits the statutory amendment is subject to retroactive application to any date of accident because the amendment concerns the "means and methods to apply and enforce duties and rights". It is this procedural in nature and retroactive in application. *Russell Corp. v. Jacobs, supra.* In sum, subject matter jurisdiction of a tribunal does not implicate the substantive rights of the parties. *Id. See also Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994). Therefore, legislative enactments which divest authority are applied retrospectively. As recognized by the *Flamily* court, once jurisdiction is divested, the JCC no longer has power to consider matters previously considered. *Flamily*

(*citing State v. Revels,* 109 So. 2d 1 (Fla. 1959). As set forth in *Landgraf, supra,* "we have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. "Application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case. Jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties'. *Id*. at 1502. The Florida courts have also recognized, "no one has vested interest in any given mode of procedure". *Life Care Ctr. of America, Inc. v. Sawgrass Care Ctr., Inc.*, 683 So. 2d 609 (Fla. 1st DCA 1996) *See Cunningham v Standard Guar. Ins. Co*, 630 So. 2d 179 (Fla. 1994); *Hollywood, Inc. v. Clark,* 15 So. 2d 175 (1943). In sum, The First District correctly determined, as a matter of law, that the amendments were applicable to all dates of accident. It did not, as Claimant contends, send such disputes to the "abyss". *See generally* William McKnight, *Settlement of Workers Compensation Claims Under F.S. 440.20(11) (c),* Fla. Bar News & 440 Report (2007).

## POINT IV. THE CLAIMANT DID NOT PRESERVE THE EQUAL PROTECTION CLAUSE CONSTITUTIONAL ARGUMENT FOR REVIEW.

### A. Standard of Review.

Constitutionality of a statute is a legal question which appellate courts shall not consider when raised for the first time on appeal. *See, e.g, Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970).

**B. Claimant Failed to Raise a Constitutional Argument in the First District.**

Claimant contends, for the first time in this Court, that § 440.20(11) is facially unconstitutional under equal protection clauses of the Florida and United States constitutions. Therefore, the issue of constitutionality is not subject to review in this Court. *See, e.g., Sanford v. Rubin, supra,* (previous failure to raise facial unconstitutionally of statute considered waiver of the issue). Even if the issue had been preserved, however (and not waiving the fact that it has not), Claimant is not correct, respectfully, in his equal protection analysis.

**C. The Equal Protection Argument Also Is Without Merit.**

While it is true, as stated in *St. Mary's Hospital, Inc. v. Phillipe*, that equal protection concerns are implicated in those instances of State action where similarly situated persons are treated dissimilarly, this is not the circumstance at bar. 769 So. 2d 961, 971 (Fla. 2001). The statute at issue in this case involves claimants who have legal representation and claimants who do not have legal representation. Two separate and distinct groups, and two separate and disparate sets of circumstances. One has the benefit of protection of counsel and the other no

such benefit in a transactions with the employer and insurance carrier. The equal protection clauses of the fourteenth amendment to the United States Constitution and section 1 of the declaration of rights of the Florida constitution, are applicable only to those "similarly situated". *See, e.g., Battaglia v Adam*s, 164 So. 2d 195 (Fla. 1964); *Level 3 Communications v. Jacobs*, 841 So 2d 447 (Fla. 2003) ( equal protection is not violated simply *because persons* are treated differently). In the case at bar, Claimant has also not been "injured" such that equal protection considerations apply. In order to challenge a statute as facially unconstitutional in violation of equal protection, the individual must in some way be injured by the statute. *See Sasso v Ram Property* , 431 So. 2d 204, 208 (Fla. 1st DCA 1983) Claimant seems to argue that his "injury" would be extra expense for filing in circuit court. We submit, that the threat of extra cost, in the form filing fees, is not "injury" for purposes of equal protection. *See, e.g., Bayfront Med. Ctr., Inc. v. Kim Oang, Thi Ly,* 465 So. 2d 1383 (Fla. 2d DCA 1985) (judgment taxing costs to non-prevailing party is not injury). Because there are no circumstances treating similar people dissimilarly, and no "injury" to the claimant, equal protection concerns do not exist in this case, even had the Claimant preserved the point below.

Of further import, even if Claimant here could support his claim (that is preserved error, similar parties being treated dissimilarly and injury), the "rational basis" equal protection analysis would apply as to the circumstances in this case.

Distinctions between classes of individuals based upon social or economic policy are subject to rational basis review when equal protection concerns are properly raised. *See, e.g., B&B Steel v. Burnsed,* 591 So. 2d at 644 (Fl.a 1sr DCA 1991); *Ciancio v N. Dunedin Baptist Church*, 616 So. 2d 61 (Fla. 1st DCA 1983); *Strohm v Hertz Corp*., 685 So. 2d 37 (Fla. 1st DCA 1996). In such circumstances, the question becomes whether the statute at issue bears some rational basis to a legitimate governmental objective. *B&B Steel,* at 647. Under this standard the statute is presumed constitutional. *Jetton v. Jacksonvill*e *Elec. Auth.*,, 399 So. 2d 396, 398 (Fla. 1st DCA). The party -- Claimant here - bears a heavy burden *of negating any possible legitimate state interest behind the statute. Sasso v. Ram Prop.*, 431 So. 2d 216, 217 (Fla. 1st DCA 1983). Claimant at bar does not, and cannot, meet this "heavy" burden. It is a legitimate state purpose to streamline workers' compensation proceedings and determine how proceedings will progress.

In sum, the proper time for Claimant to advance his equal protection argument would have been in the District Court of Appeal, once his administrative remedies were exhausted. *See Ortega v. Owens-Corning Fiberglas Corp*. 409 So. 2d 530 (Fla. 1st DCA 1982); *Sanford* v. Rubin, 237 So. 2d 134 (Fla. 1970).

**POINT V: COMPETENT SUBSTANTIAL EVIDENCE SUPPORT THE JUDGE'S FINDING THAT CLAIMANT'S HEPATITIS C CONDITION IS NOT COMPENSABLE.**

## A. Standard of Review

The standard of review is whether there is competent substantial evidence to support the JCC's finding. *See Chavarria v. Selugal Clothing, Inc.*, 840 So. 2d 1071 (Fla. 1st DCA 2003).

## B. Argument on the Merits

A careful reading of the Order of the JCC pertaining to Claimant's arguments that the City is estopped to deny the hepatitis C claim, clearly demonstrates a well reasoned determination permitted by any view of the evidence and its possible inferences. (R V21-4077-82) This decision, therefore, had all presumption of correctness in the District Court. The Claimant maintained the burden to demonstrate reversible error. Claimant failed to meet this burden. *See Chavarria v. Selugal Clothing, Inc.*, *supra*; *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979). As a result, presumably, the *Flamily* court did not even comment on this point.

The arguments raised by Claimant in his Initial Brief on the Merits are the exact arguments which were presented to the JCC and rejected by the JCC. By arguing them here, Claimant is asking this Court, as it did the First District, to substitute its judgment for that of the JCC. This is improper. *See Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976). In addition, Claimant attempts to buttress his argument with insinuations of fraud, spoilation of evidence and other misdeeds, where no

such findings were ever made upon the record by the fact-finder below. Claimant argues that the City should be estopped from denying this claim based upon what Claimant describes as a failure to comply with City policy and with discovery requests. There is absolutely no evidence in the 4,100-page record (or in the 101-page supplemental record) that *the City* intentionally lost or destroyed any medical records pertaining to Claimant, or any findings in this regard by the JCC below.

Claimant next argues that he propounded a request to produce on the City, requesting all records in their possession, and argues the City had complete medical records they failed to produce. (IB at 34). There is absolutely no evidence in the record that the City had in their possession any records when they received the February 9, 1996 Request to Produce. (R V2-398). Because of the complete lack of evidence in this regard, the JCC rejected this argument when it was presented to him below. (R V21-4077-4078). Further, the JCC recognized that Claimant's counsel had received responses to the requests to produce and raised no issue concerning any "missing items". (Index Supp. 99-101) Nor, did the JCC find the City even responsible for information from a separate medical clinic in responding to a request to produce. (*Id.*)

Finally, Claimant argues, to meet the elements for estoppel, that he relied on the assertion in the "medical summary" that his lab work from 1978 through 1982 was normal, and that he altered his position to his detriment based upon these

representations. (IB at 33). Again, Claimant argued this below and the JCC rejected the argument. (R V21-4079-4082). The JCC specifically found it was "difficult to believe" that Claimant would have responded to the elevated levels in earlier lab tests had he known of those levels. (R V21-4080). The JCC recognized Claimant had been advised of *abnormal lab work in 1978* but he did not follow up. (R V21-4080). The evidence is uncontroverted that Claimant's physicians advised him of elevated liver enzymes in 1997, 1998, and 1999, and he sought no further evaluation because he "did not think anything of it." (R V7-1382). Based upon this, the JCC found no reason to believe that Claimant would have acted any differently in 1988 and 1990. (R V21-4080). This finding is consistent with Claimant's testimony that, while he was exposed to blood, body fluids, and hepatitis C while employed as a firefighter, he never sought testing to see if he had contracted hepatitis C. Further, Claimant filed no incident reports of possible exposure. (R V8-1560-1562; V9-1618-1620). The JCC found that Claimant's "actions speak volumes in contradiction to the retroactive assertion" that if he had known of the blood tests, he would have acted. (R V21-4080). One of the essential elements of estoppel is a detrimental change of position. *See La Croix Construction Co., v. Bush*, 471 So. 2d 134 (Fla. 1st DCA 1985). As the JCC recognized, the facts presented by the record did not work to estopp the City from

denying Claimant's hepatitis C claim. These findings, respectfully, should not be disturbed on review in this Court.

**POINT VI. RESPONDENTS' RESPONSE TO BRIEFS OF AMICI CURIAE**

**A. <u>The Union</u>:** Amicus Curiae, Florida Professional Firefighters, Inc., International Association of Firefighters, AFL-CIO (hereinafter the "Union"), presents an interesting and comprehensive history of workers' compensation law and rule-making. However, the Union presents no basis for reversal of the decision of the First District below. In fact, the argument of the Union here, in many ways supports affirmance of the ruling of the *Flamily* court. The "reasoning" of the *Flamily* court, contrary to the Union's position, is in accord with long-standing precedent - - not contrary thereto. It is the Union's argument itself which is, in many ways, not in accordance with long-standing precedent.

First and foremost, by express legislative pronouncement, the statutory provision at issue here, 440.20(11) (c), is retrospective to all dates of accident, as the *Flamily* court recognized. Therefore, as to the power and authority of the judge of compensation claims, it was of no matter the accident date preceded the statutory amendment. Many such retroactive applications exist in workers' compensation jurisprudence (and in other contexts), as the Union identifies in its historical discussion. (*See, e.g.*, U.B. 4 discussing Ch. 93-415 §26, Laws of Fla.). Enactments, procedural in effect, are generally retrospective in application. *See Seminole County*

*v. Johnson*, 901 So. 2d 342, 343 (Fla. 1st DCA 2005). It is somewhat difficult to understand why the Union characterizes the decision in this case as "defying precedent".

Next, the Union sets forth a rather puzzling conclusion. The Union proclaims the decision below means:

> the washout settlement approved by Judge Willis retroactively need not have been approved by Judge Willis. Therefore, Judge Langham could not have had jurisdiction to set it aside for irregularities, failure to comply with the statute, or overreaching or withholding of information.

(UB at 5) This is simply not the foundation of the ruling below. The *Flamily* court determined *Judge Langham* did not have jurisdiction to set aside set aside the previously approved settlement on grounds the JCC, per statutory amendment, no longer maintains jurisdiction to approve finalized settlements entered by represented claimants. This has nothing to do with the subject matter jurisdiction of the previous JCC at the time of the accident and the Union here, we submit, presents no real point. The current decision involves the current authority and power, of the current JCC, over a settlement pertaining to a date of accident preceding the amendment by many years. Because (1) a settlement agreement had been reached, (2) there was no dispute concerning its construction, (3) each party had fully performed and (4) no fraud existed, the proceedings were final.

Finally, the Union relies upon this Court's decision in *Steele v. A.D.H. Building Contractors Inc.*, 174 So. 2d 16 (Fla. 1965). (*See* U.B. 7-9) This case, respectfully, does not support the Claimant here. Instead, *Steele* supports the decision of the *Flamily* court that the 1996 stipulation of these parties is not subject to being set aside - - albeit from a somewhat different perspective than that enunciated by the court. (See UB 7 thru 9) The *Steele* court ruled that no stipulation in the workers' compensation arena ("be it straight" or "washout") is subject to modification except in instances of fraud, overreaching, misrepresentation, or withholding facts by the adversary, as quoted by the Union in its brief. The court ruled:

> [w]e think it may be assumed without and violence of logic that when parties agree to *facts* and induce a deputy [JCC] to enter an order because of confidence in their joint representation, all of them are in poor position later to represent that they were mistaken about those facts, in the absence of fraud, overreaching, or some such element.

*Id*. at 18. Further the court determined:

> One entering a stipulation relative to present facts should be sure of his ground before he executes the agreement and subsequently reaps benefits from it. If he is unsure, he should consult counsel at his elbow or should simply decline and rely on the determination of the deputy and the Full Commission. Such an agreement should neither be ignored not set aside in the absence of fraud, overreaching, misrepresentation or withholding facts by the adversary or some such element as would render the agreement void.

*Id* at 19.

Settlement agreements are encouraged as a means of expediting the resolution of controversies. In the case at bar, while the allegations flew, there were absolutely no findings of fraud, misrepresentation, overreaching, or concealment on the part of an adversary. Specifically, the record of this case reveals the following. First, the JCC in his order found:

> Claimant acknowledged that he signed this settlement agreement of his own free will and that he was not under any duress or coercion to execute it. (RA Tab 4 at 33). [Claimant's counsel] Mr. Hill, testified that he knew at that time 'that Claimant had been accepted as permanently and totally disabled ("PTD")' and that he was not able return to work as a firefighter. At the time of mediation, Mr. Hill understood Claimant to be on a 'no work' status (RA Tab 4 at 36).

Later, at note 69, the JCC acknowledged the record "unclear as to the factual information Mr. Hill possessed, regarding the potential or probable cost of future medical care." The JCC recognized "the decision to settle the 1995 claim without knowing these facts is curious". (RA 4 at 36). The JCC also noted that "Claimant testified that all of the information concerning maximum medical improvement, impairment, and work restrictions was completed prior to his signing of the settlement documents". (RA 4 at 39). The JCC decided to set aside the settlement on grounds "material facts were not placed before Judge Willis in December 1996,

therefore, *he* could not perform his statutory duty in consideration of the settlement agreement". (RA 4 at 78). The JCC ruled:

> I find that the determination to set-aside the 1996 Joint Petition in this cause is supported by the statutory obligation of the Judge to render appropriate findings regarding such a settlement. I find that it is irrelevant in the context of this matter whether the misinformation was inserted into the agreement by Mr. Hill, Mr. Condry, or some combination thereof. The operative fact is simply that Judge Willis was not provided the material facts…It is irrelevant whether these disclosures or non-disclosures were intentional or inadvertent.

(RA 4 at 79-80) The JCC also determined:

> it is irrelevant who is responsible for the information in the document. I conclude that the evidence supports that at lease (sic) some of that information was inserted into the document by Mr. Hill's staff (Claimant's counsel). The evidence supports that some of the information… was an effort which both parties participated in knowingly.

(RA 4 at 81) Because the JCC below set aside the settlement based upon a failure of the previous JCC to perform a statutory duty, the First District reversed, as no such duties exist now as to represented claimants.

In sum, in the case at bar there were no findings of fraud, there were no findings of overreaching, there were no findings of misrepresentation, nor was there a withholding of facts by the adversary.

The Union also ponders what it considers unconstitutional violations engendered by the *Flamily* court decision. (U.B. at 10) However, the decision below

merely acknowledges that represented claimants' settlements have been removed from the auspices of the judge of compensation claims and placed in the realm of private contracts, once they are executed by the parties and performed. No right of access to courts has been foreclosed nor have any rights to address fraudulent inducement been foreclosed. If claimants believe an employer defrauded them, they are still entitled to prove a purported agreement is void *ab initio*. *See Jacobsen v. Ross Stores, supra, 882 So. 2d 431 (JCC post-amendment may still determine whether settlement entered).* Additionally, the "judicial economy considerations" espoused by the Union do not disturb the amendment's divestment of jurisdiction. The amendment streamlines proceedings in the administrative forum.

Finally, nothing about the *Flamily* decision disparages the legislative intent codified in section 440.015, Florida Statutes, stating "all workers' compensation controversy should be decided by the judge of compensation claims". (*See* U.B. 11). The *Flamily* decision recognizes that parties' agreements are private contracts. Post-formation proceedings do not involve a "workers' compensation controversy to be addressed by the judge of compensation claims".

In conclusion, the Union requests this Court "reaffirm its holding in *Steele v. A.D.H. Building Contractors Inc., supra*, that settlement agreements may be set aside by the Judge of Compensation Claims for fraud, overreaching, misrepresentation, or withholding facts by the adversary". (U.B. 11) Respectfully, the Unions' prayer has

nothing to do with this case. Here, there are no circumstances of fraud, overreaching, misrepresentation, or withholding of facts by the adversary.

**B**. **Florida Workers' Advocates:** Amicus Curiae, Florida Workers' Advocates (hereinafter the "Advocates), seem to suggest this Court should try the tact of judicial legislation. This, based upon the Advocates contention that the current state of workers' compensation law has plunged Claimants' Bar into a "black hole" of "befuddlement". (A.B. at 3) The confusion of counsel, however, does not support abolishment of the constitutional mandate for separation of power: judicial, legislative and executive. In addition, the authorities which the Advocates present as key examples of the source of "befuddlement", are not "befuddling" at all. Each authority, post-statutory amendment, is precisely clear concerning what authority resides with the judge of compensation claims and what authority does not, post-amendment. *See, e.g., Jacobsen v Ross Stores, supra*, *Machenko v. Sunshine Co., supra*, 894 So. 2d at 311; *Flamily v. City of Orlando, supra*, 924 So. 2d at 78. *See also Brewer v. Laborfinders*, 944 So. 2d 1102 (Fla. 1st DCA 2006); *Patco Transport Inc. v. Estupinan*, 917 So. 2d 922 (Fla. 1st DCA 2006).

To preface their argument, the Advocates correctly state that claimants, *unrepresented* by counsel, have statutory entitlement to judicial oversight in certain instances where claimants reach agreement with their employers and the carriers. § 440.20(11) (b), Fla. Stat. (2002). Curiously, the Advocates proceed to object to

recent decisions concerning *represented* claimants they contend meddle with this legislation. (A.B. at 3, *citing Brewer v. Laborfinders* & *Patco Transport, Inc. v. Estupinan*)

The *Brewer* case involved an employee who apparently maintained a potential claim for damages against his employer, as well as, a claim for workers' compensation. Mr. Brewer had retained workers' compensation counsel. Through an undescribed set of circumstances, Mr. Brewer made a decision to settle his case with his employer and executed a broad release of any and all claims, without notifying or consulting his attorney. As a result, when he sought to prosecute a claim for workers' compensation, the judge of compensation claims dismissed the petition. Mr. Brewer appealed. The First District affirmed.

The *Brewer* court, upon established precedent, recognized that releases containing all-encompassing language (such as the one executed by Mr. Brewer) are fully enforceable contracts and bar all claims, on all alternative theories. Such releases are valid and binding when executed by competent adults, whether or not they are represented by counsel. As to workers' compensation claims, the *Brewer* court also correctly recognized that the 2001 Workers' Compensation Law permits a claimant who is represented by counsel to waive all rights to any and all workers' compensation benefits, without involving the judge of compensation claims (except as to attorney's fees). As the *Brewer* court acknowledged, whether

the employee chooses to avail himself of his attorney's expertise and guidance is up to the individual. In other words, it recognized the legislation does not force a competent adult to take the wise track and involve his or her attorney in momentous legal decisions.

Similarly, the *Patco* case also involves settlements and *represented* parties. *Patco Transport, Inc. v. Estupinan, supra*. In *Patco*, as in *Brewer*, the employee was represented by counsel. 917 So. 2d 922. The *Patco* employee had an accident while driving a company truck, which caused injury. He brought civil suit against the employer for negligence. The employer did not raise workers' compensation immunity as a defense. Ultimately, the case settled and the employee received a lump-sum payment in return for execution of a broad, all encompassing release, such as the one described in *Brewer*. Later, the employee sought to prosecute a petition for workers' compensation benefits. The judge of compensation claims accepted the employee's explanation, in contradiction of the plain, unambiguous release language, that he did not consider his workers' compensation claim settled. The employer appealed. The *Patco* court reversed.

On appeal, the court once again explained that releases properly executed mean what they say and say what they mean. The *Patco* court also reiterated underlying contract law principles: plain, unambiguous language is not subject to modification based upon parol evidence; and, Workers' Compensation Law plainly

permits an injured worker who is represented by counsel to release his workers' compensation claims. *Id* at 925(citing § 440.20(11) (c)).

Based upon the discussion in these cases, the factual patterns, and the holdings, it is hard to determine what "puzzles" Claimants' Bar and the Advocates here. Neither the *Brewer* nor the *Patco* decisions, contrary to the Advocates contentions, "fly in the face of legislative pronouncements in 440.20(11) (b)"-- 440.20(11) (b) pertains to *unrepresented* claimants. The Advocates also contend that de-frauded workers will have no remedy under the *Flamily* court decision. (A.B. 4). This concern has no merit or foundation. Law and equity have long remediated fraud. *See, e.g., Prior v Oak Ridge Develop Corp.*, 119 So. 326 (1928) (standard for claim of rescission based upon fraud); *Billian v. Mobil Corp.*, 710 So. 2d 984 (Fla. 4th DCA 1998) (standard for claim of fraud in the inducement). Further, the courts have clearly explained the judge of compensation claims still maintains jurisdiction to determine whether an agreement has been reached. *Jacobsen v. Ross Stores, supra*, *See also McCoy v. Love,* 382 So. 2d 647 (Fla. 1979). If a Claimant has been defrauded, in many instances, no contract would exist. It would be void *ab initio*. Of greater import, however, these employer fraud concerns have nothing, whatsoever, to do with the *Flamily* case. No findings of fraud exist upon the record here.

In sum, the Advocates present no basis to support Petitioner's argument for reversal in this case.

## CONCLUSION

**For All the Foregoing Reasons**, Respondents, City of Orlando and its Servicing Agent, Unisource Administrators, Inc., respectfully request that the decision of the First District Court of Appeal stand undisturbed in this Court.

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 mail delivery this 30th day of April, 2007, to Geoffrey Bichler, Esq., and Todd Sanders, Esq., attorneys for Petitioner, 807 West Morse Blvd., Suite 201, Winter Park, Florida 32789; Richard Sicking, Esq., attorney for amicus, 1313 Ponce De Leon Blvd., Suite 300, Coral Gables, Florida 33134; and, Mark L. Zientz, Esq.,

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed with Times New Roman 14-point font.

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