SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ROBERT FLAMILY,

Petitioner

vs. CASE NO.: SC06-847

CITY OF ORLANDO and CITY OF
ORLANDO RISK MANAGEMENT,

Respondents
_______________________/

ON PETITION FOR REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

Table of Authorities ……………………………………………………..…iii

Preliminary Statement ………………………………………………………..vii

Statement of the Case ……………………………………………………...1

Statement of the Facts…………………………………………………..…11

Summary of Argument…………………………………………….………15

ARGUMENT

I. THE FIRST DISTRICT'S POSITION THAT THE 2001 AMENDMENT TO §440.20(11)(c), FLA. STAT. DEPRIVES JCC'S OF JURISDICTION TO SET ASIDE WORKERS' COMPENSATION SETTLEMENT AGREEMENTS OF CLAIMANTS REPRESENTED BY COUNSEL WAS ERROR AS A MATTER OF LAW..........……………….………………….17

A. THE FIRST DCA'S REASONING FOR ITS DECISION IS CONTRARY TO LONG-STANDING PRECEDENT. …………………………..……………………………………..…19

B. THE FIRST DCA INCORRECTLY INTERPRETED THE PURPOSE OF THE 2001 AMENDMENT TO §440.20(11)(c)…33

II. THE FIRST DISTRICT'S FINDING THAT THE 2001 AMENDMENT TO §440.20(11)(c), FLA. STAT. APPLIED RETROACTIVELY BECAUSE IT WAS A PROCEDURAL AMENDMENT WAS ERROR AS A MATTER OF LAW...39

III. IF §440.20(11)(c), FLA. STAT. (2002) DOES DEPRIVE JCC'S OF JURISDICTION TO SET ASIDE WORKERS' COMPENSATION SETTLEMENT AGREEMENTS ONLY OF CLAIMANTS REPRESENTED BY COUNSEL, THE STATUTE VIOLATES THE CLAIMANT'S EQUAL PROTECTION RIGHTS UNDER THE U.S. AND FLORIDA CONSTITUTIONS..…………………………..………...42

IV. THIS HONORABLE COURT HAS THE AUTHORITY TO REVIEW THE MERITS OF THE CLAIMANT'S ESTOPPEL ARGUMENTS AT TRIAL, AND SHOULD EXERCISE THIS AUTHORITY……………..46

Conclusion…………………………….………………….……..………47

Certificate of Service ………………………..………………….………48

Certificate of Typeface Compliance ………………………………...........49

TABLE OF AUTHORITIES

Page(s)

CASES

Armstrong v. Harris,
773 So. 2d 7 (Fla. 2000)…………………………..…………..……….38

Amerisure Insurance Co. v. State Farm Mutual Automobile Insurance Co.,
897 So. 2d 1287, 1290 (Fla. 2005)……………………….…………42

Barefoot v. Sears Roebuck & Co.,
650 So. 2d 1036 (Fla. 1st DCA 1995)………………...………………….31

Bould v. Touchette,
349 So. 2d 1181 (Fla. 1977)……………………………………46 (fn. 15)

Brevard County Board of County Commissioners v. Williams,
715 So. 2d 1100 (Fla. 1st DCA 1998)…………………………. 24 (fn. 8), 25

CFM Distributing v. Alpert,
453 So. 2d 169 (Fla. 1st DCA 1984)………………………… 24 (fn. 8), 25

Cordell v. Pittman Building Supply,
470 So. 2d 865 (Fla. 1st DCA 1985)………………………… 24 (fn. 8), 26

Covert v. Hall,
467 So. 2d 372 (Fla. 2d DCA 1985)………………………………. 18 (fn. 4)

D'Agostino v. State,
310 So. 2d 12 (Fla. 1975)……………………………………….46 (fn. 15)

D'Amico v. Marina Inn & Yacht Harbor, Inc.,
444 So. 2d 1038 (Fla. 1st DCA 1984)………………………..24 (fn. 8), 25

Divosta Building Corp. v. Rienzi,
892 So. 2d 1212 (Fla. 1st DCA 2005)………………………..27, 30 (fn. 12).

East v. Pensacola Tractor & Equipment Co.,
384 So. 2d 156 (Fla. 1st DCA 1980)……………………………24 (fn. 8), 25

Eskind v. City of Vero Beach,
159 So. 2d 209 (Fla. 1963)………………………………………46, (fn. 15)

FCCI Insurance Co. v. Horne,
890 So. 2d 1141 (Fla. 5th DCA 2004)…………………………… 18 (fn. 4)

Fla. Birth- Related Neurological Injury Compensation Ass'n v. DeMarko,
640 So. 2d181 (Fla. 1st DCA 1994)……………………….....……….40

Flamily v. City of Orlando,
924 So. 2d 78 (Fla. 1st DCA 2006)………………………......10, 18, 19, 38

Gerow v. Yesterday's,
881 So. 2d 94 (Fla. 1st DCA 2004)……………………….....……….27

Gilliam v. Smart,
809 So. 2d 905 (Fla. 1st DCA 2002)…………………….……………..38

Gilliland v. Wood 'N You,
626 So. 2d 309 (Fla. 1st DCA 1993)……………………….. 24 (fn. 8, 9), 25

Jacobsen v. Ross Stores,
882 So. 2d 431 (Fla. 1st DCA 2004)…………………17, 27, 28, 29, 30, 33

Lewis v. Enterprise Leasing Co.,
912 So. 2d 349 (Fla. 3d DCA 2005)…………...…………………….42

Liberty Mutual Insurance Co. v. Steadman,
895 So. 2d 434 (Fla. 2d DCA 2005)…………………………….. 18 (fn. 4)

Marchenko v. Sunshine Companies,
894 So. 2d 311 (Fla. 1st DCA 2005)………………………10, 18, 19, 20, 24

Pruett-Sharpe Const. v. Hayden,
654 So. 2d 241 (Fla. 1st DCA 1995)…………………………. 24 (fn. 8), 26

Ruiz v. Aerorep Group Corp.,
941 So. 2d 505 (Fla. 3d DCA 2006)………………………………. 18 (fn. 4)

Southeast Administrators, Inc. v. Moriarty,
571 So. 2d 589 (Fla. 4th DCA 1990)…………………………….. 18 (fn. 4)

Turner v. PCR, Inc.,
754 So. 2d 683 (Fla. 2000)………………………………………..18 (fn. 4)

Watson v. Waste Management & Gallagher Bassett Services,
2007 WL 162156, Fla. App. 1 Dist., January 24, 2007 (1D06-2776)…..22

STATUTES

§112.18, Fla. Stat………………………………………………………1

§112.181, Fla. Stat…………………………..…………………………..47

§112.181(5), Fla. Stat……………………………….…………………..47

§440.015, Fla. Stat……………………………………………17 (fn. 2), 18

§440.11, Fla. Stat…………………….……...…….…………………….17

§440.20, Fla. Stat………………………………15, 21, 22, 24, 26, 27, 30, 33,
……………………………………………………………………34, 37

§440.20(11), Fla. Stat…………………………………………19, 21, 23, 27,
36, 37, 38, 39, 42

§440.20(11)(b), Fla. Stat…………………………………….20, 22, 23, 39

§440.20(11)(c), Fla. Stat.……………………..10, 15, 16, 17, 19, 20, 22, 23,
…………………………………………………27, 28, 30, 32, 33, 39, 40, 41,
………………………………………………………..42, 43, 45, 48

§440.20(11)(d), Fla. Stat…………….……..……………..16, 21, 22, 26, 39

§440.20(11)(d)1., Fla. Stat…………………………….……..21, 22, 35

§440.20(11)(d)2., Fla. Stat……………………………………..21, 22, 35, 37

§440.22, Fla. Stat………………………………………….…………..37

§440.24, Fla. Stat…………………………………………….18, 24 (fn. 7).

LEGISLATIVE HISTORY

Fla. H.R. Comm. on Insurance, H.B. 1803 (2001), Staff Analysis 1 (3/23/01)…………………………………………….…………….…..33

Fla. H.R. Comm. on Insurance, H.B. 1803 (2001), Staff Analysis 2 (4/17/01)……………………………………………………………….…..35

Fla. H.R. Comm. on Insurance, H.R. Comm., H.B. 1803 (2001), Staff Analysis 3 (4/18/01)…………………………………………….…………….…..35

Fla. H.R. Comm. on Insurance, H.B. 1803 (2001), Staff Analysis 4 (5/31/01)……………………………………………….…….…….…..35

Ch. 2001-91, Comm. Substitute for H.B. 1803…………………….…….……36

Ch. 2001-158, Comm. Substitute for S.B. 1284…………………….……...37

PRELIMINARY STATEMENT

The Petitioner, ROBERT FLAMILY, shall be referred to herein as "Claimant" or "Claimant/Petitioner." The Respondents, CITY OF ORLANDO and CITY OF ORLANDO RISK MANAGEMENT, shall be referred to by those terms or as "the E/SA".

The Judge of Compensation Claims shall be referred to by the letters "JCC". The First District Court of Appeal shall be referred to either by its full name or as "the First DCA."

STATEMENT OF THE CASE

As this Honorable Court is aware, the record on the appeal below is extensive, comprising twenty-one volumes. This case concerns a hotly contested and exhaustively litigated workers' compensation claim that took more than three years to go to trial – a trial that involved the compensability of a firefighter's Hepatitis "C" condition, the validity of a settlement agreement, an estoppel claim based on the Employer's failure to comply with a crucial discovery request, and the Employer's failure to comply with its own policies to protect firefighters from Hepatitis "C" exposure.

In 1996 the Claimant received a "line-of-duty" disability retirement from the Orlando Fire Department due to cardiovascular abnormalities. (V7-1372). The city recognized the Claimant's cardiac problems as work-related pursuant to §112.18, Fla. Stat. (popularly known as the "Heart/Lung Bill)" (V7-1397) and also paid workers' compensation benefits until this cardiac claim was ostensibly settled in 1996. (V9-1666-1679). JCC Joseph Willis entered an order approving this settlement on December 13, 1996[1]. The agreement provided that all claims, known and unknown, were resolved by virtue of the "settlement."

[1] The mediation report, certain correspondence surrounding the settlement paperwork, the actual settlement documents themselves, and the order approving the settlement stipulation are found in Vol. 17, pages 3303-3348.

In 2000, routine blood work revealed that the Claimant had liver function abnormalities. He was subsequently diagnosed with Hepatitis "C" (hereinafter "HCV"), and underwent a liver biopsy which revealed advanced permanent liver damage due to a long standing disease process described as "full blown cirrhosis." (V10-1835). The Claimant placed the City on notice of his condition on January 3, 2001, and sought workers' compensation benefits for it. (V3-416-17). The City denied responsibility for the Claimant's HCV on January 19, 2001, and listed as its grounds for this denial, *inter alia*, that the Claimant's HCV was not the result of an accident or injury by accident arising out of and in the course and scope of his employment, and that the Claimant previously settled all claims against the City pursuant to the aforementioned settlement agreement, even if these claims were unknown at the time the agreement was made. Thus, the City maintained that the Claimant was precluded from pursuing his HCV claim. (V4-708).

The Claimant, represented by new counsel, filed Motion to Set Aside Order Approving Joint Petition filed on May 28, 2002. (V4-729-732). As grounds for this request, the motion stated that:

1) there was no medical documentation supporting the agreement's assertion that Dr. Kakkar had assigned an MMI date of July 22, 1996,

with an assignment of a 0% impairment rating and no work restrictions (V4-730);

2) at the time of the November 14, 1996 mediation and subsequent settlement agreement the E/SA had actual or constructive knowledge of the Claimant's potential liver disease dating to 1978 as shown in abnormal blood test results, and that not only were these abnormalities not disclosed to the Claimant or his attorney, but that the E/SA also affirmatively asserted via a document sent to the Claimant's counsel that they the blood tests for the years 1978 through 1982 were within normal limits. The motion further stated that recent discovery revealed that the 1978 tests results were not normal, and that no blood test results for the years 1979 through 1982 were ever provided (V4-730-31);

3) neither the Claimant nor his attorney at the time of the settlement was aware of the probability that the Claimant had been infected with "the potentially deadly Hepatitis 'C' virus" (V4-731);

4) the settlement agreement did not reference a known medical condition, and further misrepresented the Claimant's cardiovascular condition, which in turn prevented the Claimant from making an informed decision regarding his options at the time of entering the

settlement agreement, and also precluded the Judge of Compensation Claims "from being able to properly evaluate the settlement agreement" (V4-731); and

5) the Claimant would not have entered the settlement agreement had he known of the abnormal blood test results, the JCC was not provided accurate information concerning the Claimant's cardiac condition, and the E/SA's file did not contain the required supporting documentation as to maximum medical improvement, impairment and permanent restrictions. (V4-731).

As stated in the JCC's order, a final hearing on the Claimant's HCV claim was held March 18-19, 2004. (V20-3979). The threshold issue at the trial was the validity/viability of the "settlement agreement", which the City maintained shielded it from any liability for the Claimant's HCV claim. Consequently, a significant portion of the evidence produced by the parties, and considered by the JCC, concerned the circumstances surrounding the preparation of the December 1996 settlement agreement and the order approving same. This included testimony by the Claimant, the Claimant's attorney at the time of the settlement agreement, Herbert Hill, Esq., an assistant with the E/SA's law offices, and even the JCC who approved the settlement agreement, the Honorable Joseph Willis.

A review of the order vacating this agreement shows that much of this testimony concerned the information inserted into various blanks in the settlement agreement, who filled in this information, when the information was filled in, whether the document was altered after it was signed, and whether there was more than one version of the document passed between the parties. (V21-4016-17; 4020). This information included the Claimant's maximum medical improvement date, permanent impairment rating, and work restrictions (V17-3319), as well as an estimate of the cost of the Claimant's future medical care. (V17-3320).

The JCC noted Mr. Hill's testimony that, at the time the Claimant signed the settlement paperwork on December 11, 1996 regarding his coronary claim, it did not contain a description of work restrictions, nor did it state a permanent impairment rating. (V21-4016). The JCC also noted Mr. Hill's testimony that the missing information was not received from Dr. Kakkar until after office hours on December 11, 1996, and so "the substance of [Dr. Kakkar's] response was not known to either Mr. Hill or Claimant when each executed the settlement paperwork." (V21-4016-17). The JCC noted that the copy "attested by Mr. Hill to represent what was forwarded by his office to [the E/SA's attorney] on December 12, 1996 . . . is suggestive of some correction having been made to that same blank. The document

appears mottled and marked in that area in a manner suggestive of 'white-out' or some other method of covering marks having been employed." (V21-4017-18).

The JCC's order further summarized the testimony of a paralegal at the E/SA's attorney's office as stating that Mr. Hill was asked to obtain information from the Claimant's physician, and that she had no recollection whether both parties sought the medical information at issue, nor could she locate any correspondence showing that her employer did so. On receiving the versions of the documents signed by the JCC, she testified that she would have destroyed the file copy and inserted in the file the approved copy. She also said that there "were instances in which a set of paperwork has been returned to their office with blank spaces still in it" and that she has inserted information into such blanks after telephone conversations with opposing counsel. In this instance she "could not produce any document in that file which would support the conclusion of a zero percent (0%) impairment, as stated in the paperwork." (V21-4020).

The order vacating the settlement agreement also indicates that it was not until August 28, 2002, six years after the settlement agreement was approved, that the Claimant's treating cardiologist, Dr. Sunnil Kakkar, was deposed regarding the Claimant's MMI date, impairment rating, and work

restrictions. (V21-4022). The JCC noted that this testimony revealed that, as of April 22, 1996 (eight months before the settlement agreement was approved), the doctor would have restricted the Claimant from strenuous work and stressful situations, and that he would not have been capable of working as a firefighter because of his cardiac condition. It also revealed that the appropriate impairment rating for the Claimant's cardiac condition was not zero percent (0%) as stated in the settlement agreement, but would have been "'around 75 percent" and "maybe" 5 percent for his hypertension. (V21-4022).

Ultimately, the JCC vacated the settlement agreement and order approving same, stating that the "relationship of the 1996 settlement documents, as to the issues in this case (e.g. compensability of HCV), is tenuous" (V21-4054), and that the E/SA's position in the case before him would have resulted in the Claimant waiving rights he did not know existed with respect to his HCV condition. He also stated that the "central issue regarding the settlement, however, is whether the appropriate information was available to Judge Willis when the settlement was approved in 1996." (V21-4054). The JCC concluded that the agreement had to be vacated because it contained material misinformation regarding the Claimant's actual impairment and actual work restrictions, and was, therefore "patently

flawed." The JCC further found that there were material non-disclosures, but that it did not matter whether these non-disclosures were intentional or inadvertent. (V21-4058).

The JCC also, however, denied the compensability of the Claimant's HCV claim under all theories presented. (V21-4082).

With respect to the Claimant's estoppel claim, the JCC's order includes a lengthy discussion of the evidence regarding his Hepatitis C claim, including medical evidence of HCV in the Claimant (V21-4023-27), from blood tests results reviewed by the Employer's occupational medicine physician (V21-4027), the Employer's normal policy of notifying employees of abnormal liver function tests (V21-4027-28), and the occupational physician's testimony that HCV became a concern among firefighters in 1992 (V21-4028). The order also discusses testimony regarding the circumstances surrounding certain discovery requests and the responses (or lack thereof) to those requests (V21-4030-31), and testimony regarding the Employer's obligations under its contract with the firefighters' union (V21-4031-36).

Even though the JCC found "ample evidence that the Employer had policies which were intended to protect the firefighters from exposures" and that it is "equally clear that the Employer did not fulfill its obligations" he

still found that he could not conclude "that the Employer should be estopped from denying the Claimant's obligations because of failure(s) to comply with policies such as the exposure control plan" (V21-4082), blaming the Claimant for not personally tracking down the infection status of any of the people to whom he was exposed. (V21-4082).

The JCC also placed the blame for the E/SA's failure to provide requested documentation on a lack of curiosity and follow up on the part of the Claimant's attorney in 1996, Mr. Hill. (V21-4077-79). He further rejected the Claimant's position that, had he been provided with the blood test results requested he would have made an inquiry into the indications of elevated liver functions and sought medical care. In so doing, the JCC essentially blamed the Claimant, saying that the Claimant had enough information to cause concern, but did nothing (V21-4079-81), and therefore rejected the argument that the Claimant was prejudiced by not "receiving the medical records *which were apparently in [the E/SA's attorney's] possession*." (V21-4081).

The Claimant timely appealed the JCC's order. (V21-4092). The E/SA cross-appealed as to the JCC's set aside of the settlement agreement, and the benefits awarded as a result of the set aside. (V21-4097-98). The First District Court of Appeal rendered its opinion on February 23, 2006.

Flamily v. City of Orlando, 924 So. 2d 78 (Fla. 1st DCA 2006). The Claimant's motions for rehearing, rehearing *en banc*, and for clarification were all denied on March 31, 2006.

In its decision, the First DCA affirmed the JCC's denial of the compensability of the Claimant's HCV condition. *Flamily*, 924 So. 2d at 78. The court also stated that, pursuant to its decision in *Marchenko v. Sunshine Companies*, 894 So. 2d 311 (Fla. 1st DCA 2005), the JCC did not have jurisdiction to set aside the subject settlement agreement, "pursuant to the statutory changes made in 2001 to section 440.20(11)(c), Florida Statutes." *Flamily*, 924 So. 2d at 80. The court also stated that, although under Florida workers' compensation law "a claimant's substantive rights are fixed on the date of accident . . . procedural or remedial changes may apply to claimants without regard to the date of accident." *Id*. The court opined that the addition of §440.20(11)(c) was "a procedural change that should be applied retroactively." *Id*. Thus, the court ruled, "[b]ecause the statute applies retroactively, the JCC lacked subject matter jurisdiction to vacate the 1996 settlement agreement in this case." The court therefore reversed the JCC's order, and remanded for reinstatement of the settlement agreement. *Id.*

The Claimant filed his Notice to Invoke Discretionary Jurisdiction on April 27, 2006, and this Honorable Court accepted such Jurisdiction by Order dated December 12, 2006.

STATEMENT OF THE FACTS

The facts regarding the circumstances surrounding the vacated settlement agreement are as stated in the Statement of the Case, *supra*. Because this Honorable has the jurisdiction and authority to address the merits of the entire case below, and the Claimant respectfully requests that it do so, especially with respect to the discovery and safety policy aspects of his estoppel claim, the Claimant provides the following facts relative to that claim.

In 1973, the City hired the Claimant as a firefighter/paramedic. (V7-1368). At the time he was hired, the Claimant had a pre-employment physical revealing that he was a healthy young man without evidence of HCV.· (V12-2398). For nearly twenty-three (23) years the Claimant worked for the City experiencing numerous exposures to blood and bodily fluids before retiring in 1996. (V7-1386, V8-1462). In addition, the Claimant experienced needle sticks with hollow-borne needles on two (2) or three (3) occasions during his employment. (V8-1462, V18-3466). As a result of these incidents the Claimant had been exposed to HCV. (V8-1558, 1559).

While employed by the City, the Claimant was a member of the firefighter union and therefore subject to the collective bargaining agreements between the Union and the City. (V8-1506). All collective bargaining agreements required annual physicals for firefighters that either allowed or mandated blood tests depending on the year. (V6-1001-1356). These physicals were intended – at least in part - to benefit bargaining unit members by providing a general health assessment with results being communicated to members. (V3-458-459).

The Claimant had twenty-four (24) employment physicals while employed by the City (V8-1439), all of which were performed at the City operated medical clinic known as "OMC". V8-1437. At each employment physical the Claimant had blood taken for analysis (V8-1440) and he assumed that he would have been specifically advised of abnormalities uncovered during testing (V7-1377) however, on at least three (3) occasions the Claimant exhibited liver function abnormalities indicative of HCV (V17-3298-3306), and was never advised or counseled with regard to the significance of those test results. (V7-1377, V8-1523, 1534). This failure was a direct violation of OMC policy and commonly accepted medical, practice concerning abnormal blood tests. (V12-2342).

By 1992, the City was aware that HCV was a significant

occupational concern for firefighters as evidenced by a memo from OMC Bureau Chief Juan Boudet, M.D. (V18-3490-3499). At approximately the same time, the City approved an Exposure Control Plan to acknowledge the risks and limit the dangers associated with working around potentially hazardous blood and body fluids. (V9-1783-1815). The City approved a second plan in 1995 called the Occupational Safety and Health Plan also intended to protect City employees from occupational injury and disease. (V18-3478-3684).

As the City was acknowledging the risks of biohazards to first responders, the Florida Legislature was considering legislation to deal with this issue and in 1995 it passed Florida Statute §112.181. This legislation created a presumption of work relatedness for hepatitis in firefighters and other first responders. The self evident purpose of this legislation was to acknowledge the special risks associated with exposure to blood and body fluids that firefighters and other public safety workers face. At the time §112.181, Fla. Stat. became law, the Claimant was in his last year of employment with the City due to a cardiovascular problem. (V7-1372-73). The Claimant was not aware that he had been infected with the potentially deadly HCV. (V2-286, V8-1463).

In the course of the Claimants' workers' compensation claim with

respect to his cardiac condition, on February 9, 1996, the Claimant's attorney at the time, Herbert Hill, Esq., attempted to take discovery of any and all medical records in possession of the City or their attorney. (V17-3204, 3205). In response, the City did not provide any of the blood test results in its possession where the Claimant had exhibited elevated liver function indicative of HCV. (Vl-90). The City did, however, provide the Claimant with a document entitled "Summary of Medical Records Robert Flamily v. City of Orlando Fire Department, #3556" which was included as part of a group of medical records. The "Summary" document inaccurately stated that blood test results were normal in the years examined. (Vl-85; V17-3203).

As noted in the Statement of the Case, *supra.*, nearly four (4) years after the Claimant retired from the City and settled his workers' compensation claim, he was diagnosed with Hepatitis "C" (HCV). (V7-1416). The Claimant was advised of this diagnosis on September 11, 2000. (V7-1416). The Claimant placed the City on notice of his condition on January 3, 2001, and asked that it be acknowledged as an occupational disease. (V3-416, 417). The claim was denied a short time later, and the litigation summarized above ensued.

SUMMARY OF ARGUMENT

I.

The First DCA's finding that §440.20(11)(c), Fla. Stat. (2001) deprives JCC's of the authority to set aside a settlement agreement entered into by claimants represented by counsel error as a matter of law. The First DCA has long and often held that JCC's have jurisdiction to set aside settlement agreements even though the versions of §440.20 in effect at the time they rendered these decisions never expressly granted this authority. Thus the holding below is not only an incorrect interpretation of the statute in question, it is also an illogical and unsupportable deviation from long-standing precedent. It is also contrary to the logic behind the First DCA's long-standing line of cases holding that JCC's have the authority to interpret and give effect to settlement agreements despite the absence of an express statutory basis for this authority, which in turn runs counter to the First DCA's opinions that this authority was not affected by the 2001 amendments to §440.20(11)(c).

The First DCA also misinterpreted the purpose of the amendment to §440.20(11)(c). The amendment was not concerned with the jurisdiction of JCC's with respect to setting aside settlement agreements. Rather, its

purpose was to remove the *requirement* that JCC's approve settlement agreements entered into by claimants represented by counsel.

II.

The First District erred as a matter of law in finding that the amendment to §440.20(11)(c) was purely procedural, and thus could be applied retroactively. This subsection, especially when read in conjunction with §440.20(11)(d), which was added at the same time, contains important substantive elements as well, and as such, even if the amendment did strip JCC's of jurisdiction to set aside settlement agreements, it should not be applied retroactively.

III.

Assuming the amendments to §440.20(11)(c) do operate to strip JCC's of jurisdiction to set aside settlement agreements, they do so only with respect to claimants with legal counsel at the time they settle their claims, and claimants without counsel still have recourse within the workers' compensation system to have their settlement agreements set aside. This violates the equal protection rights of those claimants who settle their claims under §440.20(11)(c).

IV.

The JCC erred in rejecting the Claimant's estoppel claim, the First DCA erred in upholding the JCC's findings in this regard, and the Claimant respectfully invites this Honorable Court to address this issue, especially in light of the Claimant's inability to effectively prosecute his claim due to the actions of the Employer.

ARGUMENT

I.

THE FIRST DISTRICT'S POSITION THAT THE 2001 AMENDMENT TO §440.20(11)(c), FLA. STAT. DEPRIVES JCC'S OF JURISDICTION TO SET ASIDE WORKERS' COMPENSATION SETTLEMENT AGREEMENTS OF CLAIMANTS REPRESENTED BY COUNSEL WAS ERROR AS A MATTER OF LAW.

The First District's ruling that the JCC did not have subject matter jurisdiction to set aside the subject settlement agreement is a question of law to be reviewed *de novo*. *Jacobsen v. Ross Stores*, 882 So. 2d 431 (Fla. 1st DCA 2004).

As this Honorable Court is well aware, the Florida Legislature created the Florida Workers' Compensation Act, codified at Chapter 440, Fla. Stat., to provide an injured worker with his or her exclusive remedy[2] against his employer for an industrial accident and resulting injury(ies), subject to the

[2] *See*, §440.015, Fla. Stat..

narrow exceptions provided in §440.11, Fla. Stat.[3]. This exclusivity has been recognized by a number of appellate decisions rendered by this Honorable Court, as well as those of the District Courts of Appeal.[4] The Florida Legislature, in creating this statutory scheme, explained that "[t]he workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike. §440.015, Fla. Stat. (1990, 2002). Logically, of course, such exclusivity also provides that judges of compensation Claims have exclusive jurisdiction over workers' compensation actions, subject to a solitary explicit exception provided for in §440.24, Fla. Stat., in which the Legislature vests in circuit court judges the authority to enforce, by issuance of a *rule nisi* order and, if necessary, writ of execution, any order issued by a judge of compensation claims.

Despite the foregoing, the First District Court of Appeal held, in *Marchenko v. Sunshine Companies*, 894 So. 2d 311 (Fla. 1st DCA 2005),

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[3] Concerning exceptions to this exclusivity in situations involving employers who fail to obtain workers compensation insurance and or commit intentional torts.

[4] These include, but are by no means limited to: *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (superseded on other grounds by statute); *Ruiz v. Aerorep Group Corp.*, 941 So. 2d 505 (Fla. 3d DCA 2006); *FCCI Insurance Co. v. Horne*, 890 So. 2d 1141 (Fla. 5th DCA 2004); *Southeast Administrators, Inc. v. Moriarty*, 571 So. 2d 589 (Fla. 4th DCA 1990); *Liberty Mutual Insurance Co. v. Steadman*, 895 So. 2d 434 (Fla. 2d DCA 2005); and *Covert v. Hall*, 467 So. 2d 372 (Fla. 2d DCA 1985).

and in the case *sub judice*, *Flamily v. City of Orlando*, 924 So. 2d 78 (Fla. 1st DCA 2006), that JCC's do not have jurisdiction to set aside settlement agreements entered into by injured workers represented by counsel and employer/carrier/servicing agents. The basis for these decisions is a 2001 amendment to §440.20(11), Fla. Stat., which provided that, in cases where workers' compensation claimants are represented by counsel, JCC's are no longer *required* to approve such settlement agreements, except with respect to the attorney's fee portion thereof. *See*, §440.20(11)(c), Fla. Stat. (2001).

A. THE FIRST DCA'S REASONING FOR ITS DECISION IS CONTRARY TO LONG-STANDING PRECEDENT.

In vacating the JCC's order setting aside the subject settlement agreement, the First DCA reiterated its determination "that a JCC no longer has jurisdiction to vacate settlement agreements pursuant to the statutory changes made in 2001 to section 440.20(11)(c), Florida Statutes." *Flamily v. City of Orlando*, 924 So. 2d 78, 80 (Fla. 1st DCA 2006). The First DCA's first announcement of the effect of these statutory changes came in *Marchenko v. Sunshine Companies*, 894 So. 2d 311 (Fla. 1st DCA 2005), which the court cited as supporting authority in *Flamily*.

In *Marchenko*, the First DCA supported its conclusion by stating that JCC's "are empowered only to the extent the statutes provide [citation

omitted]", and that "'[u]nlike a court of general jurisdiction, a judge of compensation claims does not have inherent judicial power but only the power expressly conferred by chapter 440' [citations omitted]". *Marchenko*, 894 So. 2d 311. Applying these principles, the court said that "[t]he statutes give the JCC neither the authority to approve settlements under section 440.20(11)(c) nor the power to vacate or set aside a settlement reached privately between the parties under the statute." *Id*. The Petitioner respectfully submits that the First DCA's reasoning and conclusion in *Marchenko*, and thus in *Flamily*, was flawed for several reasons.

First, the court's rulings in *Marchenko* and *Flamily* were overbroad in that they state that §440.20(11)(c), Fla. Stat. (2001) deprives JCC's of the authority to approve or set aside *any* settlement agreement reached privately between the parties to a workers' compensation claim. However, a plain reading of the very first sentence of that subsection states that it applies *only* when a claimant is represented by counsel. Section 440.20(11)(b), on the other hand, expressly states (again in the very first sentence), that it applies to claimants who are *not* represented by counsel.[5]

The Court also erroneously interprets §440.20(11)(c) as depriving a JCC of the authority to review and approve a settlement agreement even

[5] This distinction raises equal protection concerns that are addressed *infra*.

when a claimant is represented by counsel. A plain reading of this subsection reveals only that it does not *require* a JCC to approve the non-attorney fee portion of a settlement agreement reached when a claimant is represented by counsel. It does not say, however, that a JCC *cannot* approve such a settlement agreement if the parties request him/her to do so. Nor does it say that a JCC cannot set aside a settlement agreement. True, it does not expressly say that a JCC can set aside a settlement agreement where the claimant is represented by counsel, but §440.20 never has so provided, and yet, as discussed *infra*., the First DCA has long and frequently recognized the authority of a JCC to do just that.

Furthermore, §440.20(11)(d)[6], which by its very terms applies to all settlement agreements reached under §440.20(11), provides that, with respect to *any* lump sum agreement, the JCC must ensure that the agreement provides for "the appropriate recovery of child support arrearages (§440.20(11)(d)1.), and, "when reviewing *any* settlement of lump-sum payment *pursuant to this subsection*, judges of compensation claims *shall* consider the interests of the worker and the workers' family when *approving* the settlement . . . ." (§440.20(11)(d)2.) (emphasis added). When read in *pari materia*, it is clear that, far from being deprived of the authority to

[6] Which was added to §440.20 at the same time as §440.20(11)(c).

approve lump sum settlement agreements, even where the claimant is represented by counsel, JCC's still possess the power, if not the obligation, to review them, at least to the extent necessary to comply with the dictates of §440.20(11)(d). This raises the question of what a JCC is to do if the agreement, even one entered into by a claimant represented by counsel, does not comply with either §440.20(11)(d)1. or §440.20(11)(d)2. As the First DCA reads §440.20(11)(c), a JCC cannot either approve or set aside a settlement agreement. Logically, then, under this construction of the statute, the JCC has no authority to ensure that the agreement complies with subsection (d), thus rendering that subsection superfluous, and/or without any effect - at least when the settlement involves a claimant represented by counsel. Surely this was not the legislature's intent when it changed §440.20.

The First District recently added to the confusion on this topic in its decision in *Watson v. Waste Management & Gallagher Bassett Services*, 2007 WL 162156, Fla. App. 1 Dist., January 24, 2007 (1D06-2776). There, they noted that the claimant had accidents in October 2001 and January 2004, and said it was allowable for the JCC to question the claimant about the fee award in question even though she was represented by counsel. The court said that §440.20(11)(b), Fla. Stat. (*1999*) "requires a Judge of

Compensation Claims to determine whether a settlement will be in the 'best interests' of the claimant and authorizes the JCC to make or cause to be made such investigations as the JCC considers necessary." The court went on to note that the amendment to §440.20(11)(c) (the amendment at issue here) was effective October 1, 2001, and provides that "parties are required to submit information in support of the settlement 'as need to justify the amount of the attorney's fees'", and held that the JCC's inquiry "fell within that allowed by the statutes." The First DCA seems to be saying that, even though the claimant's accidents occurred on or after the date the amendment to §440.20(11)(c) went into effect, and even though the claimant had a lawyer, the agreement in question was still subject to the "best interests of the claimant" investigation required by §440.20(11)(b). This would seem to be contrary to both *Marchenko* and *Flamily*, which apparently hold that a JCC can only conduct an investigation under §440.20(11)(b) if a claimant has no lawyer.

Thus, based on the foregoing, the Petitioner respectfully submits that the First DCA has incorrectly interpreted and applied §440.20(11) as amended.

As part of its discussion of the reasoning behind its holding in *Marchenko,* the First DCA gives examples of cases in which it "recognized

the JCC's limited authority . . . ." *Marchenko*, 894 So. 2d 311 (fn. 1). These include a JCC's lack of authority to: sanction an attorney, enforce a prior compensation order,[7] and award medical treatment outside of a managed care arrangement (or strike such an arrangement).

What the First DCA did not mention in either *Marchenko* or *Flamily*, however, is that it has also found that JCC's *do* have certain powers that are *not* expressly provided for in Chapter 440. One example, it just so happens, is the authority to set aside settlement agreements. Indeed, the First DCA has long and frequently not only recognized this authority[8], but has also found a JCC in error for failing to set aside a settlement agreement.[9] Furthermore, a perusal of the version of §440.20 in effect at the time each and every one of these cases was decided will reveal the utter absence of any language granting, denying, or even discussing a JCC's authority to set aside settlement agreements, making the *Marchenko* and *Flamily* decisions that much more baffling.

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[7] Which is expressly stated in §440.24, Fla. Stat., anyway.

[8] *East v. Pensacola Tractor & Equipment Co.*, 384 So. 2d 156 (Fla. 1st DCA 1980); *CFM Distributing v. Alpert*, 453 So. 2d 169 (Fla. 1st DCA 1984); *D'Amico v. Marina Inn & Yacht Harbor, Inc.*, 444 So. 2d 1038 (Fla. 1st DCA 1984); *Cordell v. Pittman Building Supply*, 470 So. 2d 865 (Fla. 1st DCA 1985); *Gilliland v. Wood 'N You*, 626 So. 2d 309 (Fla. 1st DCA 1993); *Pruett-Sharpe Construction v. Hayden*, 654 So. 2d 241 (Fla. 1st DCA 1995); and *Brevard County Board of County Commissioners v. Williams*, 715 So. 2d 1100 (Fla. 1st DCA 1998).

[9] *Gilliland v. Wood 'N You*, 626 So. 2d 309 (Fla. 1st DCA 1993).

The reasons for setting aside settlement agreements have varied. In *Gilliland v. Wood 'N You*, 626 So. 2d 309 (Fla. 1st DCA 1993), the First DCA reversed a JCC's refusal to set aside a settlement agreement where the facts showed that, at the time he entered into the lump sum settlement agreement at issue, the claimant was not fully aware of the fact that he had a bulging disc at the L4-L5 level of his spine, when he also had a herniated disk corrected at the L5-S1 level.[10] In *East v. Pensacola Tractor & Equipment Co.*, 384 So. 2d 156 (Fla. 1st DCA 1980), the First DCA held that the claimant was entitled to have his settlement agreement set aside where the totality of the circumstances showed either a mutual mistake of a material fact, or a carrier's overreaching. In *Brevard County Board of County Commissioners v. Williams*, 715 So. 2d 1100 (Fla. 1st DCA 1998), the First DCA ruled that the JCC erred in not severing an invalid portion of a settlement agreement that contained a severability clause. In *CFM Distributing v. Alpert*, 453 So. 2d 169 (Fla. 1st DCA 1984), and *D'Amico v. Marina Inn & Yacht Harbor, Inc.*, 444 So. 2d 1038 (Fla. 1st DCA 1984), the First DCA upheld a JCC's set aside of a settlement agreement where the evidence showed that the claimant was not at maximum medical

[10] Likewise, in the case at bar, at the time he signed the settlement agreement, the Claimant was unaware of his impairment rating, and the rights he had attendant to that rating, nor was he aware of his work restrictions.

improvement as required by the version of §440.20 in effect when those decisions were reached. (And perhaps this reasoning solves the dilemma posed *supra*., to wit: what does a JCC do if a settlement agreement does not comply with §440.20(11)(d)? Apparently, he should set it aside).

In *Pruett-Sharpe Construction v. Hayden*, 654 So. 2d 241 (Fla. 1st DCA 1995), the First DCA affirmed an order setting aside a settlement agreement where the claimant's attorney knew about the claimant's psychiatric condition, including a suicide attempt just six days before the JCC was asked to approve the agreement, but the JCC was not informed of this condition. It was only after the claimant's new counsel moved the court for vacation of the agreement that the JCC was made aware of the Claimant's psychiatric condition.[11]

Finally, in *Cordell v. Pittman Building Supply*, 470 So. 2d 865 (Fla. 1st DCA 1985), the First DCA held that the settlement agreement should have been set aside, even though the claimant was represented by counsel, because the parties, as in the case at bar, failed to present the JCC with certain material facts.

It is worth repeating, and important to do so, that these cases were decided over a span of nearly twenty years, and at no time during that period

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[11] It is worth noting that the scenario in that case does not differ much from this case except for the medical conditions involved.

did §440.20 expressly authorize a JCC to set aside settlement agreements. Thus, the First DCA's holdings in *Marchenko* and *Flamily* that the 2001 changes to §440.20(11) (which also do not address this topic), denied JCC's of the authority to set aside lump sum settlements was erroneous as a matter of law, and the reasoning behind these holdings is flawed and contrary to long-standing precedent - precedent that was, as seen from a review of the cases discussed *supra*., and the versions of the statute in effect when those cases were decided, unaffected by the 2001 changes to §440.20.

The First DCA's holding in *Marchenko* and *Flamily* is particularly puzzling in light of its decisions in *Jacobsen v. Ross Stores*, 882 So. 2d 431 (Fla. 1st DCA 2004), *Gerow v. Yesterday's*, 881 So. 2d 94 (Fla. 1st DCA 2004), and *Divosta Building Corp. v. Rienzi*, 892 So. 2d 1212 (Fla. 1st DCA 2005), where the court held that the 2001 amendments to §440.20(11)(c), Fla. Stat. (2001) did *not* eliminate the jurisdiction of judges of compensation claims to: (1) determine whether a settlement agreement was reached; (2) determine the terms of such an agreement; or (3) enforce a settlement agreement, even though the statute does not expressly state that JCC's have any such jurisdiction. This is clearly contrary to the reasoning the First DCA followed in *Marchenko* and *Flamily*.

The First DCA's discussion in the *Jacobsen* again adds to the confusion. There, before the payout of a settlement, the claimant died and the personal representative of the claimant's estate filed a notice of substitution of parties and a motion to compel enforcement of the settlement agreement. The JCC concluded that, pursuant to the 2001 version of §440.20(11)(c), she lacked the jurisdiction to either determine whether a washout settlement was even reached, or to enforce such an agreement if there was one. *Jacobsen*, 882 So.2d at 432. The First DCA explained that the amended version of §440.20(11)(c) provides that, when a claimant is represented by counsel, a JCC's approval of a settlement agreement is *required* only as to the attorney's fees paid to the claimant's attorney by the claimant. *Id.* (emphasis added). This is a correct reading of the plain language of the statute. But then the First DCA went on to say that the "plain language of this statute does not extinguish the JCC's *previously existing* [emphasis added] *jurisdiction* [emphasis in original] to determine whether a settlement agreement was entered, to construe, or give effect to settlement agreements." *Id*. at 432-33. Interestingly, the First DCA did not identify any statutory source of this "previously existing" jurisdiction. Thus, it must be a creature of case law recognizing the logical ambit of a JCC's

judicial authority to exercise his/her exclusive jurisdiction in workers' compensation cases.

Applying the rationale in *Marchenko* that a JCC's authority and/or jurisdiction exists only when Chapter 440 expressly says it does, it is a mystery as to just where the First DCA in *Jacobsen* found JCCs' "previously existing *jurisdiction*" to do anything with a settlement agreement other than to make sure it complies with the applicable statutory requirements, if any, and either approve it or disapprove it. That is, nowhere in *any* version of §440.20 is there an express grant to the JCC of the authority or jurisdiction to determine whether an agreement was reached, or to give effect to it, and yet, the First DCA not only concluded that a JCC has such authority, but also that this jurisdiction existed prior to, and even survived the 2001 amendments to §440.20.

Deepening the mystery behind the First DCA's rationale in *Marchenko* and *Flamily* is its statement, again in *Jacobsen*, that "[a] JCC's *jurisdiction* relating to settlement agreements is well-settled. Construction of a settlement agreement is 'a matter clearly within the province of the JCC.' [citation omitted]". *Jacobsen*, 882 So. 2d at 433. (emphasis added). This begs the question, what happened between the time *Jacobsen* was decided in 2004, and the time *Marchenko* was decided in 2005? There were

no new amendments to §440.20 during that time, and yet, sometime between these two decisions, the First DCA's thinking went from a narrow interpretation of the effect of the 2001 changes to §440.20(11)(c) – that they "simply [permit] parties represented by counsel to enter lump sum settlement agreements without obtaining" a JCC's approval of the agreement (*Jacobsen*, 882 So. 2d at 433)[12] (emphasis added), and thus have no effect on a JCC's jurisdiction "relating to settlement agreements" – to a broader interpretation that the changes actually do address the jurisdiction of JCC's with respect to settlement agreements, and, more specifically, because they do not explicitly state that a JCC can set aside settlement agreements, JCC's no longer possess such jurisdiction.

With all due respect to the First DCA, its holding in *Marchenko* and *Flamily* on the issue of JCCs' jurisdiction to set aside settlement agreements is an illogical departure from not only long-standing precedent, but precedent it set in *Jacobsen*, decided just *six months* before rendering its *Marchenko* opinion (rendered February 28, 2005).

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[12] This narrow reading of the amendment's effect was echoed in Judge Ervin's concurring opinion in the *Divosta Building* case (a decision rendered on February 11, 2005, just 12 days before the First DCA issued its opinion in *Flamily*), where he notes that it said that a "JCC need only approve the amount of attorney's fees to be paid by claimant to his or her attorney, and not the settlement agreement . . . ." *Divosta Building*, 892 So. 2d at 1212.

Furthermore, there is no logical, rational basis for differentiating between a JCC's jurisdiction to interpret and give effect to a settlement agreement, and his jurisdiction to set it aside. Indeed, this position is supported by one of the cases cited by the First DCA in *Jacobsen* in support of its position regarding the jurisdiction of JCC's "relating to settlement agreements", to wit: *Barefoot v. Sears Roebuck & Co.*, 650 So. 2d 1036 (Fla. 1st DCA 1995). In that case the First DCA stated that "construction of a 'washout' settlement agreement, like any other contract, is a question of law [citation omitted]. However, if the terms of the agreement are susceptible to more than one construction, an issue of fact is presented [citation omitted]. In cases in which such a factual issue is presented, the JCC must make the initial determination as to the intended effect of the settlement." *Id*. at 1037. Perhaps it is this principle that enables a JCC to interpret and give effect to settlement agreements even though nothing in Chapter 440 explicitly gives him/her that authority. If so, then there is no logical reason to treat a settlement agreement any differently in the context of a motion to set aside than in a scenario in which there is a request by a party for a JCC to interpret or give effect to it. That is, if a JCC's powers extend to making factual findings about a settlement agreement where there is a dispute as to its terms, or the intent of the parties with respect to that

agreement, then these powers should also extend to determining, just as in any other contract matter, whether there is evidence of fraud, mutual mistake, overreaching, or any other ground on which to invalidate the contract.

Certainly, the fact that §440.20(11)(c) applies only to cases where a claimant is represented by counsel cannot provide support for differentiating between the powers recognized in *Jacobsen*, but dismissed in *Marchenko* and *Flamily*. As the cases discussed herein clearly show (not to mention the case at bar), a claimant's representation by counsel is no guarantee that he will enter a settlement agreement with full awareness of his medical condition, and/or the rights he possesses or is giving up, nor that he or his attorney will not be the victim of misrepresentation, mutual mistake, misunderstanding, or overreaching. Thus, the principles stated in *Jacobsen* and *Barefoot* should apply in all cases in which a lump sum settlement agreement is involved, regardless of whether the claimant is represented by counsel.

Based on the foregoing, the Petitioner respectfully requests that this Honorable Court overturn the First DCA's opinions in *Marchenko* and *Flamily* to the extent that they state that the 2001 amendments to

§440.20(11)(c), Fla. Stat. deprive JCC's of jurisdiction to set aside settlement agreements.

B. THE FIRST DCA INCORRECTLY INTERPRETED THE PURPOSE OF THE 2001 AMENDMENT TO §440.20(11)(c).

Perusal of the First DCA's opinion in *Jacobsen v. Ross Stores* prior to its decision in *Marchenko* understandably leads a reader to conclude that the court deemed that the impact of the 2001 changes to §440.20 was relatively minor – it simply removed from §440.20 the *requirement* that a JCC approve a lump sum settlement agreement entered into by a claimant represented by counsel. The amended statute does not say that a JCC cannot approve the terms of such a settlement agreement if the parties so request. Nor does it say anything whatsoever about the jurisdiction, or lack thereof, of a JCC. It simply removes a requirement that existed in the prior version of the statute.

A review of the March 23, 2001 "House of Representatives Staff Analysis" of House Bill 1803[13] regarding the 2001 amendments to Chapter 440 in general, and §440.20 in particular, reveals that nothing more significant was intended by the legislature. On page one of this analysis is a summary which states that, as of that time, "few revisions [to the workers' compensation act] have been approved since 1993. Changes proposed in this proposed committee bill include the following . . . ." The analysis then

[13] Attached hereto as Appendix "2".

includes a list of the changes being proposed. The items in that list relevant to the case *sub judice* are: 1) "provide for recovery of child support arrearages"; 2) "authorize gubernatorial appointment of judges on an interim basis; 3) establish specific criteria against which judges are evaluated; and 4) "revise procedures for lump sum settlements." Note that nothing in this list so much as mentions expanding or contracting a JCC's jurisdiction with respect to settlement agreements.

Perhaps even more significant is the discussion on page two of the March 23, 2001 analysis, which specifically addresses §440.20. This analysis summarizes the version of that section in existence at the time the proposed changes are being discussed. It then goes on to state what the effect of the proposed changes would have on §440.20, to wit: "when the claimant is represented by an attorney and when all parties agree to forego a hearing, judges would no longer have to hold a hearing on lump sum settlements. *However, when reviewing lump sum settlements, judges would be required to consider the interests of the claimant and the claimant's dependents. The settlement would be required to make provision for recovery of child support arrearages.* (emphasis added). Again, nothing about depriving JCC's of jurisdiction to set aside settlement agreements. Indeed, nothing about depriving JCC's of jurisdiction to review settlement

agreements even when the claimant is represented by counsel. To the contrary, as first sentence in the emphasized text above states, a JCC is supposed to review the settlement to consider the interests of the claimant and his dependents (this is now codified at §440.20(11)(d)2.), and ensure that child support arrearages are provided for (which requirement is now codified at §440.20(11)(d)1.).

The emphasized text quoted *supra*. is repeated in the staff analysis dated April 17, 2001, attached hereto as Appendix "3". Again, no mention of restricting a JCC's jurisdiction with respect to settlement agreements, including, but not limited to, setting them aside. The summary of the effect of the proposed changes is slightly different in the April 18, 2001 staff analysis (Appendix "4"). That summary states, *inter alia*, that: "when the claimant is represented by an attorney, judges would no longer have to approve lump sum settlements, *except to approve the amount of the attorney's fees*." The rest of the summary is the same as in the two summaries quoted above in which a JCC's duty to protect the interests of claimants and their dependents is discussed.

There is also a difference (shown in italics) in the summary dated May 31, 2001 (Appendix "5"), in which it states "when an attorney represents the claimant, judges would no longer have to approve lump sum settlements,

except to approve the amount of the attorney's fees. *However, in those circumstances where a judge is required to approve the lump-sum settlement, the judge would be required to consider whether the allocation of the settlement provides for recovery of child support arrearages*." Note that this version of the changes being proposed did not find its way into the final version of the statute the Legislature approved. That is, the extant version of the statute does not limit the requirement that a JCC ensure for provision of child support arrearages to those instances in which he is *required* to approve a settlement agreement. Rather, it applies to *all* lump sum settlement agreements. Note also that in no version of these staff analyses is there any discussion about an intention to either remove a JCC's jurisdiction to set aside a lump sum settlement agreement, or about a JCC's inability to review the underlying agreement should the parties request him or her to do so.

In the preamble to Chapter 2001-91, Committee Substitute for House Bill No. 1803 (Appendix "6"), the amendments to §440.20 are summarized as, *inter alia*, "revising lump sum settlement requirements." Again, nothing about stripping any jurisdiction from JCC's. And when one looks at the additions and deletions to §440.20(11) in that bill, it merely adds the phrase "When a claimant is not represented by counsel" to subsection (b), removes

from that subsection language applying to cases where the claimant is represented by counsel, and adds what is now subsection (c), and, again, merely removes the requirement of JCC approval of the underlying settlement agreement, but does not state he cannot approve the agreement if requested by the parties.

Likewise, the preamble to Chapter 2001-158, Committee Substitute for Senate Bill No. 1284 (Appendix "8"), summarizes the change to §440.20 as "revising provisions with respect to lump-sum payments under workers compensation." It also addresses the change to §440.22 as providing that the exemption of workers' compensation claims from creditors does not extent to child support or alimony claims. And in the body of that bill we find the addition of what is now §440.20(11)(d)2. Once again, no mention of removing any jurisdiction from JCC's.

Thus, based on the foregoing the Petitioner respectfully submits that the First DCA in both *Marchenko* and *Flamily* incorrectly interpreted both the plain meaning and language of the amended version of §440.20, and the intent and purpose behind the changes to that section. It is clear that, throughout the entire legislative process leading up to the amendments to §440.20(11), the reasons for these amendments had nothing to do with limiting a JCC's jurisdiction with respect to settlement agreements. Rather,

the intent was to streamline the process, but also ensure that the interests of workers and their dependents were also protected, not only by providing for a process by which a workers' child support obligations were addressed, but also by requiring the JCC to consider whether an agreement is otherwise in the worker's, and the worker's family's best interest. Therefore, the Petitioner once again respectfully requests that this Honorable Court overrule those cases.

II.

THE FIRST DISTRICT'S FINDING THAT THE 2001 AMENDMENT TO §440.20(11)(c), FLA. STAT. APPLIED RETROACTIVELY BECAUSE IT WAS A PROCEDURAL AMENDMENT WAS ERROR AS A MATTER OF LAW.

The First District's finding that the amendment to §440.20(11) applied retroactively because it was a procedural, not a substantive, change, is subject to *de novo* review because it concerns a pure question of law, and because the First District incorrectly interpreted and applied Florida law on this issue. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), and *Gilliam v. Smart*, 809 So. 2d 905 (Fla. 1st DCA 2002).

In *Flamily*, the First DCA acknowledged that under Florida's workers' compensation law "a claimant's substantive rights are fixed on the date of accident; however, procedural or remedial changes may apply to claimants without regard to the date of accident." *Flamily*, 924 So. 2d at 80.

The court also stated that the "addition of section 440.20(11)(c) does not impact the amount of benefits or services that a claimant may receive or change the liability of the E/C. Moreover, the statutory change only affects the means of approval of a settlement agreement. Thus, it is a procedural change that should be applied retroactively." *Id*.

Admittedly, there are indeed procedural aspects to §440.20(11). And, while the addition of the current version of §440.20(11)(c) does provide the procedural means of gaining approval of a lump-sum settlement, this addition must be read in conjunction with the addition of §440.20(11)(d), which provides for the *substantive* protection of a claimant's dependents where there are child support arrearages, as well as the interests of both the claimant and his family when approving such a settlement agreement. Thus, these sections, again when read in conjunction, are not merely procedural, but a mix of both substantive and procedural, and thus should not be applied retroactively.

Moreover, the First DCA's decision in *Marchenko* logically must stand for the proposition that the former version of §440.20(11)(b), which applied to all lump sum settlements (regardless of whether the claimant was represented by counsel), granted JCC's the authority to set aside settlement agreements. This logic further dictates that the addition of §440.20(11)(c)

operated to remove this authority in cases where claimants are represented by counsel. If the First DCA's interpretation is correct, this change to the statute was, at least to a certain extent, substantive, and not just procedural, because it deprives certain claimants of any remedy within the workers' compensation act to obtain relief from settlement agreements entered into under a cloud of fraud, overreaching, mutual mistake, or misunderstanding. Thus, the statute should not be applied retroactively.

Interestingly, the First DCA in *Flamily* cites, in support of its finding that the addition of §440.20(11)(c) is procedural, the case of *Fla. Birth-Related Neurological Injury Compensation Ass'n v. DeMarko*, 640 So. 2d 181 (Fla. 1st DCA 1994), where it held that "a statute transferring jurisdiction from one quasi-judicial tribunal to another was procedural in nature and should apply retroactively." This raises the question of to what "quasi-judicial tribunal" is the authority to set aside settlement agreements entered into under §440.20(11)(c) being transferred? If there isn't one, and the authority has been sent into the abyss, then surely this is no mere procedural change. If the authority is being transferred to the circuit court, then again, this is a substantive change because there is nothing "quasi-

judicial" about circuit courts[14] and the language quoted above at least implies that only when jurisdiction is being shifted from one quasi-judicial tribunal to another quasi-judicial tribunal is such a shift "procedural", not "substantive."

Based on the foregoing, the First DCA's decision in *Flamily* that the addition to §440.20(11)(c) was procedural in nature, and thus retroactive in application, was error as a matter of law, and the Petitioner respectfully requests that this Honorable Court overrule that decision.

III.

IF §440.20(11)(c), FLA. STAT. (2002) DOES DEPRIVE JCC'S OF JURISDICTION TO SET ASIDE WORKERS' COMPENSATION SETTLEMENT AGREEMENTS ONLY OF CLAIMANTS REPRESENTED BY COUNSEL, THE STATUTE VIOLATES THE CLAIMANT'S EQUAL PROTECTION RIGHTS UNDER THE U.S. AND FLORIDA CONSTITUTIONS.

By its terms, §440.20(11)(c), Fla. Stat. (2001) applies only in those instances in which a claimant has legal counsel at the time he enters into a lump sum settlement of his workers' compensation claim. With the exception of the addition of the limiting phrase "[w]hen a claimant is not represented by counsel", subsection (b) remained substantively unchanged

[14] And if the authority is now in the hands of the circuit courts for claimants represented by counsel, this raises the equal protection concerns as discussed *infra*.

by the 2001 amendment to §440.20(11). Thus, based on the holding in *Marchenko* and *Flamily*, and assuming this Court concurs with this holding, claimants without legal counsel at the time they enter into a lump sum settlement of their workers' compensation claim retain their ability to have settlement agreements set aside by a JCC, but those with legal counsel when they enter such agreements do not. As such, this is a clear violation of the equal protection rights of these claimants (including the Petitioner herein) under the federal and state constitutions.

"Any statute which creates . . . a disparity treating one person or group differently than others must bear some reasonable relationship to a legitimate state objective." *Lewis v. Enterprise Leasing Co.*, 912 So. 2d 349, 352-53 (Fla. 3d DCA 2005). This is otherwise known as the "rational basis test", which "provides the most lenient level of scrutiny under the federal and state equal protection clauses." *Amerisure Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 897 So. 2d 1287, 1290 (Fla. 2005).

The First DCA in *Marchenko* and *Flamily* never identified any specific language in the change to §440.20(11)(c) that deprives JCC's of jurisdiction to set aside settlement agreements, nor has that court identified any intention to do so, never mind any state purpose behind such a change. That is to say, even if one divines the wording in the amended version of

§440.20(11)(c) to deprive JCC's of jurisdiction to set aside settlement agreements, neither the language in that statute, or the legislative history behind it, provide so much as a clue as to any state purpose –rational or otherwise - for doing so.

If we apply the First DCA's interpretation of §440.20(11)(c) to a situation in which a claimant represented by counsel at the time he signs a settlement agreement later learns that he should not have signed that agreement due to some key factual or legal mistakes or misrepresentations that occurred in reaching the agreement, or, as here, because the claimant and his lawyer had an incomplete understanding of his medical condition, such a claimant apparently has no recourse at all. Or, he *may* be able to have his settlement set aside is by seeking relief with the circuit courts (assuming the statute of limitations has not run). This, of course, requires the payment of filing fees that the claimant would not have to pay if he were able to pursue his claim in workers' compensation court. This result is the same even if the claimant and his attorney were mis informed by the carrier about material aspects of the claimant's case (by, for example, failing to fully comply with discovery requests).

There is absolutely no rational basis for forcing such claimants to go through these extra steps to set aside their settlements agreements, when

those without counsel do not have to do so. While it is possibly true that, in most cases, those with attorneys will enter into fair settlement agreements, this is not always the case, as the Petitioner here learned. There is no rational basis for depriving him of the right to seek an order from a JCC vacating his settlement agreement simply because he had an attorney at the time he entered into the agreement. Doing so unnecessarily promotes additional litigation in the already overburdened circuit court system.

Not only does forcing claimants like the Petitioner to seek redress in the circuit court put them at a financial disadvantage, it also means that they are likely to face substantial burdens in seeking relief due to the fact that litigation in circuit court involves discovery techniques that do not exist in workers' compensation cases (e.g., interrogatories, requests for admissions). They are also likely to face delays they would not otherwise face within the workers' compensation system. Finally, when they finally do get to the point where a judge reviews the settlement agreement, such claimants are at a disadvantage because in all likelihood the circuit judge will not be as familiar with the subject matter and nuances attendant to workers' compensation cases as would a JCC. Again, there is no rational basis for subjecting claimants represented by counsel at the time they enter a workers' compensation settlement agreement to these burdens and disadvantages

while claimants without counsel when they settle their claim are not so subjected.

Certainly, there is no identifiable legitimate state purpose for making this distinction. The Legislature set up the workers' compensation scheme to be the sole arena in which workers' compensation matters are handled, subject only to the exception of the authority to enter judgments and issue writs to enforce compensation orders. If the Legislature wanted to burden the circuit courts with the additional responsibility of addressing the validity of workers' compensation settlements in cases where the claimant was represented by counsel, then it could have explicitly stated so. Since it did not, it is logical to presume that the Legislature did not consider it in the State's interest to do so.

For these reasons, the Petitioner respectfully requests that this Honorable Court strike §440.20(11)(c), Fla. Stat. (2001) as unconstitutional because it violates certain claimants' rights to equal protection as found in the state and federal constitutions.

IV.

<u>THIS HONORABLE COURT HAS THE AUTHORITY TO REVIEW THE MERITS OF THE CLAIMANT'S ESTOPPEL ARGUMENTS AT TRIAL, AND SHOULD EXERCISE THIS AUTHORITY</u>.

Although the underlying reason for the Claimant's request that this Honorable Court accept jurisdiction of this case was the decision below that the JCC did not have jurisdiction to set aside the settlement agreement, and that the statutory amendment on which the First DCA relied applied retroactively, this Honorable has the jurisdiction and authority to address the merits of the entire case below.[15]

Specifically, Claimant respectfully requests that this Honorable Court address the Claimant's estoppel arguments in the case below, especially since they involved the Claimant's inability to effectively prosecute his HCV claim against the City due to the City's failure to comply with not only its own policies, and the collective bargaining agreement with its firefighters[16], but also with the Claimant's discovery requests. The JCC noted these concerns but, with all due respect, gave them what amounted to "short shrift", and placed the blame on the Claimant. (V21-4027-36; 4077-82). In so doing, the JCC apparently disregarded the responsibilities

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[15] *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963); *D'Agostino v. State*, 310 So. 2d 12 (Fla. 1975); and *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977).

[16] These are discussed in the Statement of the Facts section of this brief.

imposed on employers of, *inter alia*, firefighter/paramedics, by §112.181(5), Fla. Stat. to maintain certain records regarding suspected exposures to HCV of its employees, and to file reports regarding same. If an entity fails to comply with this legal requirement it can, as here, seriously impede a claimant's ability to prove his HCV is work-related. The First DCA did not address any aspect of the Claimant's estoppel arguments in the underlying opinion, and the Claimant respectfully insists that the issues raised in that argument are too important to ignore. The burdens placed on claimants seeking relief under §112.181 are heavy enough without employers, intentionally or otherwise, obstructing such claimants' ability to meet their burden. As such, the Claimant herein seeks a clear and forceful signal from this Honorable Court that compliance with §112.181(5), collective bargaining agreements, and their own policies, is not optional, but mandatory.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Honorable Court overrule the First DCA's decision in *Flamily v. City of Orlando*, 924 So. 2d 78 (Fla. 1st DCA 2006) (and, therefore, also overrule *Marchenko v. Sunshine Companies*, 894 So. 2d 311 (Fla. 1st DCA 2005)),

and remand the instant action to the First DCA with instructions to that court to reinstate the JCC's order vacating the subject settlement agreement. Alternatively, he requests that his Honorable Court strike §440.20(11)(c) as unconstitutional, and remand the case with the aforementioned instructions. The Claimant also requests that this Court remand this case to the First District Court of Appeal to consider his estoppel arguments raised at trial, but not addressed by the District Court in its opinion.

The Claimant also requests that this Court's order include instructions to the First DCA to enter an order awarding the Claimant attorney's fees and costs regarding his prosecution of the appeal below.

Respectfully submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this 29th day of January, 2007 to: Barbara A. Eagan, Esq., 445 West Colonial Dr., Orlando, Florida 32804, Counsel for the Respondent.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was computer-generated using Times New Roman fourteen point font on Microsoft Word, and hereby complies with the font standards as required by Fla. R. App. P 9.210 for computer-generated briefs.

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