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 REPLY BRIEF ON THE MERITS

Todd J. Sanders, Esq.
Fla. Bar. No.: 860920

Geoffrey Bichler, Esq.
Fla. Bar No.: 850632

Bichler & Kelley, P.A.
807 West Morse Blvd.
Suite 201
Winter Park, Florida 32789
(407) 599-3777
Counsel for Petitioner

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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."

References to the Record on Appeal shall be abbreviated by the letter "V" followed by the applicable volume and page number (e.g. V1-21). References to the E/SA/Respondent's Amended Answer Brief on the Merits shall be abbreviated by the letters "RAB", followed by the appropriate page number (e.g., RAB-9). References to the Supreme Court Record shall be abbreviated by the letters "SCR", followed by the appropriate page number (e.g., SCR-17). References to the Court's Supplemental Record shall be abbreviated by the letters "Supp. SCR", followed by the appropriate page number (e.g., Supp. SCR-79).

ARGUMENT

I. THIS HONORABLE COURT HAS JURISDICTION OF THIS CASE, AND SHOULD CONTINUE TO EXERCISE ITS JURISDICTION TO CONSIDER THE CASE'S MERITS.

The Claimant will not here repeat the reasons given in his Brief on Jurisdiction for why this Honorable Court has jurisdiction over this matter, but responds to the E/SA's assertion (RAB-10) that this Honorable Court should decline to exercise its discretionary jurisdiction because the Claimant failed to seek a set-aside of his settlement agreement within an unspecified limitations period.

The E/SA raised before the JCC the assertion that he should not set aside the order approving the settlement agreement at issue based on the time limitations in §440.28, Fla. Stat. (2002) (V4-714-15). However, this statute applies to the modification of *compensation orders* (or orders denying compensability), *not* to orders that approve a *settlement agreement.* Furthermore, §440.20(11), subsections (a), (b), and (c) all explicitly provide that orders entered under those subsections are not subject to modification pursuant to §440.28, Fla. Stat. Thus, as this section is expressly inapplicable to situations such as that at bar, the E/SA's reliance on this section, then and now, is misguided. As to any other argument citing alternative time limits,

these were not raised below, and thus should not be considered for the first time now.

Also, although resting much of its argument regarding the jurisdiction (or lack thereof), of JCC's to set-aside settlement agreements on what the E/SA consider a strict and literal reading of the statute in question (§440.20(11)(c)), here they depart from that principle, and suggest (RAB-11) that case law imposes a time limitation in which a party my move to set aside a settlement agreement because the statutes do not do so - that is, the absence of a statute constitutes an invitation to this Court to create one. For one thing, doing so is outside the purview of any court. Courts interpret the law, they do not legislate. That the First DCA avoided doing so in *D'Amico v. Marina Inn & Yacht Harbor, Inc.*, 444 So. 2d 1038 (Fla. 1st DCA 1984) should not serve as precedent supporting the E/SA's assertion that §440.192 imposes a statute of limitations on moving for a settlement agreement set-aside. So long as Chapter 440 is silent as to a limitation period for moving to set aside a settlement agreement, the courts should refrain from creating one.

Finally, any time limits on bringing a motion to set aside, or nullify, a settlement agreement should start when a party to such an agreement discovers the fraud, mistake, or misrepresentation forming the basis for such

a motion. (*See, Allie v. Ionata*, 417 So. 2d 1077 (Fla. 5th DCA 1982)). Here, the Claimant timely filed his motion on discovery of the mistakes, misrepresentations, and omissions in the agreement.

II. THE 2001 AMENDMENTS TO §440.20(11) DID NOT, NOR WERE THEY INTENDED TO, STRIP JCC'S OF JURISDICTION TO SET ASIDE SETTLEMENT AGREEMENTS WHERE A CLAIMANT WAS REPRESENTED BY COUNSEL AT THE TIME THE AGREEMENT WAS EXECUTED.

The Claimant is not arguing, as the E/SA suggest he may be, that the exclusivity provisions of Chapter 440 apply "in all instances." After all, as the Claimant noted in his initial brief (P. 24 and fn. 7), Chapter 440 contains a statute section that provides for an explicit exception to this authority or jurisdiction, to wit: §440.24, Fla. Stat. (2002), which states that the circuit courts have the jurisdiction to force an employer/carrier to comply with a JCC's order. There is also §440.33(2), Fla. Stat., which provides that a JCC lacks the jurisdiction to punish individuals for disobeying or refusing "any lawful order or process", but allows the JCC to refer the matter to the appropriate court possessing such power.

Also, the First DCA has recognized that JCC's lack the authority to sanction attorneys, award medical treatment outside of an authorized

managed care arrangement, or strike such an arrangement. (*Marchenko v. Sunshine Companies*, 894 So. 2d 311 (fn. 1) (Fla. 1st DCA 2005)).[1]

With the exception of the managed care limitation, note that there is a consistency in the express limitations on the power of JCC's – they all have to do with the authority to force persons or entities to do something. This, of course, is consistent with the quasi-judicial nature of the JCC position, which does not grant JCC's the authority to enter a judgment ordering the sheriffs of the state to incarcerate or levy. And these limitations are specific as well as logical, and if, as this and other courts have consistently held, JCC's have exclusive jurisdiction over workers' compensation matters, then any exception to this principle should be explicitly provided for by statute, not simply inferred by an interpretation of a statute section (*e.g*., §440.20), which does not address jurisdiction, but, rather, addresses, *inter alia*., methods and procedures for resolving workers' compensation disputes. And certainly, none of the aforementioned statutes either expressly or implicitly restrict a JCC's authority to set aside an *order* approving a settlement agreement which was entered by a JCC who was previously assigned to a case.

[1] That opinion also "recognized" a JCC's lack of authority to enforce a prior compensation order, but this point is, as noted, addressed in §440.24).

Thus, the E/SA's assertion (RAB-12) that the exclusivity provisions of Chapter 440 "are defined by statute" is true as far as it goes. Certainly, as noted by E/SA (RAB-12), §440.33(1) grants various specific powers to JCC's, including, notably, the authority (*i.e.*, jurisdiction), to "do all things conformable to law which may be necessary to enable the judge effectively to discharge the duties of her or his office." As noted at length in the Claimant's initial brief on the merits, no version of §440.20 has *ever* explicitly granted JCC's the *express* authority to set aside settlement agreements, and yet they have done so with the approval of the First DCA for decades.

Indeed, the E/SA (RAB-12) describe §440.33 as granting "general powers". This raises two interesting points. First, both the E/SA and the First DCA (in *Marchenko* and *Flamily*, two cases on which the E/SA rely heavily in support of their position), place great emphasis on the principle that a JCC possesses *only* those powers *expressly* granted by statute, but now we also have some "general powers" granted by §440.33(1). This supports the Claimant's argument that the exclusive jurisdiction of JCC's over workers' compensation claims includes *all* matters arising in such claims, *except* those matters that are *specifically* disallowed by Chapter 440 (or as reasonably interpreted as doing so, *e.g.*, finding that the Chapter does not

allow a JCC to order the provision of benefits not expressly awardable by statute).

Secondly, §440.33 has not been materially altered since before 1996, and thus, to the extent that it is, or may be, the/a source of a JCC's power to set aside settlement agreements as recognized by the First DCA prior to *Marchenko* and *Flamily*, it should still be considered as such.

Further support for this reasoning is found in the fact that, again despite the utter lack of any express authority for a JCC to do so, the First DCA recently upheld a JCC's set aside of a mediation agreement. In *United Self-Insured Services and City of Cocoa v. Ripoll*, 1D06-6667 (Fla. 1st DCA *per curiam* decision dated March 15, 2007) (see the Appendix attached hereto), the 1st DCA upheld a JCC's order granting a claimant's motion to set aside a mediation agreement.[2] The basis for this motion was an apparent mistake. Specifically, the agreement included a provision that "was added after an emotional and exhausting Mediation and without discussion during the Mediation." If a JCC can set aside a mediation agreement based on mutual mistake, why can't the JCC set aside a settlement agreement on this basis, or due to misrepresentation? Interestingly, neither the motion to set

[2] A copy of the mediation agreement itself is also attached in Supp. A, and clearly indicates that the claimant was represented by counsel at the mediation, and that the claimant's counsel signed the agreement.

aside the mediation agreement, or the order, cites any statutory, regulatory, or case authority indicating the JCC's jurisdiction or power to set this agreement aside.

Perhaps this authority can be found in §440.33(1). If not, then perhaps it can be found in the same place that courts have used to find the authority of JCC's to set aside settlement agreements in the past, regardless of whether the claimant was represented by counsel.

The E/SA also assert (RAB-12) that Chapter 440 is inapplicable to "collateral issues" such as settlement agreements involving a party with "second thoughts" about such an agreement.[3] This implies that, for all the years during which the First DCA has affirmed the setting aside of settlement agreements, or reversed based on a JCC's failure to do so, despite the absolute lack of *any explicit* statutory authority for JCC's to do so, in *any* version of §440.20, the circumstances surrounding such set asides (or failures to set aside) were mere "collateral issues" wholly disconnected from the exclusivity provisions of Chapter 440. This is surely an overly-expansive interpretation of the amendments to §440.20 at issue here.

[3] To describe the Claimant's desire to set aside the agreement at issue as based on mere "second thoughts" is to grossly understate the matter, especially when one considers the JCC's findings regarding the very suspicious circumstances surrounding the "filling in the blanks" that occurred *after* the Claimant signed the agreement. (V21-4016-4022).

The Claimant does not dispute that the purpose of the subject amendments to §440.20(11) was to streamline the settlement process in workers' compensation claims where the claimant is represented by counsel. This intention is clearly the focus of the relevant portions of the legislative history attached to the Claimant's initial brief on the merits. But, in recognizing this clear intent, the E/SA and the First DCA are apparently conflating the terms "required" and "may". That is, the E/SA argue, and the First DCA found, that the Legislature's apparent desire to streamline the settlement process in workers' compensation claims by no longer *requiring* the JCC to approve settlement agreements involving represented claimants, simultaneously stripped JCC's of the jurisdiction to approve such settlement agreements at the parties' request, or to set them aside. This is a very selective application of the principle that a JCC only has that jurisdiction which is expressly granted by statute. The word "require" is essentially a mandate, and, while it can certainly be construed to grant jurisdiction (otherwise, how could the JCC comply with the mandate?), the mere fact that it once *required* a JCC to do something, but no longer does so, does not, *ipso facto*, mean that a JCC can no longer do something.

The E/SA also suggest that the legislature sought to "streamline" the settlement process by tossing requests to set aside settlement agreements

entered into by represented claimants into the lap of the circuit courts[4]. This hardly seems like "streamlining", and one could reasonably expect that something this significant would have been at least *mentioned* somewhere in the legislative history behind the subject amendments. But it was not. This reasoning also raises the specter of concurrent proceedings in both the workers' compensation and circuit courts regarding the same claim.

For example, suppose a claimant wishes to obtain a set-aside of a settlement agreement he entered into while represented by counsel. The JCC cannot do so (under the E/SA and First DCA's interpretation of §440.20(11)(c)), and thus the Claimant must seek relief in circuit court. Meanwhile, however, the statute of limitations clock is running on his workers' compensation claim, and thus, to protect himself in the event the circuit court does in fact set the agreement aside (a process that could take years), he files a petition for benefits with the JCC. Then the E/C will assert that the claim should be dismissed because of the settlement agreement, and insist on the agreement's enforcement, which in turn, as noted by the E/SA

[4] They also cite as authority for this position (RAB-24) The article by McConnaughhay and Moniz, *"Workers' Compensation Settlements: The Next Generation"*, as support for this position. Interestingly, however, in an article that is otherwise replete with sources and references supporting their views, the authors cite no authority for the proposition that "at this time, when a settlement agreement is effectuated, any attempt to overturn that agreement would fall outside a workers' compensation context and would be interpreted and governed by contract law."

(RAB-21) will require the JCC, pursuant to Rule 60Q-116(5), of the Rules of Procedure for the Adjudication of Workers' Compensation Claims, to determine whether there was a valid settlement agreement which acts as a bar to the petition. The JCC is then authorized to enter an order adjudicating the agreement's binding nature, which in turn will also likely result in an order dismissing the claim. At this point, the Claimant must appeal the both the JCC's order regarding enforcement of the settlement agreement, as well as the JCC's dismissal of the claim based on the settlement agreement. The case then proceeds to the First DCA. Meanwhile, the set aside action is grinding away in circuit court.

And what are the First DCA's options? It *can* uphold the JCC's order regarding the settlement agreement, as well as the JCC's dismissal based on the JCC's. But it *cannot* remand the case to the JCC to determine whether the agreement should be set aside, because *Marchenko* and *Flamily* says a JCC can't do this. (Or maybe it could reverse the JCC's finding that there was an enforceable settlement agreement, but doesn't this have the same effect as setting the agreement aside?). It could perhaps stay the appeal pending the outcome of the circuit court action, but if the losing party in the circuit court action appeals, the case may be wind up pending in two different courts of appeal. And what if the First DCA does not stay the

action, but affirms the JCC, the workers' compensation case is dismissed, and the statute of limitations runs before the circuit court ultimately sets the agreement aside? What is the Claimant's remedy then? Does he even have one?

This is streamlining?

There is, perhaps, an alternative, however. Again, as noted by the E/SA (RAB-21, 22), the court in *Jacobsen v. Ross Stores*, 882 So. 2d 431 (Fla. 1st DCA 2004), and *Divosta Building Corp. v. Rienzi*, 892 So. 2d 1212 (Fla. 1st DCA 2005), stated that the subject amendments did not alter a JCC's power to determine whether a settlement agreement has been reached (though it did not point to any specific language in Chapter 440 as a source of this power). This raises the question of the ground(s) on which a JCC may find that an agreement was *not* reached. The E/SA suggest (RAB-22) that, pursuant to *Rienzi*, "a JCC, for example, could determine a purported agreement void *ab initio* based upon fraud."

And apparently, based on the 1st DCA's decision in *Ripoll* (discussed *supra*.), a JCC can find that there was some mutual mistake or representation that has the effect of nullifying a settlement agreement, *ab initio*. This is consistent with cases finding that workers' compensation settlement agreements (or orders approving them) can be set aside (i.e., voided), where

there is fraud, mistake misrepresentation, overreaching, or withholding of facts. (*See, e.g., Maggard v. Monteverde Academy,* 505 So. 2d 604 (Fla. 1st DCA 1987), and *Steele v. A.D.H. Building Contractors, Inc.*, 174 So. 2d 16 (Fla. 1965). In the case *sub judice*, the JCC found that there was "misinformation . . . inserted into the agreement . . . .". (V21-4059; Supp. SCR.-80). This is essentially the same thing as a "misrepresentation", and the practical effect of the JCC's decision to set aside the settlement agreement was to find it void *ab initio*, and thus non-binding, even if the finding was characterized as a "set aside." And, although the JCC based his decision on the fact that the misinformation was presented to the JCC, who was asked to approved the settlement agreement, his ultimate decision was correct, even if for the wrong reason, and his findings should stand. *Houssami v. Nofal*, 578 So. 2d 495 (Fla. 5th DCA 1991) (the "tipsy coachman" doctrine).

As to the E/SA's assertion (RAB-32) that the Claimant raised for the first time in his Initial Brief his constitutional arguments, and thus they should not be considered here, the Claimant respectfully disagrees. He brought up these concerns in his Motion for Rehearing filed with the First DCA (*see*, paragraph three of this motion). (SCR-8).

III. THE JCC'S FINDING THAT THE E/SA WAS NOT ESTOPPED FROM DENYING THE CLAIMANT'S HCV CLAIM WAS ERROR.

The E/SA (RAB-4) seek to undermine the Claimant's integrity and veracity by dwelling on certain alleged inconsistencies in his testimony. This is nothing more than a red herring as it is irrelevant to the Claimant's assertion that the E/SA should be estopped from denying his Hepatitis C claim because it was the E/SA's failure to abide by its own reporting procedures and requirements, as well as those pursuant to the collective bargaining agreement, that made it impossible for the Claimant to overcome his burden of proving a specific instance of exposure to Hepatitis C while in the course and scope of his employment. Indeed, 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". (V21-4081; Supp. SCR-102). The Claimant asserts that an employer should not be allowed to avoid any liability for providing workers' compensation benefits by failing to fulfill its obligations as dictated by either its own policies, or by an agreement with its employees.

However, the First DCA, in its opinion in this matter, did not even address this issue, and instead focused on the Claimant's inability to satisfy the elements of a §112.181, or §440.151 claim as a basis for compensability.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Honorable Court either overrule *Marchenko* and *Flamily*, 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 on equal protection grounds, and remand the case with the aforementioned instructions.

Respectfully submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this 22nd day of May, 2007, to: Barbara A. Eagan, Esq., 445 West Colonial Dr., Orlando, Florida 32804, Counsel for the Respondent; Richard Sicking, Esq., Counsel for Amicus Florida Professional Firefighters, Inc., 1313 Ponce de Leon Blvd., #300, Coral Gables, FL 33134; and Mark Zientz, Esq., Counsel for Amicus Florida Worker's Advocates, Inc., 9130 South Dadeland Blvd., Ste. 1619, Miami, FL 33156.

Todd J. Sanders, Esq.
Fla. Bar. No.: 0860920
Geoffrey Bichler, Esq.
Fla. Bar No.: 850632
Bichler & Kelley, P.A.
807 West Morse Blvd.
Suite 201
Winter Park, Florida 32789
(407) 599-3777
Counsel for Petitioner

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.

Todd J. Sanders, Esq.
Fla. Bar. No.: 0860920
807 West Morse Blvd.
Suite 201
Winter Park, Florida 32789