

IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

Jacqueline Duprey,  
Petitioner,

Case No.: SC07-398

vs.

La Petite Academy  
and  
Gallagher Bassett Services, Inc.,

Respondents.

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RESPONDENTS' INITIAL BRIEF  
OPPOSING DISCRETIONARY JURISDICTION

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This is an Initial Brief on Jurisdiction opposing the request to invoke discretionary jurisdiction to review the February 5, 2007 decision of the First District Court of Appeal, Tallahassee, Fla.

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IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

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**TREATISES, BOOKS, AND SECONDARY SOURCES CITED:**

Padovano, Honorable Philip J., Florida Appellate Practice  
(2007 edition) . . . . .  
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**CITATIONS TO THE RECORD ON APPEAL:**

(Throughout this Initial Brief, citations to the Record on Appeal appear in the following format:

(R.x.)

where "R." abbreviates the word "Record" (or "Supp.R." abbreviates the words "Supplemental Record"), and x is the page number within the Record where the cited information is found.)

RECORD ON APPEAL CITED AT. . . . . 1, 2,  
3, 4

**CITATIONS TO THE FIRST DISTRICT DECISION FROM WHICH  
DISCRETIONARY REVIEW IS SOUGHT:**

(The First District's February 5, 2007 opinion in this case, from which discretionary review is sought, is called "the OPINION" throughout this brief.)

OPINION . . . . .1, 5, 6, 7, 8, 9,  
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### STATEMENT OF THE CASE

This attempt to invoke discretionary jurisdiction involves the sole issue of whether the Petitioner's attorney, a workers' compensation practitioner, will be paid using the statutory formula mandated by the Workers' Compensation Act or via some other method the courts might conjure. Before Respondents won their reversal, Respondents argued before a Judge of Compensation Claims for the Orlando District ("JCC"), but failed to convince him, that Florida Statutes section 440.34 mandated a fee calculated as a percentage of the benefits won. Petitioner argued, and convinced the JCC, that he may disregard section 440.34's fee formula in favor of a fee the JCC found to be "reasonable." As a result, the JCC before reversal awarded a fee equal to an additional eight hundred eleven percent (811%) of the benefits obtained, despite section 440.34's limit of an additional twenty percent (20%). Florida's First District Court of Appeal reversed the 811% award, remanding to the JCC to re-compute the fee by using section 440.34's formula. The First District's opinion, from which discretionary review is sought, is called the OPINION throughout this brief.

### STATEMENT OF THE FACTS

We respectfully point out that the following 3 allegations in Petitioner's Statement of the Facts have no factual support in the Record: (1) section 440.34 impaired

Petitioner's ability to obtain the assistance of counsel; (2) claimant prevailed on all issues before the JCC; and (3) all of Respondents' defenses had no reasonable grounds. In this regard, the following additional facts from the Record are noteworthy.

Petitioner's entitlement to attorney fees resulted from 5 partially successful claims out of 14 claims made. In calculating a "reasonable" fee instead of a statutory fee, the JCC compensated Petitioner for all time spent on all claims regardless of the success or failure of the claim because the JCC found the time spent on the failed claims was "too intertwined with time pertaining to issues adjudicated to serve as a basis to reduce the amount of the attorney fee claimed." (See Order on Appeal at pg. 4, properly appearing in the Record on Appeal as pg. 1930a [hereinafter "Fee Order pg. 4"].)

Petitioner's 14 claims began with her first Petition for Benefits ("PFB") dated March 26, 2004 which sought "[1] authorization of a lumbar CT scan...[2] adjust AWW...[3] authorization of physical therapy...and [4] [decisions on issues regarding how the claimant allegedly] never requested a change of doctor...." (R.1954-1955.) On May 17, 2004, a second PFB sought "[5] Temporary Total Disability [("TTD")] from 4/5/04 to present and continuing...and [6] Temporary Partial Disability [("TPD")] from 4/5/04 to present and

continuing...." (R.1958-1960.) On June 25, 2004, a third PFB repeated her claim to adjust the AWW and additionally sought "[7] TTD and/or [8] TPD and/or [9] IB benefits from 5/21/04 and/or 6/1/04 through the present and as long as appropriate...[10] authorization of TENS unit as prescribed by Dr. Jungreis...and [11] authorization of second opinion and/or change of physician ...." (R.1961-1963.) On August 2, 2004, a fourth PFB sought "[12] authorization of psychological counseling...and [13] authorization of change of neurologist...." (R.1965-1967.) In all four PFBs, Petitioner sought "[14] penalties and interest" on all financial benefits claimed. (R.1954-1967.)

On October 27, 2004, the JCC held a trial/merit hearing on all ripe, due and owing claims. Voluntary dismissals of several of the 14 claims above preceded the trial. Several defenses were adjudicated at the trial, but the ones that prevailed in part were that the claimant voluntarily limited her income; and that the Petitioner's employment was terminated for cause. (R.1439-65.) A July 23, 2004 letter (Supp.R.2044) and the employer's testimony (Supp.R.2023-26) explained the Petitioner's termination. Although not asserted specifically as a defense, the claimant's base Average Weekly Wage (her "AWW", or rate of pay under section 440.14 used for all past and future benefits) was revealed to be lower than the base AWW in use until that date, so the claimant's base

AWW was lowered by the Judge prior to adding the claimed "fringe benefits" to the AWW. (R.1439-65.)

The following table illustrates the ultimate outcome of each of Petitioner's 14 claims:

Claim number	Outcome: Did Petitioner prevail on this claim? (Record cite in parenthesis)
1	NO (R.1439-65.)
2	YES IN PART: The base AWW was lowered, but "fringe benefits" were added.
3	NO (R.1439-65.)
4	NO (R.1439-65.)
5	NO (R.1439-65.)
6	YES IN PART: no additional weeks of TPD were awarded, but the rate of pay changed due to the change in AWW.
7	NO (R.1439-65.)
8	NO (R.1439-65.)
9	YES IN PART: IB's were awarded, but reduced because the Judge agreed with the defense that the claimant limited her income (deemed earnings were applied).
10	NO (R.1439-65.)
11	NO (R.1439-65.)
12	YES
13	NO (R.1439-65.)

14	YES IN PART: Penalties and interest denied except as to the claims won above.
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Therefore, the table above can best be summarized by stating that the Petitioner prevailed on some of her 14 claims insofar as she received a reduced award of \$2,526.40 in indemnity benefits inclusive of penalties and interest plus authorization of psychological counseling. (R.1443.) For these benefits, the JCC awarded Petitioner her attorney's fees payable by Respondents.

**POINTS ON APPEAL IN OPPOSITION TO REQUEST FOR REVIEW**

**ONE:** The OPINION interprets section 440.34 consistently with every other Fee Order ever entered statewide by the Offices of the Judges of Compensation Claims. **TWO:** The OPINION does not conflict with any other decision. **THREE:** The OPINION is a "Citation PCA" that this Court lacks jurisdiction to review. **FOUR:** Discretionary review is unnecessary once again, for the same reason as This Court found discretionary review of this same issue unnecessary 4 prior times in the past 7 months. **FIVE:** Petitioner owes taxable costs for attempting review.

**SUMMARY OF THE ARGUMENT OPPOSING REVIEW**

This Court declined discretionary review of this exact same issue 4 times in the past 7 months and was wise to do so. With the sole exception of the Fee Order reversed herein,

every legislative and judicial body interprets section 440.34 consistently. From the halls of the Legislature, to the seventeen districts comprising the statewide Office of the Judges of Compensation Claims, to the six different First District panels to address this issue, literally everyone reached the same interpretation. With such unanimity and certainty on this issue, there is simply no dispute for the Supreme Court to address.

**ARGUMENT OPPOSING DISCRETIONARY REVIEW**

**I. THERE IS NO CONFLICT BETWEEN THE ORDER ON APPEAL AND EVERY OTHER FEE ORDER EVER ENTERED BY THE OJCC**

Petitioner urges review based on conflict, but there is no conflict, neither before the appellate courts nor before the seventeen districts comprising the statewide Office of the Judges of Compensation Claims (hereinafter "the OJCC"). Respectfully we point out that with the sole exception of the Fee Order that was reversed by the OPINION, the OJCC has never entered a Fee Order conflicting with the interpretation found in the OPINION.

Collectively, long before Florida's First District Court of Appeal ever interpreted section 440.34, the OJCC was interpreting and implementing section 440.34's fee cap statewide since its passage four years ago. See Senate Bill 50A, 2003 Fla. Legislature (making 440.34 effective for all accidents on or after Oct. 1, 2003). The OJCC is the state

agency charged with interpreting and implementing section 440.34, and This Honorable Supreme Court holds that "an agency's interpretation of a statute it is charged with enforcing is entitled to great deference." Ameristeel Corp. v. Clark, 691 So.2d 473 (Fla.1997). Accord PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla.1988). Despite the lack of a First District interpretation, every OJCC Fee Order ever entered interpreting 440.34 (except the Fee Order reversed by the OPINION) interpreted 440.34 exactly as the First District did once the First District finally made its review. See Sepulveda v. Gale Interior Solutions, OJCC Case#04-006773ORL (OJCC Orlando Feb.2005); Phillips v. Edward Healy Rehab Center, OJCC Case #03-044576TMB (OJCC West Palm Beach Mar.2005); Wood v. Florida Rock, OJCC Case#04-013370WJC (OJCC Orlando Mar.2005); McTierman v. Pinellas Suncoast Transit Authority, OJCC Case#04-028606LLH (OJCC St. Petersburg May 2005); Campbell v. Aramark, OJCC Case #04-006767MAD (OJCC West Palm Beach July 2005); Buitrago v. Landry's, OJCC Case #03-028649EHL & #04-013626EHL (OJCC Tampa Aug.2005); Lundy v. Four Seasons, OJCC Case #03-041427SHP (OJCC West Palm Beach Nov.2005); Parker v. Pensacola Care, Inc., OJCC Case #05-9094JJL (JCC Tallahassee Feb.2006); Bass v. Target Stores, Inc., OJCC Case#05-4912JJL (OJCC Tallahassee July 2006). Therefore, the OPINION does not

conflict with how the OJCC interpreted 440.34 collectively prior to First District review.

Likewise, the OPINION does not conflict with, but instead is in accord with, every other decision of the First District that directly interprets 440.34 after its amendment in 2003. Wood v. Fla. Rock Indus., 929 So.2d 542 (Fla. 1st DCA 2006), rev. denied, 935 So.2d 1221 (Fla.2006); Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So.2d 506 (Fla. 1st DCA 2006), rev. denied, 939 So.2d 93 (Fla.2006); Campbell v. Aramark, 933 So.2d 1255 (Fla. 1st DCA 2006), rev. denied, 944 So.2d 986 (Fla.2006); Phillips v. Edward Healy Rehab. Ctr., 933 So.2d 600 (Fla. 1st DCA 2006); Murray v. Mariner's Health, 31 Fla.L.Weekly 3016 (Fla. 1st DCA 2006); Buitrago v. Landry's, 31 Fla.L.Weekly 2340 (Fla. 1st DCA 2006). The First District, having addressed this issue in no fewer than 6 cases using 6 different panels, has certainly done a thorough review. The issue has been so exhaustively addressed by the First District that it has stopped certifying the question and begun affirming the OJCC by simply entering a PCA. See Phillips, 933 So.2d at 600.

Finally, the OPINION does not conflict directly with any decision from any other District. The First District is the sole statewide venue for workers' compensation appeals. See sec. 440.271, Fla. Stat. No other District has venue, and thus, there is no inter-District conflict to resolve.

**II. THERE IS NO CONFLICT, DIRECT OR INDIRECT, BETWEEN THE FIRST DISTRICT'S OPINION AND ANY OTHER APPELLATE CASE LAW**

By ignoring the statutory amendments, Petitioner argues there is intra-District conflict between the OPINION and the 30-year-old decision in Lee Engin'g & Constr. Co. v. Fellows, 209 So.2d 454 (Fla.1964), but this is wrong because Lee does not interpret current law but instead a law that has been altered and amended twenty-two (22) times between the day Lee was issued through today. See ss. 17, 35, ch. 69-106; s. 365, ch. 71-136; s. 119, ch. 71-355; s. 18, ch. 75-209; s. 9, ch. 77-290; ss. 10, 23, ch. 78-300; ss. 27, 124, ch. 79-40; ss. 15, 21, ch. 79-312; s. 14, ch. 80-236; s. 12, ch. 83-305; s. 4, ch. 86-171; ss. 19, 43, ch. 89-289; ss. 29, 56, ch. 90-201; ss. 27, 52, ch. 91-1; s. 32, ch. 91-46; s. 3, ch. 91-47; s. 252, ch. 91-224; s. 34, ch. 93-415; s. 120, ch. 97-103; s. 21, ch. 2001-91; s. 13, ch. 2002-236; s. 26, ch. 2003-412, Laws of Florida. The statute interpreted in Lee cannot be said to be the same statute that exists today. The most recent amendments explicitly removed the codification of the factors analyzed in Lee. See ch. 2003-412, Laws of Florida. When the Florida Legislature excludes or deletes a statutory provision, the exclusion will be considered intentional and the courts assign meaning to the omission. See BellSouth Telecomm., Inc. v. Meeks, 863 So.2d 287, 291 (Fla.2003). Thus, the OPINION did its duty in assigning meaning to the Legislature's action,

leaving no need for This Court to exercise discretionary review.

The criminal-law "Sixth Amendment Right to Counsel" decisions cited by Petitioner, such as Olive v. Maas, 811 So.2d 644 (Fla.2002) and Makemson v. Martin County, 491 So.2d 1109 (Fla.1986), do not conflict with the OPINION. Neither the First District nor the JCC found -- and no party ever alleged -- that Petitioner is accused of a crime and is therefore entitled to Sixth Amendment rights. In Olive v. Maas, 811 So.2d 644 (Fla.2002), This Court noted that "Mark Evan Olive is a Florida attorney who routinely represents defendants on death row in postconviction proceedings.... His concern is based on a series of cases from this Court which, in short, provide that statutory maximum fees may be unconstitutional when they are inflexibly imposed in cases involving unusual or extraordinary circumstances because these caps interfere with the trial court's inherent power to ensure adequate representation and the defendant's Sixth Amendment right to assistance of counsel. See Makemson v. Martin County, 491 So.2d 1109 (Fla.1986)...." Because the Sixth Amendment right to counsel only applies to criminal proceedings, there can be no conflict between today's civil law decision and criminal law decisions such as Olive and Makemson.

### III. A "CITATION PCA" IS NOT ELIGIBLE FOR REVIEW

Petitioners, citing how Florida Statutes section 440.34 withstood constitutional attack, urge discretionary review on that ground. However, the only constitutional attack came via cross-appeal, and the portion of the opinion denying the constitutional attack should be considered nothing more than a "Citation PCA." "A per curiam decision that merely cites a controlling precedent...[is] sometimes referred to as a 'Citation PCA' [and] is not reviewable...." Hon. Philip J. Padovano, Florida Appellate Practice sec. 3.10 (2007 edition).

**IV. THE COURT SHOULD DENY DISCRETIONARY REVIEW OF THIS CASE JUST AS IT DID IN THE OTHER 3 CASES RAISING THIS IDENTICAL ISSUE**

This Honorable Court was wise to deny discretionary review of this very same issue 3 times in the past 7 months. Wood v. Fla. Rock Indus., 929 So.2d 542 (Fla. 1st DCA 2006), rev. denied, 935 So.2d 1221 (Fla.2006); Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So.2d 506 (Fla. 1st DCA 2006), rev. denied, 939 So.2d 93 (Fla.2006); Campbell v. Aramark, 933 So.2d 1255 (Fla. 1st DCA 2006), rev. denied, 944 So.2d 986 (Fla.2006). With the OJCC uniformly interpreting 440.34, and the First District agreeing with that interpretation in 6 successive opinions, there is simply no need to resolve a "dispute" because none exists.

**CONCLUSION**

WHEREFORE, Respondents respectfully request This Honorable Court to DECLINE discretionary review; and to award Respondents their taxable appellate cost under sec.440.34, Fla. Stat. (2003).

**CERTIFICATE OF FONT SIZE USED**

In compliance with the Florida Rules of Appellate Procedure as amended, I hereby certify that a permissible computer font typeface and size was used in the printing of this brief, to wit: Courier, 12 pt.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been provided via ordinary U.S. Mail on this 26th day of March, 2007 to our opposing counsel, Mr. Wayne Bilsky, 2431 Lee Road, Winter Park, FL 32789 as counsel for Ms. Jacqueline Duprey; to Mr. Bill McCabe, 1450 S.R. 434 West #200, Longwood, FL 32750 as co-counsel for Ms. Jacqueline Duprey; and to Rayford Taylor, Esq., P.O. Box 191148, Atlanta, GA 31119-1148 as counsel for amicus curiae.

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