

# Enforcement of the Compensation Judge's Order, Certification of Contempt, and Rule Nisi, a Practitioner's Roadmap

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The comp practice periodically collides with other practice areas. During the course of navigating a work injury, an attorney must understand Chapter 440, Chapter 90, and the 60Q Rules of Procedure. Often, however, other practice areas and their specific statutory, rule, and decisional authorities affect workers' compensation ("comp") cases. Frequently, family law, labor law, and appellate practice expertise may be required. Periodically, knowledge of criminal law, estate law and their procedure rules may also be needed by comp practitioners. These intrusions may create knowledge issues, timing issues, and even jurisdictional issues that complicate the process and progress of the comp case. Because of the statutory nature of comp and the limited authority of Florida's Judges of Compensation Claims (JCC), practitioners will sometimes have no alternative but to seek the enforcement powers of the Circuit Court. As with other ancillary comp issues, civil enforcement will require practitioners to understand civil procedure and the summary process known as the Rule Nisi.<sup>1</sup>

Thus, broad jurisdictional issues are often interwoven throughout a comp case, and it is the rare Circuit Judge that immediately grasps the role of Florida's court of general jurisdiction, the Circuit Court, in the life of a workers' compensation claim. Circuit Courts are burdened, some would argue overburdened, with a steady flow of criminal, family, contract, tort law cases, and all of the various ancillary issues that accompany them. Periodically, however, the limitations on statutory authority of JCCs dictates that the inherent authority of the Circuit Court is required to effectuate the otherwise administrative process of the Florida Office of Judges of Compensation Claims.

There remains significant under-appreciation for the inherent limitations of administrative hearing officers' authority, including Judges of Compensation Claims (JCCs), some attributable to miscommunication. Attorneys and JCCs alike persist in erroneously referring to the Office of the Judges of Compensation Claims as a "court." Despite the clear contradiction to this characterization<sup>2</sup>, habit or ignorance perpetuates it, thereby fostering a lack of appreciation of JCC limited statutory authority or jurisdiction.

JCCs have no inherent judicial authority. The power of a JCC is therefore limited to what is granted by statutory authority, and the duly adopted rules related to it.<sup>3</sup> Within the comp statutory construct, the ability of JCCs to enforce orders has a history of misconception and misunderstanding. Statutory specificity results in JCCs having more authority regarding enforcement of some orders than others. In enforcement proceedings, it is therefore crucial to first determine the nature of the order for which enforcement is sought. Furthermore, the identity of the recalcitrant entity, and their status as party or non-party, may also affect the extent of the JCC's authority. When enforcement of an order is sought against a party to the workers' compensation litigation, there are a variety of sanctions that a JCC may employ to enforce her or his order. It is when these enforcement efforts are insufficient, or when enforcement regarding a non-party is required, such as a subpoenaed witness who refuses to appear or to produce documents, that the intervention of the Circuit Courts will be required.

The statutory authorities of the JCCs are predominantly found in Chapter 440, F.S. Their powers include conducting hearings, preserving order therein, and compelling discovery. Fla. Stat. §440.33(1). This general authority is the foundation for trial preparation, particularly with respect to production of documents and testimony. This section also provides that for purposes of medical record obtention, the order of a JCC is "deemed to be an order of a court of competent jurisdiction."

The powers of a JCC also include the "enforcement of order" in proceedings. Fla. Stat. §440.33(1). However, the JCC has no contempt authority. Therefore, if a person "disobeys or resists any lawful order or process, or misbehaves during a hearing" or "obstruct(s) the hearing" the JCC is statutorily obligated<sup>4</sup> to "certify the facts to the court having jurisdiction in the place in which it is sitting," e.g., the Circuit Court for that particular OJCC District.<sup>5</sup> This same obligation applies to instances in which a person "neglects to

produce” documents or things, “refuses to appear” when subpoenaed, or “refuses to take oath or affirmation.” The rules of statutory construction dictate that a statutory reference to “court” without further statutory definition or delineation refers to the court of “general jurisdiction,” which is the Circuit Court.<sup>6</sup>

When a matter is certified pursuant to Fla. Stat. §440.33, the Circuit Court shall “thereupon in a summary manner hear the evidence as to the acts complained of and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court.” Fla. Stat. §440.33(3). Thus, authority exists for the Circuit Court to summarily enter a Judgment or hold a person in contempt, just as if enforcing its own decisions or preserving order in its own proceeding.

The concept of contempt is largely misunderstood and often overestimated. Contempt proceedings require significant judicial time, and must afford fundamental due process to the entity against which penalties are to be enforced. Contempt can be either civil or criminal, depending upon the nature of the behavior addressed. Both civil and criminal contempt may be applied in both civil and criminal cases, i.e., civil contempt is not limited to those cases in which the underlying claim is civil, and criminal contempt is likewise not limited to criminal cases.<sup>7</sup> It is important to remember that a single act or behavior may subject a person to both civil and criminal contempt.<sup>8</sup>

The United States Supreme Court has explained “the distinction between criminal and civil contempt often turns on the ‘character and purpose’ of the sanctions involved.” If a contempt sanction benefits someone complaining of behavior (action) or inaction, it is “remedial” and therefore it is “civil” contempt.<sup>9</sup> The Florida Supreme Court has further explained “[t]he purpose of criminal contempt . . . is to punish. Criminal contempt proceedings are utilized to vindicate the authority of the court or to punish for an intentional violation of an order of the court.”<sup>10</sup>

Both criminal and civil contempt are each further divided into two categories, “direct” and “indirect.” The major distinction between the two is whether the complained of behavior occurs in the presence of the Judge. Behavior in the Judge’s presence is “direct contempt” and behavior elsewhere, typically failure to comply with a court’s order, is “indirect contempt.” Civil direct contempt proceedings are summary in nature, and may be instigated upon motion of a party or directly by the Judge. The charged party is entitled to notice, an impartial hearing, and an opportunity to present defenses to the charge.<sup>11</sup> Sanctions may include confinement, a fine, or both, and attorney’s fees and costs may likewise be imposed. The contempt judgment must be in writing, recite the facts relied upon, and specifically find the ability of the respondent to comply with the order at issue.

Indirect civil contempt proceedings are often initiated by a party, because by definition indirect contempt occurs outside the Judge’s presence. The party seeking enforcement (petitioner) has the burden of proving by a preponderance of the evidence that the respondent has “willfully disobeyed an order.”<sup>12</sup> The behavior must be shown to “clearly violate” the prior order.<sup>13</sup> As with direct contempt, indirect contempt can be imposed only after the respondent party is provided with notice of the proceedings and an opportunity to be heard.<sup>14</sup>

In instances in which Circuit Court involvement is the only viable final solution, these proceedings are best instigated with the issuance of a “Certification Order” by the assigned JCC. This order should describe the offense(s), the efforts of the JCC to enforce order or process without Circuit Court involvement, and should make ultimate findings as to the efficacy of those efforts and the exhaustion of JCC enforcement alternatives. The assigned JCC should submit a copy of that “Certification Order” to the Chief Judge of the Circuit in which the JCC’s district office is located.

Therefore, in instances of misbehaving witnesses or parties at trial, the JCC enters a “certification” of the inappropriate behavior or failure. This “certification” order is then transmitted by the JCC to the Circuit Court for the geographic jurisdiction in which the JCC is hearing the case. The resulting Circuit Court proceedings will almost always be “indirect” contempt proceedings as the complained of behavior or inaction will have occurred outside the Circuit Court’s presence. During such contempt proceedings, however, there is

the potential for ongoing action or inaction to result in Circuit Court consideration of additional “direct” contempt issues. The Circuit Court should assure that the allegedly offending party is afforded appropriate notice and an opportunity to be heard regarding the allegations of inappropriate action or inaction. The Circuit Court may then impose either civil or criminal contempt proceedings as are appropriate from the Circuit Court’s findings. Any decision imposing contempt sanctions should be in writing and include appropriate findings to support the conclusion. This may include incorporation of the JCC’s “certification” into the Circuit order. These issues of non-party failure or refusal to comply with JCC orders are likely some of the most difficult issues that confront comp practitioners. Likewise, in comparison to the more summary proceedings of Rule Nisi, these proceedings will be the most complex comp proceedings for the Circuit Court.

A JCC order “making an award or rejecting the claim” is called a “compensation order.” Fla. Stat. §440.25(4)(e). If an employer or carrier fails to pay benefits that are due “under any compensation order,” or if either fails to “comply with such order,” the Circuit court is vested with authority to enforce the terms of the compensation order. Standing to pursue such enforcement is statutorily vested in the “division or any beneficiary under such order.” Fla. Stat. §440.24(1). This statutory section specifically directs the process shall be by “Rule Nisi.”

Rule Nisi authority does not allow the Circuit Court to supplant the JCC as the finder of fact, or invest the court with the jurisdiction to determine entitlement to benefits. The Rule Nisi proceeding is not an opportunity to collaterally attack the JCC’s decisions. Review of the JCC’s decisions is appropriately sought only in the First District Court of Appeal. Once that appeal opportunity passes, and the order is final, the Circuit Court has “no authority in the Rule Nisi proceeding to do anything but order its enforcement.”<sup>15</sup> The “resolution of factual issues is beyond the limited Rule Nisi jurisdiction of the Circuit Court.

When considering a request for Rule Nisi relief, the Circuit Court is limited to a two prong inquiry: (1) whether there is a final order in full force and effect, and (2) whether there has been a default under that order. Again, the procedure is not to be used to determine the merits of the underlying compensation order or to resolve factual disputes between the parties.”<sup>16</sup> Similarly, if the compensation order is inherently “conditional,” then the burden in Circuit Court is upon the moving party to demonstrate that the condition precedent has been fulfilled, e.g. that the order is sufficiently “final.”<sup>17</sup> The cited authorities suggest that the party seeking enforcement may require rendition of both a JCC ruling regarding factual issues and then a Rule Nisi order to accomplish the enforcement.

Recognizing that Rule Nisi proceedings are focused on the enforcement of a final order, our Courts have recognized that “modification” available under Fla. Stat. §440.28 renders finality somewhat illusory in workers’ compensation. As such, modification might potentially be used by a carrier to forestall Rule Nisi enforcement. The filing of a motion for modification with the JCC does not change the finality of the compensation order, however “once the Judge of Industrial Claims files a modification order, the petition for modification has achieved a degree of legitimacy, and the original compensation order can no longer be considered final.”<sup>18</sup>

Prior to pursuing the Rule Nisi alternative, a party seeking to enforce a JCC’s final order should consider the spectrum of enforcement tools available through the JCC. If a matter is prosecuted or defended frivolously, the JCC has the authority to assess the “costs of the proceedings, including reasonable attorney’s fees” against the attorney responsible. A determination imposing this sanction must also be reported to the “appropriate grievance committee,” and such assessment cannot be recouped from the party represented. Fla. Stat. §440.32(2). If the standard of “frivolous” is not met, but the proceedings were determined to nonetheless have been “instituted or continued without reasonable ground,” then the JCC may assess costs against the party deemed culpable. This provision might be employed in seeking costs and/or fees associated with enforcement proceedings before a JCC.

The division of workers’ compensation (“DWC”) may report any employer or carrier failure to comply with either a compensation order or an order of the Circuit Court to the Department of Insurance (DOI). Upon

such a report, the DOI is obligated (“shall,” see endnote 4) to suspend the insurance carrier’s license “to do an insurance business in this state, until such carrier has complied with such order. Fla. Stat. §440.24(2). The DWC has the authority to suspend a self-insured employer’s authorization to self-insure in the event of similar failure or refusal by a self-insured employer. Fla. Stat. §440.24(3). These provisions may alone be sufficient to compel compliance with a compensation order if the non-complying party is an employer or carrier.

For other, non- “compensation order” orders, there are JCC enforcement tools applicable to the parties. The provisions of Fla. Stat. §440.24(1) through (3) apply to “compensation orders.” However, the provisions of Fla. Stat. §440.24(4) applies to “any order” rather than specifically to “compensation orders.” This statutory authority therefore allows the JCC to dismiss a claim, suspend payments due, or strike defenses.

The Rules of Workers’ Compensation Procedure contain specific authority for the imposition of further sanctions. See, Rule 60Q6.125. Pursuant to this authority, the failure to comply with either the procedural rules or an order of the JCC may subject the party to sanctions including “striking of claims, petitions, defenses, or pleadings; imposition of costs or attorney’s fees; or such other sanctions as the judge may deem appropriate.” Such sanctions may be sought by Motion, Rule 60Q6.125(4)(a), or may be initiated by issuance of an order to show cause, Rule 60Q6.125(4)(b).

Therefore, in an appropriate situation, the JCC’s statutory authority may be sufficient for the enforcement of a “compensation order.” When it is not, the added authority of the Division of Workers’ Compensation and Department of Insurance Regulation may be sufficient to force compliance. When these are not sufficient, the Rule Nisi proceeding in Circuit Court affords the party the process to reduce a compensation order to a civil judgment enforceable with the State’s full police power.

In situations of non-compliance by a party, the sanctions available to a JCC may likewise be sufficient. The award of attorney’s fees and/or costs as a sanction may alone be sufficient. The statutory authority to strike claims or defenses will likely be sufficient in all but the most difficult situations of party non-compliance.

Following these processes will minimize expense of enforcement, and capitalize on the underlying case-knowledge already in the hands of the assigned JCC. Furthermore, this process allows for correction of behavior in the spirit of the maxim that such “shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.” See, Rule 60Q6.125(4)(a). Wise practitioners will maximize their chances to prevail by seeking enforcement from the JCC first, and thereafter proceed to Circuit Court with a detailed “Certification Order.”

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<sup>1</sup> Rule Nisi is effectively an application for issuance of a summary order of enforcement. The dictionary definition is “A rule or order of court granted ex parte on the motion of one party, directing the other party to the action or proceeding to show cause why the rule should not be made absolute, such ex parte rule becoming absolute unless such cause is shown.” Black’s Law Dictionary, 944, Fifth Ed. 1979.

<sup>2</sup> Myers v. Hawkins, 362 So.2d 926 (Fla. 1978); Farrell v. Amica Mutual, 361 So.2d 408 (Fla. 1978).

<sup>3</sup> Millinger v. Broward County Mental Health & Risk Mgmt., 672 So.2d 24 (Fla. 1996); Pace v. Miami-Dade County Sch. Bd., 868 So.2d 1286, 1287 (Fla. 1st DCA 2004); Pruden v. Herbert Contrs., Inc., 988 So.2d 135 (Fla. 1st DCA 2008).

<sup>4</sup> The statutory use of “shall” in Fla. Stat. §440.33(1) connotes a mandatory construction. See, Jefferson v. Wayne Dalton Corp., 793 So.2d 1081 (Fla. 1st DCA 2001); S.R. v. State, 346 So.2d 1018 (Fla. 1977); White v. Means, 280 So.2d 20 (Fla. 1st DCA 1973); Steinbrecher v. Better Constr. Co., 587 So.2d 492 (Fla. 1<sup>st</sup> DCA 1991).

<sup>5</sup> The Office of the Judges of Compensation Claims is organized into 17 District Offices throughout Florida. The locations and designations of these Districts are published on the OJCC website, [www.fljcc.org](http://www.fljcc.org).

<sup>6</sup> See, Alvarez v. City of Plantation, 824 So.2d 339 (Fla. 4th DCA 2002); Sanders v. Cianfroga, Telfer, Reda, Faherty & Anderson, 889 So.2d 942 (Fla. 5th DCA 2004).

<sup>7</sup> Grant v. State, 464 So.2d 650 (Fla. 4<sup>th</sup> DCA 1985); Shook v. Alter, 729 So.2d 527 (Fla. 4<sup>th</sup> DCA 1985).

<sup>8</sup> Hope v. State, 449 So.2d 1315 (Fla. 2nd DCA 1984).

<sup>9</sup> Intl. Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827-28 (1994).

<sup>10</sup> Bowen v. Bowen, 471 So.2d 1274, 1277 (Fla. 1985). See also, Parisi v. Broward County, 769 So.2d 359, 364 (Fla. 2000).

<sup>11</sup> NLRB v. Cincinatti Bronze, Inc., 829 F.2d 585 (6th Cir. 1987).

<sup>12</sup> Picurro v. Picurro, 734 So.2d 527 (Fla. 4<sup>th</sup> DCA 1999).

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- <sup>13</sup> Curry v. Robbins, 744 So.2d 527 (Fla. 3<sup>rd</sup> DCA 1999).  
<sup>14</sup> Parsons v. Wennet, 625 So.2d 945 (Fla. 4<sup>th</sup> DCA 1993).  
<sup>15</sup> Covert v. Hall, 467 So.2d 372, 374 (Fla. 2<sup>nd</sup> DCA 1985) (citations omitted).  
<sup>16</sup> Sarakoff v. Broward County Sch. Bd., 736 So.2d 1232, 1235 (Fla. 4th DCA 1999); City of Hollywood v. Benoit, 1 So. 3d 1142 (Fla. 4<sup>th</sup> DCA 2009).  
<sup>17</sup> Maldonado v. Keller Metal Products, 203 So.2d 158, 160 (Fla. 1967).  
<sup>18</sup> Grant-Sholk Constr. Co. v. Moore, 282 So.2d 634, 636 (Fla. 1973).