IN THE SUPREME COURT OF FLORIDA

CASE NO.: 64,809

MARY ELLEN O'NEIL,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

BRIEF OF PETITIONER
Mary Ellen O'Neil

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TABLE OF CITATIONS

DESIGNATION OF PARTIES AND RECORD REFERENCES

The parties and references referred to are as follows:
Mary Ellen O'Neil as Petitioner or claimant.
Department of Transportation as Respondent or employer.
"R" for record of proceedings before the Deputy Commissioner.
"Appx." for Appendix of Petitioner.

STATEMENT OF THE CASE

Claimant was injured in an accident arising out of and in the course of her employment May 14, 1980. Claimant reached age 65 August 4, 1980 less than three months after her accident. (R 124, Appx. 38). Claimant reached maximum medical improvement March 18, 1981. (R 6, Appx. 3). No further benefits were provided to her.

Claim was made for permanent total disability benefits and in the alternative wage loss benefits. Claim was defended on the grounds claimant was not permanently totally disabled and that the statute precluded award of wage loss benefits to an individual 65 years of age.

By Order entered December 4, 1981, the Deputy Commissioner found claimant was not permanently totally disabled; that she would be due wage loss benefits except the applicable statute precluded award of said benefits to an individual 65 years of age and same accordingly could not be awarded.

From that Order, claimant sought review by the District Court of Appeal. By initial Order, entered without opinion, June 7, 1983, the District Court of Appeal affirmed the Deputy's denial of permanent total disability benefits and affirmed denial of wage

loss citing Sasso v. Ram Property Management, 413 So. 2d 204 (Fla. 1st DCA 1983)(presently scheduled for oral argument before this Court March 5, 1984).

Petition for Rehearing was filed and by Order entered December 29, 1983, the Court reached the unanswered question in Sasso and held the wage loss provision of the Florida workers' compensation law was not in violation of Federal Age Discrimination in Employment Act. However, the Court certified to this Court as being a question of great public importance:

> Does section 440.15 (3)(b) 3.d, Florida Statute (1979), violate the supremacy clause of the United States Constitution because it conflicts with the Federal Age Discrimination in Employment Act, 29 U.S.C. Section 621, et seq. (1976)?

From that Order affirming the determination of the Deputy Commissioner Petitioner seeks review by this Court.

STATEMENT OF THE FACTS

Claimant was 66 years of age at the time of hearing. She had completed grammar school and a few years of high school - was not a high school graduate. (R 18, 19, Appx. 6, 7).

Claimant had been employed by the employer herein for approximately eight years before her accident. (R 19, Appx. 7). Prior to that, she had helped her son in a laundrymat for approximately two years and before that ran machines and was a floor lady for nineteen years at Appex Products. (R 19, Appx. 7). That job at Appex involved her being on her feet all day long and performing work involving use of foot presses. (R 20, Appx. 8). Her job with the employer herein involved that of a toll collector, which pursuant to the regulations required her to be standing all

day long. (R 21, Appx. 9). She was directed by her manager not to sit. (R 21, Appx. 9).

Claimant was attended by Dr. Burgess, who operated on her left leg. (R 22, 23, Appx. 10, 11). She then came under the care of Dr. Hoffeld. (R 23, Appx. 11). Counsel for claimant offered into evidence medical reports of Dr. Burgess, claimant's initially authorized attending physician, which however, were objected to by counsel for the employer and accordingly, not accepted into evidence by the Deputy Commissioner. (R 8, 9, Appx. 4, 5).

The only medical testimony in the record is accordingly that of Dr. Hoffeld. He testified Petitioner had a significant problem with her left leg with regard to which surgery had previously been performed and she had a lumbar spondylosis, which was "significantly aggravated by her work-related injuries." (R 65, 66, Appx. 17, 18). It was his opinion, claimant, as a result of her compensable injury, had a 30% permanent impairment of the left leg and an additional 15% permanent impairment of the body due to the back injury. (R 65, 66, 67, Appx. 17, 18, 19). In connection with Petitioner limitations, he testified:

> this woman seems disabled from her usual work activities that is as working as a toll collector. She is definitely limited in regard to her back and knee from doing the prolonged standing required of this job. She is limited in regard to bending, lifting and any activities requiring significant ambulation. She certainly is unable to climb stairs. (R 106, Appx. 31).

Dr. Hoffeld further testified claimant is restricted from all walking and her overall endurance was very limited. (R 70, Appx. 22). In fact, he noted her job search and the walking in connection

therewith had caused her to be hospitalized for observation and possible further injury. (R 69, Appx. 21).

He noted, even in connection with sitting, she would have to have some kind of a seat that was more of a chair with a back support as opposed to a stool or unsupported sitting. (R 83, Appx. 23). Upon questioning by counsel for the employer as to the possibilities of employment considering her physical condition, the most favorable testimony to Respondents elicited was:

> I think that one might be able to imagine some part-time or half-day function in a sitting or sedentary position, which she might be able to perform on pretty much of a regular basis, but I don't know of any jobs that allow that, but that's up to you. (R 84, Appx. 24).

Dr. Hoffeld had prescribed pain medication regarding both claimant's back and knee problems. (R 89, Appx. 25). He indicated that he was considering further surgery to the knee. (R 89, Appx. 25). Petitioner was not quite at the point where he would recommend knee replacement. (R 90, Appx. 26).

Claimant had sought re-employment with the employer herein. However, the manager stated:

> Ms. Mary O'Neil, in my opinion, is unable to work at any position at this plaza due to her physical condition. (R 110, Appx. 32).

Claimant also sought employment at an employment agency who contacted a number of employers on her behalf. However, they stated that due to her physical limitations, they were unable to obtain employment for her. (R 111, Appx. 34). She also sought employment at her previous employer of nineteen years, Appex. They advised that due to her physical limitations, they had no work available for her. (R 112, Appx. 35). Claimant also sought employment at

Professional Drivers Agency. However, they advised the position with that firm would require walking up and down stairs and because of her physical limitations there was no employment available for her. (R 113, Appx. 36).

Claimant also sought employment at Gray Drugstores, Winn Dixie, a Sunoco gas station, Zayre Department Store, Pic-N-Pay Grocery Store, Favia Shoes, a pizza restaurant, Eckerd's Drug-store. (R 27, 28, Appx. 14, 15). She also sought the services of the rehabilitation nurse for the Division of Workers' Compen-sation, but the rehabilitation department was unable to be of any assistance to her. (R 28, 29, Appx. 15, 16).

Claimant had continued problems with her knee injury which continued to swell and which required continued injection. (R 23, Appx. 11). She had to walk with a cane. (R 23, 24, Appx. 11, 12). She also complained of difficulty just standing doing the dishes, could not walk upstairs, had severe pain in the back and leg for which she continued to take medication. (R 23, 24, 25, Appx. 11, 12, 13). Claimant finds it necessary to lie down frequently during the course of the day for several hours. (R 25, Appx. 13). Dr. Hoffeld testified her lying down during the course of the day to obtain relief was fully consistent with the nature of her injuries. (R 100, 101, Appx. 28, 29).

No rehabilitation of any nature whatsoever was afforded to claimant by Respondent employer/carrier nor was any evidence submitted as to any work of any nature whatsoever actually avail-able to this injured worker, who was precluded by statute from proceeding with any liability claim against the employer arising

out of this matter. Section 440.11 F.S.

POINTS PRESENTED

The District Court of Appeal certified a constitutional issue for consideration by this Court. However, the Court considering accepting jurisdiction in this matter, appropriately has jurisdiction to determine the entire case. In the event it is determined it was error to fail to adjudicate Petitioner as permanently totally disabled, then it will be unnecessary for the Court to reach the constitutional issues in this case. The points presented for consideration by this Court are accordingly as follows:

POINT I

IS THE FAILURE TO ADJUDICATE CLAIMANT PERMANENTLY TOTALLY DISABLED IN CONFLICT WITH PREVIOUS DECISIONS BY THIS COURT WHERE THE ONLY MEDICAL TESTIMONY WAS THAT CLAIMANT WAS TOTALLY DISABLED FROM EMPLOYMENT, CLAIMANT'S EMPLOYER HEREIN AND PREVIOUS EMPLOYERS OF 27 YEARS CONFIRMED BECAUSE OF HER PHYSICAL INJURIES THEY COULD NOT RE-EMPLOY HER, DIVISION REHABILITATION CONFIRMED THERE WAS NOTHING AVAILABLE, CLAIMANT SOUGHT UNSUCCESSFULLY EMPLOYMENT WITH OTHER EMPLOYERS AND NO EVIDENCE WAS PRESENTED AS TO ANY WORK OF ANY NATURE AVAILABLE TO CLAIMANT NOR WAS ANY REHABILITATION PROVIDED TO HER BY RESPONDENT EMPLOYER?

POINT II

IS SECTION 440.15 (3)(b) 3d, F.S. 1979 IN VIOLATION OF THE FLORIDA CONSTITUTION?

POINT III

DOES SECTION 440.15 (3)(b) 3d, F.S. 1979 VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT CONFLICTS WITH THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT?

ARGUMENT

POINT I

IS THE FAILURE TO ADJUDICATE CLAIMANT PERMANENTLY TOTALLY DISABLED IN CONFLICT WITH PREVIOUS DECISIONS BY THIS COURT WHERE THE ONLY MEDICAL TESTIMONY WAS THAT CLAIMANT WAS TOTALLY DISABLED FROM EMPLOYMENT, CLAIMANT'S EMPLOYER HEREIN AND PREVIOUS EMPLOYERS OF 27 YEARS CONFIRMED BECAUSE OF HER PHYSICAL INJURIES THEY COULD NOT RE-EMPLOY HER, DIVISION REHABILITATION CONFIRMED THERE WAS NOTHING AVAILABLE, CLAIMANT SOUGHT UNSUCCESSFULLY EMPLOYMENT WITH OTHER EMPLOYERS AND NO EVIDENCE WAS PRESENTED AS TO ANY WORK OF ANY NATURE AVAILABLE TO CLAIMANT NOR WAS ANY REHABILITATION PROVIDED TO HER BY RESPONDENT EMPLOYER?

Since the inception of the workers' compensation law, this Court has ruled on many occasions as to the proof necessary to establish permanent total disability. It has been established by this Court in numerous decisions that where an injured worker has established industrial unemployability, except in a light specially created position in order to defeat the claim for permanent total disability, the burden of proof is then on the employer/carrier to present evidence as to regular stable work available to the injured worker within his limitations. Absent establishment of said evidence, the injured worker is entitled to adjudication of permanent total disability. Kaplan v. Lowry Electric Co., 293 So. 2d 348 (Fla. 1974); Stanley v. Master Masonry

Construction, Inc., 287 So. 2d 67 (Fla. 1973); Richardson v. City of Tampa, 175 So. 2d 43 (Fla. 1965); Taylor v. Brennan Construction Co., 143 So. 2d 320 (Fla. 1962). This Court, in Taylor quoted with approval the following:

> ...an employee who is so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable labor market for them does not exist, may well be classified as totally disabled.

The Court, in the Taylor case specifically pointed out that the suggestion of possible employment does not satisfy the employer's burden. In this case, there was not even a suggestion as to any possible employment.

In Taylor, this Court rejected the Deputy's denial of permanent total benefits pointing out the testimony of a physician that he thought claimant could do certain type jobs such as a watchman, but would be limited and he "imagined" there would be jobs he could do was not competent evidence to support denial of said classification of benefits to the injured worker. So too, in Richardson, the denial thereof was reversed as a matter of law even where the employer had indicated there were various positions they could probably establish for claimant - that did not establish "the burden of the city to prove that a job claimant could perform was available." In Stanley, again the denial of permanent total benefits was reversed as a matter of law in that the employer therein, "did not present any testimony to show that some form of regular employment is within the reach of the claimant." In Kaplan, the Court stated:

> In this case, the claimant made an evidentiary showing that he was industrially unemployable, that is, that he has sustained injuries to such a nature so as to totally lose his wage earning capacity. The judge refused to accept this for some unknown reason and the employer did not come forward to make a showing that suitable employment was available within the scope of claimant's capacity or physical ability to perform such work.

This Court therein as well reversed the denial of permanent total holding claimant established his entitlement thereto as a matter of law.

The applicable statute in the pending matter was amended effective August 1, 1979 to provide:

> In such other cases, no compensation shall be payable under paragraph (a) if the employee is engaged in, or is physically cabable of engaging in, gainful employment, and the burden shall be upon the employee to establish that he is not able uninterruptedly to do even light work due to his physical limitations. Section 440.15 (1) (b) F.S. 1979.

It is suggested the applicable statute simply codifies the already existing law in connection with permanent total. It was, and admittedly is the burden of the claimant to show he is permanently totally disabled. What more can an injured worker possibly ever show to be entitled to permanent total disability than was shown in the pending case, which is as follows:

1) Claimant, at the time of hearing, was 66 years of age and lacked a high school education. (R 18, 19, Appx. 6, 7).

2) Claimant's impairments were 30% of the leg and 15% of the body. (R 65, 66, 67, Appx. 17, 18, 19).

3) Medical testimony reflects she is disabled from her usual work activities, even as a toll collector, and the most favorable evidence elicited by Respondent was that the physician thought, "that one might be able to imagine some part-time or half-day function in a sitting

or sedentary position, which she might be able to perform on pretty much of a regular basis, but I don't know of any jobs that allow that, but that's up to you." (R 84, Appx. 24, 106, Appx. 31).

4) Respondent employer of eight years stated claimant was unable to work in any position for them due to her physical condition. (R 110, Appx. 32).

5) Claimant's previous employer of nineteen years stated there was no work available to her because of her physical limitations. (R 112, Appx. 35).

6) Claimant sought the services of an employment agency who contacted a number of employers on her behalf, but because of her physical limitations they were unable to obtain employment for her. (R 111, Appx. 34).

7) The division rehabilitation department was unable to assist her with her physical limitations in obtaining any employment. (R 28, 29, Appx. 15, 16).

8) Claimant sought the services of various employers on her own without success. (R 27, 28, Appx. 14, 15). In fact, just the walking in connection with that job search, according to her physician, resulted in the need for hospitalization because of aggravation of her injury from walking. (R 69, Appx. 21).

9) There was no evidence at all presented of any work available for this injured worker or even the suggestion of any possibilities.

What more could the claimant possibly present? Petitioner knows not. It is suggested whatever is viewed as the additional requirement for proof by claimant under the above quoted statute must be viewed as being satisfied by the above proof presented and, if not, then the permanent total section is simply beyond the reach of any 65 year old worker, who in addition is precluded under the applicable statute from even obtaining any wage loss benefits. This Court affirmed the constitutionality of the new workers' compensation law precluding the injured worker from a common law suit against the employer on the premise that the benefits available still satisfy a reasonable quid pro quo. Acton v. Fort Lauderdale Hospital,

440 So. 2d 1282 (Fla. 1983). One category of benefits was permanent total for which not withstanding the above noted proof, claimant has heretofore been held not to qualify. She also does not qualify at all for wage loss benefits notwithstanding the Deputy's concession as to significant destruction of earning capacity (unlike Acton, who was back earning the same wages) simply because of her age. What then, does she or any other 65 year old worker receive in return for being required to give up common law action against the employer for her 30% impairment to the leg, additional 15% impairment to the body and destruction of earning capacity? Apparently nothing.

It is suggested it is incumbent upon the Court to interpret the statute in a fashion to uphold its constitutionality. If the significant underpinning of the workers' compensation law, wage loss benefits, have per se been denied to the injured worker by the legislature as in this case, then at least the law must be interpreted to allow to the injured worker a reasonable opportunity to obtain permanent total benefits. If it was intended as it expressly was by the legislature that the 65 year old injured worker does not get wage loss benefits and the permanent total section is interpreted so stringently as to be beyond reach, then it is suggested there being nothing in return the Act cannot be viewed as constitutional as applied to such an individual.

It was intended the workers' compensation insurance carrier assist the injured worker with rehabilitation with inducement therefore to avoid the continued payment of wage loss benefits. See Regency Inn v. Johnson, 422 So. 2d 870 (Fla. 1st DCA 1982).

However, no rehabilitation was afforded the injured worker herein nor need the carrier bother therewith since they are exculpated from providing her any benefits and hence what need to spend any money on rehabilitation. So too, with medical regarding the 65 year old worker. That will be covered by Medicare, it is too expensive and unrewarding to try to get the employer/carrier to even provide medical benefits. Greynolds Park Manor v. George, 423 So. 2d 485 (Fla. 1st DCA 1982)(wherein although ultimately holding the employer/carrier was obligated for medical bills they acknowledged were due, it is represented to this Court that as a result of lack of any meaningful enforcement mechanism the reimbursement has still not been made). Further, no matter how disabled may be the worker, when compensation benefits need not be provided, the statute of limitations regarding provision of medical which otherwise would be open during the payment of compensation very quickly closes out. Thus, in the pending case, claimant O'Neil, who suffered a serious injury with her employer, three months thereafter reached age 65 and has not had any earnings since said employment in return for being precluded from suing the employer gets (1) no permanent total compensation, (2) no wage loss benefits, (3) no rehabilitation, (4) no medical - nothing.

The Deputy Commissioner in connection with the permanent total aspect stated in his Order, "there is no medical evidence of the claimant's inability to return to work." Such a finding is simply unsupported in view of the only medical evidence in the record, which has been set forth above. The Deputy then discusses the job search of claimant and appears to totally disregard it

because it was suggested by another. (R 127, Appx. 41). There is simply no authority in the workers' compensation law for such a determination. See Flesche v. Interstate Warehouse, 411 So. 2d 919 (Fla. 1982) wherein benefits were initially denied for lack of any job search and thereafter undertaken because of said denial. In fact, claimant undertook a job search which was such as to cause her to be hospitalized because of the walking involved in connection therewith, which was confirmed by her attending physician. (R 69, Appx. 21). The extent of the job search is dependent upon the nature of the injuries. Sizemore v. Canaveral Port Authority, 332 So. 2d 23 (Fla. 1976). Where a job search has been conducted and it has been confirmed it was to the extent to in fact cause claimant to be hospitalized because of aggravation to her problem because thereof can it really be said under any circumstances the job search is not satisfactory considering claimant's physical limitations? We think not.

It is submitted the decision herein denying claimant permanent total disability benefits directly conflicts with this Court's above noted decisions; that if this injured worker with the quality of proof established and the lack of any contrary evidence as to any work available to her does not qualify for permanent total disability benefits and does not by legislative dictate qualify for wage loss benefits, then she and other similarly situated 65 year old workers get nothing in return for giving up their common law right to sue the employer and the workers' compensation law, as applied to said individuals, must be viewed as unconstitutional. It is submitted this Court should attempt to interpret the law to be constitutional which compels the determina-

tion that this injured worker should be provided permanent total disability benefits.

POINT II

IS SECTION 440.15 (3) (b) 3d, F.S. 1979 IN VIOLATION OF THE FLORIDA CONSTITUTION?

The issue herein is presently pending for determination before this Court in the case of Sasso v. Ram Property Management, 431 So. 2d 204 (Fla. 1st DCA 1983), scheduled for oral argument by this Court March 5, 1984.

The central underpinning for the workers' compensation law as an allegedly fair alternative is at least the opportunity to obtain wage loss benefits where there has been an impairment of earnings resulting from injuries sustained in an on the job injury. See Carr v. Central Florida Aluminum Products, Inc., 402 So. 2d 565 (Fla. 1st DCA 1981). However, the challenged statute herein simply blanketly states the 65 year old worker cannot get any wage loss benefits and does not even attempt to hinge that at least on obtaining social security benefits.

In Acton v. Fort Lauderdale Hospital, 440 So. 2d 1282 (Fla. 1983), this Court upheld the new workers' compensation wage loss scheme as not being in violation of access to the Courts because,

> the new system offers greater benefits to injured workers who still suffer a wage loss after reaching maximum medical recovery, Supra P. 1284.

In that case, claimant Acton, did not qualify therefore because he returned to work earning greater monthly wages than at the time of his accident. However, not so in the pending matter, where the Deputy although denying permanent total benefits recognized the significant destruction of earning capacity to this injured worker

but, was precluded from any wage loss benefits simply because of her age. She and other 65 year old workers injured on the job are viewed as simply outlaws. The limitation cannot be viewed simply as a "cap", but a complete bar to the 65 year old injured worker unlike Acton, who at least might be eligible for some wage loss when and if his earning were affected.

It is established that the traditional right of action in tort may not be eliminated by statute without provision of a reasonable alternative. Kluger v. White, 281 So. 2d 1 (Fla. 1973); Sunspan Engineering & Construction Co. v. Spring Lock Scaffolding Co., 310 So. 2d 4 (Fla. 1975); Overland Construction Co., Inc. v. Simons, 369 So. 2d 572 (Fla. 1979). In Kluger, this Court noted the workers' compensation law, as it then existed, abolished the right to sue one's employer in tort:

> but provided adequate, sufficient and even preferable safeguard for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury.

It is established that where a part of a statute is unconstitutional, such as the exception herein challenged, a construction which will uphold the remaining portion is favored. See Snively Groves v. Mayo, 135 Fla. 300, 184 So. 839 (Fla. 1938).

The District Court, in the Sasso opinion, held there was no denial of access to the Courts in that the 65 year old provision is just a "limitation" to a claimant's entitlement to wage loss benefits similar to limitation as to the number of weeks, statute of limitations and such.

However, the foregoing limitations presuppose the opportunity to obtain some benefits with a then limitation thereof whereas in

the pending matter, the 65 year old worker is totally barred from any wage loss benefits compensating her to any extent for loss of earning capacity. If anything such as one dollar of benefits suffices to satisfy the access to the Courts Doctrine, then nothing more need be said in connection with this aspect except that constitutional doctrine is obviously rendered meaningless by such an interpretation and if so, an improper interpretation. If on the contrary, there must be some reasonable quid pro quo in return for abolishing a common law right then it is obvious, at least as applied to the 65 year old worker, either denial of these benefits simply because of age must be held unconstitutional or the individual must be permitted to retain the right to sue the employer.

The Court in Sasso applies the "some reasonable basis" standard in determining the propriety of this admittedly discriminatory legislation. In initially determining that, the Court discards the contended purpose of double-dipping as being a rational proper basis supportive of the legislation. Sasso v. Ram Property Management, Supra P. 218, 219. The Court however, then seeks to uphold the legitimacy of this obviously discriminatory legislation on the following basis:

1) Reducing benefits because of decline in the older worker's productivity.

2) Reducing benefits as a legitimate legislative purpose to get older workers out of the work force apparently by letting them know if they get hurt on the job they cannot sue their employer and will get basically nothing in return.

3) Reducing costs simply at the expense of the 65 year old worker. Sasso v. Ram Property Management, Supra P. 219, 220.

The Court says the foregoing are plausible reasons satisfying the some rational basis standard and inquiry accordingly is at an end.

The reasoning by the Court is to say the least frightening. First, the contention as to alleged reduced productivity by the elderly worker is without any foundation and fact. EEOC v. Wyoming, 75 L. ED 2d 18 (1983). Next, there is no rational reduction based upon age such as the provision of a lesser amount with an increasingly lesser amount as the individual ages, but simply total blanket denial to the 65 year old worker. As to any legitimacy to a purpose of inducing the worker as he gets older to leave the work force because he knows if he gets injured there will be no compensation little comment need be made. First, there is nothing supportive of any such conjured intent by the legislature. Further, again the provision does not provide for any progressive decrease of benefits with increased age, but simply a blanket denial of benefits to the 65 year old worker. Contrary to the conclusion of the District Court, it is suggested the legislature could hardly have rationally decided this type provision in this manner might have fostered greater opportunity for younger workers by creating an incentive to retire through not decreased disability coverage, but blanket denial of coverage. It is inconcevable that the legislature even might have intended that it is desirous that all 65 year old workers quit a reasonable time before age 65 because at age 65 they will be viewed as outlaws unable to obtain damages against a negligent employer and unable to obtain workers' compensation. Before that being viewed as a "rational" purpose of the legislature, it is suggested at the least some expression of such

a foreign concept is necessary.

Regarding the objective to reduce costs of premiums, although that may be a legitimate purpose that cannot provide a basis for upholding discriminatory legislation placing the sole burden thereof on the 65 year old worker. The Court, in discussing this aspect, notes that allegedly the aged worker is more prone to on the job injury. However, again it is noted there is not a general decrease in benefits due to the aging process to account therefore, but simply a denial of all benefits to the 65 year old injured worker.

It is suggested this challenged provision is in violation of Florida constitutional provisions regarding access to the Courts, equal protection and due process and that denial of wage loss benefits to the 65 year old worker should be held unconstitutional.

POINT III

DOES SECTION 440.15 (3)(b) 3d, F.S. 1979 VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT CONFLICTS WITH THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT?

It is noted that the rationalization by the Court in Sasso upholding as constitutional under Florida law the challenged provision flies in the face of the exact purpose for adopting the federal legislation as expressed in the most recent opinion dealing therewith. EEOC v. Wyoming, 75 LED 2d 18 (1983).

JUSTIFICATION IN SASSO FOR CONSTITUTIONALITY UNDER FLORIDA LAW	PURPOSE OF ADOPTING FEDERAL LEGISLATION
1) Old age and corresponding decrease in productivity as justification for discrimination in providing lesser benefits.	1) "The available empirical evidence demonstrated the arbitrary age lines were, in fact, generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers."
2) Attempt to offer increased job opportunities to young workers entering the labor force by creating incentives to older workers to retire by letting them know if they get hurt they will get no benefits.	2) Arbitrary age discrimination was profoundly harmful in at least two ways. First, to deprive the national economy of the productive labor of millions of individuals and impose on the governmental treasury substantially increased costs in unemployment insurance and federal social security benefits. Second, it inflicted on individual workers, the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations.
3) Reduce the premium cost by giving older workers lesser benefits which is legitimate, "since it is well recognized that the aged are more prone to on-the-job injury..."	

The federal legislation was passed by its own stated purpose to reject, as a legitimate basis for discrimination, alleged decrease in productivity. So too, the federal legislation reject as a legitimate purpose any desireability to get rid of older workers to make room for younger ones, which policy the Federal legislation finds harmful both to individuals and economically. As to the third reason regarding reduction of premium costs by giving older workers nothing because they are more prone to on-the-job injury, those statistics discussed in a dissenting opinion in the Wyoming case were considered by Congress and as well rejected as any kind of legitimate basis for discriminating against workers between the ages of 40-70. Whether,

in fact, there is any decrease in productivity or whether older workers are more prone to on-the-job injury, Congress recognized a serious problem occurring in industry regarding older workers and found they should be protected from this kind of reasoning. Initially, the protected class was between the ages of 40-65 and pursuant to amendment in 1978, the age limit was raised to 70.

Whatever the desire of employers, including the state, to make room for younger workers, to dispense with allegedly less productive older workers or dispense with older workers because they are more prone to injury, Congress specifically decided and declared such a basis for discrimination no longer permissible in view of other goals:

> It is therefore the purpose of this (act), to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. §2,29 USC section 621.

It is well established that the terms of the workers' compensation act and benefits thereof are part of the employment contract. Chamberlain v. Florida Power Corporation, 144 Fla. 719, 198 So. 486 (1940); Florida Forrest and Park Service v. Strickland, 154 Fla. 472, 18 So. 2d 251 (1944); Stansell v. Marlin, 14 So. 2d 892 (Fla. 1943).

The Court, in the opinion herein, from which review is sought, recognizes that to be the case and further recognizes the prohibitions also apply to the state as an "employer." (Appx. 2). However, the lower Court opinion then says:

> ...Congress intended the prohibitions of that part (employer practices) to reach only those matters over which employers have control.

In other words, it is acknowledged the state cannot discriminate, the employer cannot discriminate, but allegedly the state can simply pass legislation applying to both themselves and other employers and when so legislated in that fashion, federal legislation can be rendered nugatory. The Court cites no authorities in support of such a proposition, which is completely foreign to the supremacy clause.

It is suggested the lower Court appears to confuse the question as to the employer adherence to the Florida law with the consitutional question as to the right of the state to pass discriminatory legislation in violation of federal law. Admittedly, employers have no direct control over the provisions of the workers' compensation law. However, the terms and conditions thereof are without challenge a part of the employment contract. The terms and conditions thereof, the alleged great benefits of which have been noted by this Court (Acton v. Fort Lauderdale Hospital, 440 So. 2d 1282 (Fla. 1983) are admittedly discriminatory and directly contrary to the purposes of the federal legislation.

Can said federal legislation simply be sidestepped by the states by passing contrary legislation under their view of their police power?

The Wyoming case involved a far more legitimate exercise than the reasoning advanced by the District Court in Sasso allegedly supportive of Florida's discriminatory legislation. Wyoming legislature conditioned further employment of fish and game wardens

upon reaching age 55 on approval by their employer for the purpose of being sure as to their physical preparedness and possibly allegedly because of affect on state finances. Nevertheless, the Supreme Court held the federal law paramount; the states bound thereby; and the state legislation unconstitutional.

It is established the purpose of the federal legislation being remedial and humanitarian, it is to be construed liberally to achieve its purposes of protecting older employees from discrimination. Moses v. Falstaff Brewing Corp., 525 F. 2d 92 (1975); Sarton v. City of Columbus Utilities Commission, 421 F. Supp. 393 AFFD. 573 F. 2d 84.

The lower Court attempts to analogize workers' compensation benefits for which the employer is responsible in lieu of the individual's common law rights against the employer to other type government benefits stating:

> We see little distinction, for purposes of the ADEA, between governmental enactments which provide for benefits to be paid by the government, and governmental enactments which provide for benefits to be paid by others. (Appx. 2).

There, of course, is no question these are employer provided benefits and that they are a significant part of the terms, conditions and privileges of the employment contract. They are hardly gratuitous governmental benefits, but provided in lieu of the individual's right to pursue a common law action for negligence against the employer for which the employer is immunized when they comply with the workers' compensation law. For some period of time after initial adoption of the workers' compensation law, both the

employer and employee could elect to reject said coverage with the employee then retaining his common law rights against the employer. Even now, an employer may elect to "cover" under these terms and conditions employees otherwise not covered and thereby obtain the beneficial immunity provisions. Section 440.04 F.S. 1979. So too, may certain employees reject coverage thereunder and retain their common law rights. Section 440.05 F.S. 1979. Where however operative the benefits are very much a part of the terms, conditions and privileges of employment pursuant to which (1) the employer is immunized from suit, (2) the employer is obligated to provide particular bneefits, (3) the employee is relegated to those benefits - and there is admitted discrimination in providing said benefits to the 65 year old worker. An employer admittedly cannot discriminate regarding promotion opportunities, leave policy, seniority in order to get rid of the older worker - can they do so via discriminatory legislation saying the 65 year old worker will get nothing for an on the job injury, nevertheless still cannot sue for common law negligence and accordingly had best leave the work force as he approaches that age? Such an analysis flies in the face of the specifically expressed congressional intent in ADEA which was to protect the 65 year old worker from such discriminatory terms and conditions of employment.

The lower Court takes the position the legislature can circumvent federal legislation by passing contrary enabling legislation, which then being a statutory law, allegedly falls without the intent of Congress in passing ADEA. No authority for such a proposition is cited and such a proposition appears directly

contrary to the Wyoming decision. If such were the case, then the legislature apparently could also affect other terms and conditions of employment such as promotion, leave policy, seniority, the employer would have to comply therewith notwithstanding such legislation flies in the face of contrary federal legislation.

The lower Court did not reach other aspects such as the following exception:

> ...where age is a bonified occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. 29 USC §623 (F.) 1.

There is no contention the occupational qualification portion of that section is in any way applicable. Regarding the latter portion of the exception, the differentiation herein is by its terms based on nothing other than age. The challenged statutory provision simply discriminates against the individual 65 years of age and nothing more. No other factors are delineated. In Brown v. Goodyear Tire & Rubber Co., 3 Kan. App. 2d 648, 599 P. 2d 1031 (1979), Aff'd., 227 Kan. 645, 608 P 2d 1356 (1980), appeal dismissed 66 Led. 2d 142, Reh. Denied 66 Led. 2d 614 (1980) the Court dealt with a statute that was correllated with other benefits and the purpose was to prevent duplication - double dipping. The Court therein held under the circumstances that provision fell within the exception with the differentiation based on reasonable factors other than age.

In the pending matter, it is first noted there is no such similar statutory language - no correllation with even receipt of social security benefits, but simply a blanket denial. Further,

the lower Court in Sasso already rejected the purported double dipping.

It is accordingly submitted there is nothing in this exception which would be applicable.

The District Court, in requesting the parties to address this matter, proposed a third issue for consideration which however has properly not even been commented upon by the Court in their opinion. That issue, as initially posed, was:

> Whether Florida's workers' compensation law can be considered a bonified employee benefit plan under 29 USC section 623 (F)(2), which is not a subterfuge to evade the purposes of the Age Discrimination in Employment Act.

Left out by the Court in posing the issue was a significant part of the statutory section. The legislation discusses a bonified employee benefit plan and then described what is meant by it, "such as a retirement, pension or insurance plan."

It is obvious from reading the applicable statutory language in its entirity that the Florida workers' compensation scheme hardly falls within that section. The Florida workers' compensation scheme is not a retirement scheme, a pension scheme or insurance plan as contemplated by that section. Although it involves insurance, the nature of insurance plan contemplated is qualified by the preceeding language discussing retirment and pension plans.

In fact, the very challenge herein is that the Florida scheme gives the 65 year old worker absolutely nothing - just because the worker is 65 years of age. Marshall v. Hawaiian Del. Co., 575 F. 2d 763 (9th Cir. 1978) discusses the type of program intended by Congress as an exception to the federal legislation discussed

herein. The bonified employee benefit plan contemplated is one where there is an established retirement, pension or insurance plan that provides something reasonable to the retired individual. Where such a plan is applicable, and an individual governed thereby, then the involuntary retirement of said individual, who then gets the alternative benefits, was excepted from this legislation.

The Florida workers' compensation scheme, which by its terms precludes the 65 year old worker from anything, hardly falls within that exception. Further, there is no case law that would support as "bonified" a benefit plan that simply provides the 65 year old worker gets nothing.

CONCLUSION

For the foregoing reasons, it is submitted it should be unnecessary for this Court to reach the constitutional issues in this case in that claimant has established entitlement to adjudication of permanent total disability benefits as a matter of law. She showed without rebuttal she was 66 years of age, had a 30% impairment to the leg, additional 15% impairment to the body because of her back injury, the most favorable medical testimony to Respondent was the attending physician might "imagine" sedentary, part-time work a few hours a day, but knew of nothing within her capability, Respondent employer herein who was a rather large employer terminated their employee of eight years and advised they had nothing for her considering her physical injuries, claimant's previous employer of nineteen years could not re-employ her with her physical injuries, employment agencies were unable to assist her because of her physical injuries, state rehabilitation

was unable to obtain any employment for her, claimant's own job search was unsuccessful and the employer offered absolutely no assistance - not even the suggestion of any possibilities.

The denial of permanent total disability benefits to this individual is in direct conflict with numerous decisions by this Court. This or any other claimant can show no more to establish their entitlement to permanent total disability. The legislature precluded her from obtaining the alleged key underpinning of the new workers' compensation law - wage loss bneefits and if to be constitutional at all, she must then have the opportunity to at least obtain permanent total benefits or she simply gives up her common law rights for zero in return.

In the alternative, if this Court does not concur with Petitioner's contention as to entitlement of Petitioner to permanent total benefits, then it is necessary for this Court to reach the constitutional issues presented. It is suggested the Florida wage loss scheme blanketly denying benefits to the 65 year old worker is in violation of the Florida Constitution. It is further submitted that the legislation is in any event unconstitutional under the supremacy clause as being in violation of Federal ADEA legislation.

Respectfully sumitted,

BY: _____
L. BARRY KEYFETZ, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above foregoing was mailed this 25 day of February, 1984 to: DOUGLAS J. GLAID, ESQUIRE, 510 S.E. 17th Street, Fort Lauderdale, Florida 33316.

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