IN THE SUPREME COURT OF FLORIDA

LUIS ACOSTA,	)	
Petitioner,	)	
vs.	)	CASE NO: 65,214
KRACO, INC., et al.,	)	DCA Case No: AT-7
Respondents.	)	
	)	

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

LUIS ACOSTA was injured in a compensable, industrial accident, while working for KRACO, INC., on April 16, 1980. A claim was filed on July 3, 1980. A hearing was held before the Honorable Margarita Esquiroz on November 5, 1981. Appellant specifically challenged the constitutionality of Florida Statute 440.15(3)(b) 3.d., 1979.

The parties stipulated that temporary total disability benefits had been paid from April 16, 1980 through and including June 24, 1980 and that Appellant's average weekly wage was $110.23, entitling him to a weekly compensation rate of $73.49.

Deputy Commissioner Margarita Esquiroz entered an Order on December 14, 1981 awarding Appellant additional temporary total disability benefits from June 25, 1980 through September 3, 1980, along with statutory interest and penalties. Appellant's claim for wage loss benefits was denied solely due to Appellant's age, i.e. 68, pursuant to Florida Statute 440.15(3)(b) 3.d., 1979.

Appellant filed his Notice of Appeal, challenging the constitutionality of Section 440.15(3)(b) 3.d., Florida Statutes, 1979. The First District Court of Appeal, after hearing oral argument, entered an opinion on February 3, 1983, finding that Appellant did not have standing to challenge the constitutionality of Florida Statute 440.15(3)(b) 3.d., 1979. Due to certain factual deficiencies within the Deputy Commissioner's Order, the case was reversed and remanded for further proceedings consistent with the Court's opinion.

Deputy Commissioner Margarita Esquiroz entered an additional Order dated May 6, 1983, in accordance with the First District Court of Appeal's opinion. This Order again denied Appellant's claim for wage loss benefits solely due to Appellant's age, pursuant to Florida

Statute 440.15(3)(b) 3.d., 1979.

Appellant timely filed his Notice of Appeal and formally moved that judicial notice of the Briefs filed in the first Appeal, i.e. Case No: AI-429, should be taken by the First District Court of Appeal in considering the current Appeal, i.e. Case No: AT-7.

Oral Argument was granted and on April 3, 1984, the First District Court of Appeal entered its Order finding Florida Statute 440.15(3)(b) 3.d., 1979, constitutional. The First District Court of Appeal certified the following question to the Supreme Court as one of great public importance: DOES SECTION 440.15(3)(b)3.d., FLORIDA STATUTES, 1979, VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT CONFLICTS WITH 42 U.S.C. SECTION 403 (f)(3)(1983)?

Appellant timely and properly petitioned this Honorable Court and was granted an opportunity to submit Briefs on the merits.

The record on appeal will be referred to by using the letters "TR".

STATEMENT OF THE FACTS

LUIS ACOSTA, now 70, was 67 when the accident occurred and 68 when wage loss was denied (TR8). Mr. Acosta received an 11th grade education in Cuba. He is fluent in Spanish, but does not understand, read nor speak English (TR8). He was receiving Social Security of approximately $442.00, a month at the time of his accident with KRACO, INC., i.e. April 16, 1980. He had always worked since arriving in the United States on November 3, 1956, primarily as a baker (TR9). He has worked at The Embers, for nine years, and Royal Castle for seven years (TR10). While working for KRACO, INC., Appellant did clean-up work; swept, welded metal sheets, assisted in carrying metal sheets weighing approximately 300 pounds and carried blocks weighing approximately 70 to 80 pounds by himself (TR10). He had no problems lifting these metal sheets prior to his accident (TR10).

Appellant's accident occurred when he fell in an open hole injuring his knee, back and right arm (TR11). His salary was $110.23. Initially, Appellant worked full time, but subsequently requested part time work due to the earning limitation placed upon himself by Social Security (TR12).

Mr. Acosta saw Dr. Hernandez immediately after his accident and received treatment including ultrasound and a prescription for pain medication (TR13).

Appellant's compensation checks stopped in June of 1980 although Appellant continued to see his doctor. Mr. Acosta felt that he was unable to work due to an inability to do any lifting (TR13,14). Sweeping also caused back pain (TR14). Upon being released to work by Dr. Hernandez, Appellant conducted a job search. He looked for part time and/or light work (TR14). Appellant searched for work as a

baker's helper (approximately 15 bakeries)(TR16).

Appellant testified that he is unable to lift heavy items, and has problems bending over (TR16). He feels he is unable to work as a baker due to the heavy lifting involved (50 - 100 pounds) (TR16). Mr. Acosta felt he was able to return to light work approximately 2½ months prior to the November 5, 1981 Hearing, and is able to perform certain work at the present time (TR18). Although bakery work was available for him, he was unable to accept the job due to the job requiring him to pick up big pots, place them in the oven, and to pick up dough weighing approximately 50 pounds and throw it over on the table (TR17). Appellant's problem is in his back.

Dr. Pedro Hernandez testified that he first saw Appellant on April 17, 1980 and diagnosed a cervical and lumbar spine strain, trauma to the right leg. He initiated treatment in the form of hot packs, ultrasound and cervical traction (TR31). Dr. Hernandez felt Appellant had reached the plateau of maximum medical improvement on September 4, 1980, and assigned 6% permanent partial disability rating based on the AMA Guides (TR33). As of September 4, 1980, Dr. Hernandez still found muscle spasms in Appellant's lumbar region (TR33). Dr. Hernandez recommended that Appellant find a job which would not require him to stay for a long time in the same position. The doctor testified that Appellant has to move all of the time, sometimes sitting and sometimes walking. Appellant has to have light work. He cannot lift heavy objects from the floor. Said restrictions were due to the accident of April 16, 1980 (TR34). Dr. Hernandez stated that he would advise any 69 year old man to avoid heavy lifting (TR45).

Dr. Neal assigned a 5% permanent disability to Appellant.

ARGUMENT I

DOES SECTION 440.15(3)(b)3.d, FLORIDA STATUTES, 1979, VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT CONFLICTS WITH 42 U.S.C. SECTION 403(f)(3) AND 403(f)(1)(8), 1983?

The Supremacy Clause of the United States Constitution, i.e. Article 6, Clause 2 states that:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof.....shall be the Supreme Law of the Land...."

Although state law exercising State's traditional police powers, is not pre-empted on account of interference with Federal Law or policy unless that was the clear and manifest purpose of Congress, Courts are obligated under the Supremacy Clause to strike down state laws which stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Raskin vs. Moran, 684 F.2d 472 (1982). The undersigned believes that Congress did not intend to pre-empt the State of Florida from exercising its State power in the field of workers' compensation. Accordingly, in order to determine the applicability of the Supremacy Clause in this matter we have to evaluate and compare the purpose contained in Florida Statute 440.15(3)(b)3.d.,1979 with the purpose effectuated by Congress under 42 U.S.C. Section 403(f)(3) and 403(f)(1)(8) to determine if Florida Statute 440.15(3)(b)3.d. stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.

Chapter 42, U.S.C. Section 403 covers reduction of insurance benefits payable under Section 402. 42 U.S.C. Section 403(f)(3) states:

> "For purposes of paragraph (1) and subsection (h) of this section, an individual's excess earnings for taxable years shall be 50 per centum of his earnings for such year in excess of the product of the applicable exempt amount as determined under paragraph (8), multiplied by the number of months in such year, except that, in determining an individual's excess earnings for the taxable year for which he attains age 70, there shall be excluded any earnings of such individual for the month in which he attains such age and any subsequent month (with any net earnings or net loss from self-employment in such year being prorated in an equitable manner under regulations of the secretary. The excess earnings as derived under the preceding sentence, if not a multiple of one dollar, shall be reduced to the next lower multiple of one dollar. "

Mr. Acosta was 67 when the accident occurred and is currently 70 years old. He was and is receiving social security benefits. He is a member of the class protected under 42 U.S.C. Section 403. Basically, 42 U.S.C. Section 403 allows an individual collecting social security benefits under Section 402 to supplement income received from social security with additional earnings.

Subsesction 403(f)(3) of the Social Security Act provides that in applying what is commonly known as the "Retirement Test" to reduce a Social Security recipient's benefits on account of specified earned income, any income earned after the recipient's 70th birthday will not be used to reduce benefits. The effect of this provision is that social security recipients will not suffer offset of their earnings against their benefits after they reach the age of 70.

Persons receiving benefits under 42 U.S.C. Section 402 who have not attained the age of 70 are also able to supplement their social security benefits pursuant to Section 403(f)(1)(8); the Retirement Test. Basically, this section allows individuals to receive social security retirement benefits and supplement their income as follows:

1979 - up to $4,500
1980 - up to $5,000
1981 - up to $5,500
1982 - up to $6,000
1983 - up to $6,600
1984 - up to $6,960

The amount of supplemental income allowed to be earned by an elderly person prior to reduction in social security has steadily increased. Once a recipient of social security retirement benefits exceeds the yearly amount of supplemental earnings, his social security benefits are reduced by a $1 for every $2 earned in supplemental income. The Federal policy evident from Section 403(f)(1)(8) is that persons over age 65 but not yet 70 should receive their full social security benefits regardless of the source or amount of other income earned as long as said income is not in excess of the amount allowable under the section. After exceeding the allowable amount said benefits should be reduced pursuant to the formula of the "Retirement Test". Congress wanted persons who were able to work past normal retirement age to be able to receive some return on their social security "investment". The aforementioned purpose of Congress can be further seen by the elimination of the "Retirement Test" as it applies to persons over age 70.

It has been held in Cannon vs. Moran, 331 NW2d 369, Wisconsin, 1983, that a statute which effectively deprives the recipient of Federal benefits by reducing Plaintiff's salaries in an amount precisely equal to the Federal benefits is in conflict with Section 403(f)(3). The Court in Cannon interpreted a Wisconsin statute which reduced Judges' salaries by the amount of pension benefits received as unconstitutional due to said statute being in conflict with the

Supremacy Clause. The Court noted that the Federal policy contained in the statutory section was to allow persons over the age 70 their full social security benefits. The Wisconsin salary deductions scheme conflicted with this intent. The Court specifically stated:

> Surely the protections of the Federal Statute are thwarted when the Federal Government puts money in the Plaintiff's left pocket while Wisconsin takes a precisely equal amount of money from the right pocket solely because the money was received through the Social Security Program."

The Court in Cannon refers to Raskin vs. Moran, supra, where the Court stated that 42 USC Section 403(f)(3) together with pertinent statements of legislative history indicate:

> "That Congress eliminated the "Retirement Test" recognizing that some persons were able to work past normal retirement age, but otherwise received no return on their social security "investment". The Federal policy evident from this Statute is that persons over age 70 should receive the full Federal benefits regardless of the source or amount of other income earned by the recipient. Although the SSA does not expressly preclude the application of state law which might incidently affect some aspect of social security, we have no doubt that a state statute which effectively denies benefits conferred by Section 403 would be suspect under the Supremacy Clause."

After analysis, the Wisconsin statute was found to be invalid since, although it did not directly prevent or impede Plaintiff's receipt of social security benefits, it effectively deprived the recipient of those Federal benefits by reducing Plaintiff's salary in an amount equal to the Federal benefits.

The Federal purpose contained within Section 403 of the Social Security Act to allow a recipient of Social Security benefits between the ages of 65 and 70 to receive benefits so long as earned income does not rise above the maximum level and to allow receipt of partial benefits after the maximum level, along with allowing those 70

or older to receive the full amount of benefits without regard to income earned, is thwarted by and is in direct conflict with Florida Statute 440.15(3)(b)3.d., 1979.

Section 440.15(3)(b) 3.d., Florida Statutes, 1979, states:

> "the right to wage loss benefits shall terminate, when the injured employee reaches the age of 65."

The Florida Statute eliminates the right of an individual over 65 years old to obtain wage loss benefits. Wage loss benefits were created by the Legislature effective, August 1, 1979, as a substitute for disability benefits previously awarded. The purpose of the Statute is evident, i.e. restoration of wages lost.

The Court in Carr vs. Central Florida Aluminum Products, Inc., 402 So.2d 565 (Florida 1st DCA, 1981) stated that:

> ". . . seen in a context of statutory purpose to compensate injured workers for actual wage loss rather than any longer for anatomical disability or loss of wage earning capacity, the legislature has in effect assumed that these designated injuries almost inevitably result in an economical loss of the sort the legislature determined to compensate."

This restoration of actual wages lost is a major component of workers' compensation. Dr. Larson has stated that:

> "from the very beginning the heart of workers' compensation was the restoration of a portion of actual lost wages. When wages are interrupted a portion is replaced week by week..."

Wage loss is a substitute and/or replacement for actual wages and provides the injured worker with a source of income during his disability. Florida Statute 440.15(3)(b)3.d., 1979 barrs the 65 year old individual from collecting this source of income.

Florida Statute 440.15(3)(b) 3.d., similar to the Wisconsin

Statute, does not reduce social security benefits but reduces wage loss benefits (a source of income) totally. The total bar of a worker from receiving wage loss benefits deprives the worker between the ages of 65 and 70 the opportunity to supplement his social security benefits by receiving earned income or its substitute (wage loss benefits) in accordance with the Retirement Test. The 70 and older worker is deprived the right to supplement his social security benefits by the total income received through his labor or its substitute, i.e. wage loss benefits.

Raskin involved a statute which lowered wages by the exact amount received under the Social Security Law. The Florida Workers' Compensation Law, i.e. 440.15(3)(b)3.d., Florida Statutes, 1979, does not operate by reducing wage loss benefits in an amount equal to social security. There is no formula in the Florida Statute for said reduction. What actually takes place is that wage loss benefits are eliminated (total reduction). Since the elimination of wage loss benefits in 1979 is tied solely to age, said elimination is not related to Appellant receiving social security nor to the amount received. However, under the unique Florida wage loss system, replacement of lost earnings is being eliminated causing your Appellant to lose supplemental income. This violates the purpose of the Social Security Law in allowing Appellant to supplement his social security benefits. It would seem to the undersigned that the elimination of entitlement to this replacement of lost wages stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Social Security Statute.

This premise is further supported by Congress' broad purpose

in establishing old age benefits. Social security was partially created to function as a public social insurance program which would protect aged workers and their dependents from their loss of income. (Rosenberg vs. Richardson, 538 F.2d 487 (23 Cir. 1978). Congress eliminated the "Retirement Test" recognizing that some persons who were able to work past normal retirement age would otherwise receive no return on their social security investment. (Raskin v. Moran, supra). Similarly,allowing persons to earn certain income prior to reduction of social security benefits and only reducing social security benefits on a prorata share of income earned over the amount allowable would indicate an intention to allow workers such as your Appellant who are able to work to receive a partial return on their social security investment.

Congress did not intend receipt of Workers' Compensation benefits to reduce retirement benefits. The Social Security Law does not consider Workers' Compensation benefits as being wages. Chapter 42, U.S.C. Section 409, effective December 31, 1981 specifically excludes from the term "wages" payments which are received under a Workers' Compensation Law. Therefore, in actuality, there is no statutory authority in the Social Security Law allowing benefits to be reduced by amounts received under Workers' Compensation as it applies to old age retirement benefits under Subsection 402. Allowing a reduction (total elimination) of compensation due to a worker receiving social security benefits directly conflicts with the purpose of Congress. The money the Federal Government puts in Appellant's left pocket is being taken by the State from the right pocket. It is my sincere opinion that Florida Statute 440.15(3)(b) 3.d. should be stricken as violative of

the Supremacy Clause.

The First District Court of Appeal in Acosta upheld the constitutionality of Florida Statute 440.15(3)(b)3.d. by stating:

> "in view of the rationale of Sasso, we must conclude, that the valid purposes of Section 440.15(3)(b)3.d. are not directly related to preventing "double-dipping" and, accordingly, are not in controversion of the salutary purpose behind Section 403(F)(3) of the Social Security Act".

Section 403(f)(3) does not involve double-dipping. It involves old age retirement. Florida Statute 440.15(3)(b) 3.d, 1979 directly interferes with the intent of 403(f)(3) and 403(f)(1)(8) by taking away what the Federal Statute gives, i.e. the ability of the aged worker to have supplemental income.

The First District Court of Appeal in Acosta also stated:

> "The Florida Statute in question does not specifically rely upon the receipt of Social Security benefits in mandating elimination of wage loss benefits to persons over the age of 65."(emphasis ours)

The First District Court in Sasso vs. Ram Property Management, 431 So.2d, (Fla. 1st DCA, 1983), states:

> "Consequently, we view the 1979 version of the wage loss law as affecting only those who are at least 65 and collecting O.A.S.I." (emphasis ours).

Therefore, it seems that the Court in Acosta, limited the scope of the challenged statute while the Sasso Court expanded it.

Furthermore, the First District Court of Appeal in Acosta, concluded that the valid purposes of Section 440.15(3)(b)3.d. are not in controvention of the statutory purpose behind Section 440.13(f)3) of the Social Security Act.(emphasis ours). Case law clearly indicates that where a State Statute impedes the operation of the Federal Statute, the Court must strike the State Statute even if the "State Legislature

in passing its law had some purpose in mind other than one of frustration." (Perez vs. Campbell, 402 U.S. 637.) The purpose is not limited only to valid purposes but to all purposes. In the case at bar, Florida Statute 440.15(3)(b)3.d. does not represent a mere inconsistency with the Federal Law but rather completely impedes the operation of the Federal Law and stands as an obstacle to the execution of the full purpose and objective of Congress in enacting said statute. Florida Statute 440.15(3)(b)3.d. must be stricken even if the valid purposes for its creation do not directly impede the operation of the Federal Law since the total effect of the Statute (even if not intended) does impede the operation of the Federal Law.

ARGUMENT II

WHETHER THE PROVISIONS OF FLORIDA STATUTE 440.15(3)(b) 3.d., 1979 AND VALID PURPOSES EFFECTUATED THEREBY VIOLATE THE FEDERAL SUPREMACY CLAUSE IN ARTICLE 6, UNITED STATES CONSTITUTION BY REASON OF CONFLICT WITH THE PROVISIONS, PURPOSE AND POLICY OF THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT 29 U.S.C., SECTION 621, et seq.

29 U.S.C. Section 621 is entitled "Statement of Findings and Purposes". Said section reads as follows:

"(a) The Congress hereby finds and declares that. . .

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long term employment with resultant deterioation of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers, their numbers are greater and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act (29 U.S.C. Section 621-634) to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employees and workers find ways of meeting problems arising from the impact of age on employment."

Mr. Acosta, who was 67 on the date of the accident and 67 when attaining maximum medical improvement, comes within the class of older persons who are protected under 29 U.S.C. Section 621-634 since Section 631 entitled "Limitations", states the following:

"The prohibition in this Act (29 U.S.C. Section 621-634) shall be limited to individuals who are at least forty years of age but less than seventy years of age."

Some of the protections received by Mr. Acosta pursuant to 29 U.S.C. Section 621-634 include pursuant to Section 623 entitled "Prohibition of Age Discrimination" state the following:

> "(a) Employer practices. It shall be unlawful for an employer. . .
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;[1]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act (29 U.S.C. Section 621-634).

To summarize, the purpose of Age Discrimination in Employment Act (29 U.S.C. Section 621, et seq.) is to promote employment of older persons based on ability rather than age; to prohibit discrimination on account of age; and finally, to aid workers in meeting impacts that come with age. Gill vs. Union Carbide Corporation, 368 Fed Supp 364, 1973.

The First District Court of Appeal in O'Neil vs. Department of Transportation, 442 So.2d 961 (Fla. 1st DCA, 1983) found that the Florida wage loss provision did not violate 29 U.S.C., Subsection 623

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1 The phrase "terms, conditions, or privileges of employment" encompasses a wide and varied range of job-related factors including but not limited to, job security, advancement, status, and benefits. The following are examples of some of the more common terms, conditions or privileges of employment: The many and varied employee advantages generally regarded as being within the phrase "fringe benefits", promotion, demotion or other disciplinary action, hours of work (including overtime), leave policy (including sick leave, vacation, holidays), career development programs, and seniority or merit systems (which govern such conditions as transfer, assignment, job retention, layoff and recall). An employer will be deemed to have violated the Act if he discriminates against any individual within its protection because of age with respect to any terms, conditions, or privileges of employment, such as above, unless a statutory exception applies. (emphasis ours) (33 FR 12227, Aug. 30, 1968).

> "since the provisions of Florida Workers' Compensation Law do not constitute compensation, terms, conditions, or privileges of employment within the meaning of 29 U.S.C. subsection 623."

The O'Neil Court did not consider workers' compensation to be a fringe benefit. The O'Neil Court stated:

> "the prohibitions of U.S.C., Subsection 623(a) are limited to employment practices within the control of the employers."

However, the employer does have some control. The employer in the State of Florida can elect to be covered under workers' compensation if he has less than 3 employees. The employer can elect not to have workers' compensation coverage and subject himself to suit in Circuit Court. The employer can choose certain deductible co-insurance plans. Therefore, the employer does have control and decision making powers in deciding to have workers' compensation coverage or not.

The Court in O'Neil, as previously indicated, felt that workers' compensation was not a fringe benefit. However, the Court in Sasso, in stating valid purposes for upholding the challenged statute as being constitutional, clearly indicated that some of the purposes behind the creation of the statute were:

1. To cut the payment of employment-related fringe benefits due to an old age related decline in productivity and physical abilities;

2. To make room in the job market for younger workers by reducing retirement of older workers through a process of wage or fringe benefit reduction.

Obviously a conflict exists between the Court in O'Neil and the Court in Sasso vs. Ram Property, Inc., 431 So.2d 204 (Fla 1st DCA,1983). If the Sasso Court is correct and compensation is a

fringe benefit then Florida Statute 440.15(3)(b) 3.d., 1979 should fail since it is clearly violative of the A.D.E.A. Conversely, if workers' compensation is not a fringe benefit, then the only valid purpose per Sasso to uphold the constitutionality of the Statute would be to reduce cost of insurance premiums. Reducing costs of insurance premiums at the expense of workers simply due to the worker's age is not sufficient, in the undersigned's opinion, to survive the challenges or equal protection, due process and access of the Courts. These arguments will be made subsequently; however at this time the undersigned will brief why Florida Statute 440.15(3)(b) 3.d., 1979 conflicts with 29 U.S.C. 621 et seq.

As previously mentioned, the purposes of the A.D.E.A. have to be compared with the purposes of the Florida Legislature in enacting Florida Statute 440.15(3)(b) 3.d. This Court in Sasso, supra, defined three possible objectives inherent in this statute which survived preliminary constitutional scrutiny. These three possible objectives are:

> "1. To cut the payment of employment related fringe benefits due to old age related decline in productivity and physical abilities;
>
> 2. To make room in the job market for younger workers by inducing retirement of older workers through a process of wage or fringe benefit reduction; and
>
> 3. To reduce the cost of insurance premiums to the employers. "

To summarize, the purpose of Florida Statute 440.15(3)(b) 3.d. is to remove the elderly worker from the work force by replacing them with younger workers and thereby additionally reducing insurance costs to employers. Said purposes on their face conflict with the purposes of

the Age Discrimination in Employment Act (29 U.S.C. Section 621, et seq.) which strives to promote employment of the elderly rather than force them to terminate their employment.

The purpose of the Age Discrimination in Employment Act and Florida Statute 440.15(3)(b) 3.d. are diametrically opposed to each other. The State Statute when compared to the Federal Statute does not represent a mere inconsistency with the Federal Law but rather completely impedes the operation of the Federal Law and stands as an obstacle to the execution of the full purpose and objectives of Congress in enacting said Statute. Accordingly, this Court must strike down Florida Statute 440.15(3)(b) 3.d. since it impedes the operation of 29 U.S.C. Section 621 et seq. This applies even if the "State Legislature in passing its law had some purpose in mind other than one of frustration". (Perez vs. Campbell, 402 US 637).

Specifically, in the case at bar, Mr. Acosta lost his job due to an industrial accident. At the date of his accident, April 16, 1980, he was employed by an employer in the State of Florida. He had the ability to perform the job required. He was productive. After attaining maximum medical improvement, Mr. Acosta was left with a permanent impairment. He is entitled to the protection afforded by the Age Discrimination in Employment Act. He is not supposed to be disadvantaged in efforts to retain employment, regain employment when displaced from jobs, or have compensation, terms, conditions or privileges of employment used to discriminate against him. One of the stated purposes in Sasso is:

> "to make room in the job market for younger workers by reducing retirement of older workers through a process of wage or fringe benefit reduction".

This purpose does not aid the elderly worker to retain or regain employment but rather displace him. The suggestion of reducing fringe

benefits and wages due to age is specifically prohibited by 29 U.S.C. Section 623, which as previously mentioned, specifically outlaws discrimination against any individual with respect to his compensation terms, conditions or privileges of employment, because of such individual's age and further prohibits the reduction of the wage rate of an employee in order to comply with this Act. There is no doubt that the purpose of Florida Statute 440.15(3)(b) 3.d. directly conflicts with the purpose of the Federal Statute 29 U.S.C. Section 621, et seq. and accordingly, must be stricken.

The Court in Sasso indicated that Florida Statute 440.15(3)(b) 3.d. legislative purpose was:

> "to reduce the cost of insurance premiums to the employers."

This purpose again conflicts with 29 U.S.C. Section 623 as affecting Mr. Acosta's compensation, terms, conditions, or privileges of employment.[2] Congress has further stated its intent by enacting 29 U.S.C. Section 623(g)(1). This Section became effective January 1, 1983 and states:

> "for purposes of this section, any employer must provide that an employee aged 65-69 shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employees under age 65".

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2 It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation - an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed. (33 F.R. 9173, June 21, 1968).

Yes, group insurance is not workers' compensation. However, the purpose stated was to reduce the cost of insurance premiums to the employers. The employer cannot reduce his cost by eliminating coverage to an elderly worker. Similarly, the State of Florida through State action cannot require the employer to discriminate against Mr. Acosta by affording him a different insurance policy than that given to younger employees. Since Mr. Acosta was 67 years old at the date of his accident, his contract of insurance was different than those under 65 since he was already barred from receiving wage loss. The intent of Congress is clear. An employer cannot reduce the cost of insurance if said reduction disadvantages the elderly worker whose age is 40-70 years old. The effect of the recent amendment further stresses the intent of Congress in this area. Florida Statute 440.15(3)(b) 3.d. must be stricken.

The Sasso opinion further stated that it was the intent of the Legislature:

> "to cut the payment of the employment related fringe benefits due to an old age related decline in productivity and physical abilities".

This generalization is prohibited by the Age Discrimination in Employment Act and one of the main reasons for the enactment of the Statute itself. There is no indication that the State Legislature considered the ability and productivity of elderly workers in enacting Florida Statute 440.15(3)(b) 3.d. The Florida Workers' Compensation Law applies to all types of employment. The purpose of the Age Discrimination in Employment Act was to judge the elderly person on their ability.

The Federal Government allows an employer under 29 U.S.C. Section 623(f):

> "to take any action otherwise prohibited under Sections A, B, C, or E of this Section where age is a bona fide occupational qualification reasonable necessary to the normal operation of the particular business or where the differentation is based on reasonable factors other than age"[3,4]

Florida Statute 440.15(3)(b) 3.d. does not consider an elderly workers' ability in regard to occupational qualifications reasonable necessary to the normal operation of a particular business. The Florida Statute refers to all businesses and does not consider the ability of the elderly worker to perform the tasks required. Further, there is no evidence on the record that Mr. Acosta even after his accident does not have the ability to perform some type of work. There is no consideration in Florida Statute 440.15(3)(b) 3.d. to the ability of Mr. Acosta and/or other workers' abilities. Actually, by totalling eliminating wage loss benefits, Florida Statute 440.15(3)(b)

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3 Whether occupational qualification "bona fide" and "reasonably necessary" to the normal operation of the particular business", will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of bona fide occupational qualification will have limited scope and application. Further as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsiblity of the employer, employment agency, or labor organization which relies upon it. (33 F.R. 9172, June 21, 1968).

4 The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit. Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicabiliy of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it. (33 F.R. 9173, June 21, 1968).

3.d. has assumed that an impaired elderly worker has no ability and no productivity. Mr. Acosta is both able and productive. This assumption by Florida Statute 440.15(3)(b) 3.d. meets the purposes of 29 U.S.C. 623 et seq. head on.

It is the undersigned's opinion that under the Supremacy Clause, Florida Statute 440.15(3)(b) 3.d. has to be stricken. I also feel that the test in determining if Florida Statute 440.15(3)(b) 3.d. violates 29 U.S.C. Section 621 et seq. and the United States Supremacy Clause is completely different than the test which has to be applied concerning due process, equal protection and access to the Courts. The testing procedures, regardless of nomenclature, concerning equal protection, and due process and access to Courts seem to indicate that if any potential purpose of a Statute survives the rational basis test, then the Statute is constitutional. This Court in Sasso stated:

> "While the apparent primary reason for the statute fails the rational basis test, other potential objectives of the statute survive it. Where, as here, there are plausible reasons, for . . . (the Legislature's) action, our inquiry is at an end."

The reverse is applicable concerning the Supremacy Clause. If any one of the possible purposes involved in the creation of Florida Statute 440.15(3)(b) 3.d. stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress in enacting the Age Discrimination and Employment Act, then Florida Statute 440.15(3)(b) 3.d. must be stricken. This applies even if the conflicting purposes are not the primary purpose. This applies even if the State Legislature in passing its law had some purpose in mind other than one of frustration (Perez vs. Campbell, 402 U.S. 637).

Inspection of the purposes of 440.15(3)(b) 3.d. as stated in Sasso clearly indicate that the Florida Statute stands as an obstacle to the accomplishment and execution of the full purpose of the Federal Legislation, 29 U.S.C. Section 621, et seq. Accordingly, Florida Statute 440.15(3)(b) 3.d. has to be stricken.

ARGUMENT III

WHETHER THE PROVISION OF CHAPTER 440.15(3)(b)3.d. 1979 IS UNCONSTITUTIONAL AS IT VIOLATES ARTICLE I SECTION XXI OF THE FLORIDA CONSTITUTION ENTITLED ACCESS TO COURTS

The Court in Sasso determined that Florida Statute 440.15(3)(b)3.d., 1979 does not deny an aged Claimant's right to access to the Court correctly cited the case of Kluger vs. White, 281 So.2d 1, Florida 1973, and stated that:

> "the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."

This Court more precisely stated that the Legislature may abolish such a right in two instances: 1) where it authorizes a reasonable alternative for the redress of injuries, or 2) where it can demonstrate an overpowering public necessity for abolishing such a right. Furthermore, the Court recognized that the doctrine precluding access to courts does not apply to statutes that limit the right of action to some extent and do not completely bar redress in a judicial forum (emphasis ours).

After analyzing Florida Statute 440.15(3)(b)3.d., within the above guide lines, the First District Court in Sasso stated:

> "the statute, thus, limits a Claimant's entitlement to wage loss benefits upon the occurrence of any one of the four conditions, while not affecting, in any way, his right to any one of the other compensation benefits provided by Chapter 400. As such, this section falls within the exception to the Kluger rule and does not violate Florida's access to Court's provision."

With all due respect, the undersigned disagrees with the basis of the analysis and the ultimate conclusion.

The Florida Workers' Compensation Law was initially found to be constitutional because, although it abolished the right to sue one's employer in tort for job related injury, it provided adequate, sufficient, and even prefereable safeguards for an employee who is injured on the job. This alternative protection was essential for the statute to be held constitutional. The 1979 statutory changes changed compensation for permanent disability from a system which compensated an injured worker for a permanent loss through a schedule of weeks based upon permanent impairment to a wage loss basis. The alternative protection and means of redress had been changed. Wage loss was the new alternative means of compensation and redress.

The 1979 Florida Workers' Compensation Law still afforded temporary total, temporary partial, rehabilitation, permanent total, and medical bills for all injured workers regardless of age. The alternative protection in these areas still existed. However, Workers' Compensation Laws which replaced the right of an employee to sue involved more than these elements. Enormous amounts of compensation were payable to injured workers who had received a permanent disability. Permanent partial disability benefits were a major integral part of the entire system which provided the alternative protection. Prior to 1979, all workers were able to receive these benefits. Their right to redress for an injury was preserved.

Wage loss was introduced in 1979 as an alternative to permanent partial disability. An alternative had now been substituted for an alternative which had been substituted originally as an alternative protection.

The wage loss system has been held constitutional by this

Court in numerous decisions. The Court in Carr vs. Central Florida Aluminum Products, Inc., stated that:

> "Our task is to determine whether the legislative classification was made on some reasonable basis, bearing a substantial relationship to legitimate legislative purpose and defined the legislative purpose in the 1979 changes as being "..."an effort to control high costs, inequitable awards, and delays in payments of claims, the legislature in 1979 substituted "permanent impairment" benefits under section 440.15(3)(a) and "wage loss" benefits under section 440.15(3)(b) for the disability benefits previously awarded for similar permanent injuries."

The Court further stated:

> "...seen in the context of a statutory purpose to compensate injured workers for actual wage loss rather than any longer for anatomical disability or loss of wage earning capacity, the legislature has in effect presumed that these designated injuries would almost inevitably result in economic loss of the sort the legislature determined to compensate."

Therefore, this Court held that the new wage loss provision represented a reasonable alternative substitute for the old permananent impairment. A reasonable alternative protection was provided to allow redress for an injury.

However, Florida Statute 440.15(3)(b)3.d. removes this alternative protection from any worker who is 65 and has attained maximum medical improvement and has sustained a permanent impairment. Wage loss as a substitute alternative protection has been made null and void by 440.15(3)(b)3.d. as it applies to the over 65 worker. The delicate balance of access to the Courts pertaining to compensation for a permanent injury has been altered. A substantial right provided by the Workers' Compensation Law to originally justify its constitutionality has now been discarded. The alternative protection has been removed. The 65 year old permanently injured worker cannot receive

permanent disability or wage loss. His right for redress for a permanent injury has been abolished.

This Court in Sasso attempts to justify the exclusion of this right by stating that it is just another limitation similar to the other limitations placed on wage loss benefits within the statute itself i.e. 440.15(3)(b)3 a, b and c. However, there is a difference between the limitations contained in Subsection a, b, c and Subsection d. This difference is critical. Subsection a, b and c are limitations. They do not abolish a right. Their right is only limited in that the amount recoverable is limited. Under these sections, the injured worker has alternative protections and can receive redress for their injury. Unfortunately, Subsection d is totally different. Workers who are 65 years old, reached maximum medical improvement and have sustained a permanent impairment are barred completely from ever receiving wage loss. The amount of compensation is not limited; it is totally eliminated. Their right is totally abolished.

There is a distinct difference between a limitation and a bar. A limitation assumes that a party is eligible to receive something. A bar denies the right of one to be eligible to receive anything. Accordingly, this Court's statement that Florida Statute 440.15(3)(b) limits a claimant's entitlement to wage loss benefits upon the occurrence of any one of the four conditions is erroneous as the last condition, 440.15(3)(b)3.d., does not limit the claimant's entitlement but rather bars it. He has no alternative means of redress for his injury. He is denied access to the Courts. Mr. Acosta, specifically, has had his rights altered and no alternative method of recovery provided. Mr. Acosta has personally been denied access to the Courts.

ARGUMENT IV

WHETHER THE PROVISION OF CHAPTER 440.15(3)(b) 3.d., 1979 IS UNCONSTITUTIONAL AS IT VIOLATES ARTICLE I, SECTION II AND ARTICLE I, SECTION IX OF THE FLORIDA CONSTITUTION, ENTITLED "BASIC RIGHTS (EQUAL PROTECTION) AND DUE PROCESS.

Florida Statute 440.15(3)(b) 3.d. violates the equal protection and due process clauses of both the Florida and Federal Constitution. The holding in Sasso stated that Florida Statute 440.15(3)(b) 3.d. did not conflict with equal protection clauses of either the Florida or Federal Constitution. Concerning the applicable tests to determine whether the Statute violated Florida's Equal Protection Clause, the court stated that the "some reasonable basis" standard now appears to be the proper form of the rational basis test under the Florida Constitution and that:

> "Under the "some reasonable basis" generally, as long as the classificatory scheme chosen by the legislature rationally advances a legitimate governmental objective, courts will disregard the methods used in achieving the objectives, and the challenged enactment will be upheld."

The Court in evaluating the legislative objective in creating the 65 year old exclusion section accepted the proposition that the statute's primary purpose was to halt the practice of "double-dipping". To reach this conclusion, this Court relied upon a 1980 amendment to Florida Statute 440.15(3)(b) 3.d., which amended the statute by providing that an injured workers' right to permanent disability wage loss benefits terminate:

> "when the injured employee reaches age 65 and becomes eligible for benefits under 42 U.S.C., Section 402 and 405."

It appears from the Court's opinion that this amendment was important in clarifying the intent and objective of the statute. However, the Court further stated that they could envision at least four possible objectives inherent in the statute:

1. To halt the practice of double-dipping;

2. To cut the payment of employment-related fringe benefits due to an old-age related decline in productivity and physcial abilities;

3. To make room in the job market for younger workers by inducing retirment of older workers through a process of wage or fringe benefit reduction; and

4. To reduce the cost of insurance premiums to the employers.

It was determined after lengthy analysis that the statute's primary purpose, i.e. to avoid double dipping, violated the equal protection clause of the Florida Constitution.[5] The Court then stated that all three other possible objectives inherent in the statute are in fact possible reasons for the drafting of said statute and since these three possible objectives, although not primary, do not violate equal protection, the statute itself is constitutional. There is no support for this assumption contained in either legislative reports and journals or from legal argument of the government before the Court. Inferences of an objective by reference to similar legislation or actions taken by the legislative body and the remaining sections of Florida Statute 440 indicate that these three other possible objectives were not applicable in the creation of Florida Statute 440.15(3)(b) 3.d. Actually, Chapter 440 of the Florida Statute and current changes in the Workers' Compensation Law negate the hypothesis stated by the First District Court of Appeal in Sasso. The 1980 amendment re-emphasizes that the primary purpose was to avoid double dipping and

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[5] In lengthy analysis, the court determined that social security retirement benefits and workers' compensation disability benefits are not duplicative and therefore the lack of any commonality of purpose saps the statute of rationality, assuming its purpose is the avoidance of double-dipping.

negates the validity of the three remaining possible objectives since age alone was no longer the triggering mechanism. The alleged possible three objectives are not reasonable inferences but rather mere speculation. Speculation cannot be allowed to deprive any citizen of the rights of equal protection and due process. This is true regardless of the nomenclature of any test used to determine if these constitutional rights have been violated by a legitimate state objective.

It would seem that the constitutional challenge in Sasso did not involve a direct challenge under Article I, Section IX, of the Florida Constitution entitled "Due Process", which states:

> "No person shall be deprived of life, liberty, or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself."

This Court in reviewing the correctness of the Sasso opinion regarding the constitutional challenges of Equal Protection and Due Process must first ascertain the intent, objective and purpose of the Workers' Compensation Law in toto. For example, the Supreme Court in Lasky vs. State Farm Insurance Co., 296 So.2d 9, stated:

> ". . .it therefore becomes necessary for us to examine the objectives of the legislature in enacting this statute in order to determine whether the provisions of the act bear a reasonable relation to them."

The statute in question, i.e., Florida Statute 440.15(3)(b) 3.d is a part of the Florida Workers' Compensation Law which is contained in Florida Statute 440. Obviously, the intent and purpose of this particular subsection cannot be in conflict with the intent and purpose of the whole act. The undersigned believes that if this particular section defeats the intent and purpose of the Florida Workers' Compensation Act in toto, then, obviously, said section should fail

the "some reasonable basis" test.

The intent and purpose of the Florida Workers' Compensation Law originally was to provide for injured workers, and, in the event of their death from injuries received in their employment, their dependents, so that the burden does not fall on society as a whole, but on the industry served (Whitehead vs. Kene Roofing Company, 43 So.2d 464, Florida 1949). The law was initialy designed to remove from the worker himself the burden of his own injury and disability and place it on the industry he served; therefore, such laws were to be liberally construed with the interest of the worker foremost (Dennis vs. Brown, 93 So.2d 584, Florida 1957).

Extensive legislative changes took place and primarily took effect on August 1, 1979. These changes for the most part did not alter the original purposes of Workers' Compensation Legislation. This Honorable Court in Carr vs. Central Florida Aluminum Products, Inc., in upholding the constitutionality of the wage loss system stated that:

> "Our task is to determine whether the legislative classification was made on some reasonable basis, bearing a substantial relationship to legitimate legislative purpose and define the legislative purpose in the 1979 changes as being an effort to control high costs, inequitable awards, and delays in payments of claims. . ."(emphasis ours).

The logic behind the opinion of this Court in Carr had been stated by Dr. Larson on various occasions including during a plenary session which occurred on Saturday, June 16, 1979 at the Benson Hotel in Portland, Oregon. Dr. Larson stated concerning workers compensation that:

> "from the very beginning the heart of workers' compensation was the restoration of a portion of actual lost wages. When wages are interrupted a portion is replaced week by week, as needed to avoid becoming a public

> charge. Now this was not just an economic judgment or a judgment of convenience, this went to the very heart of justifying worker's compensation in getting it passed in the first place. . . getting it held constitutional, for that matter . . ." (emphasis ours).

Florida Statute 440.15(3)(b) 3.d violates this premise which is essential for the constitutionality of Workers' Compensation Legislation. Mr. Acosta is not having a portion of his wages replaced. He is becoming a public charge. The legitimate legislative purpose of enacting the new Workers' Compensation Law, i.e. to replace a portion of wages as they are lost so that the work-related injury does not become a burden to the injured worker, his family, or society in general, is not being carried out.

Florida Statute 440.15(3)(b) 3.d also violates the remaining sections of Florida Statute 440. Florida Statute 440 is designed to replace a portion of wages. Florida Statute 440.15(3)(b) 3.d prohibits this in Mr. Acosta's case. Its effect works in the opposite direction for the purpose of the act itself.

It is extremely important to note that the Court in Carr did not indicate that the purpose of creating the wage loss system was to cut the payment of employment-related fringe benefits due to an old age-related decline in productivity and physical abilities, nor was the purpose defined as to make room in the job market for younger workers by inducing retirement of older workers through a process of wage or fringe benefits reduction. The Court in Sasso inferred these additional purposes and erroneously classified the right to Workers' Compensation as being a fringe benefit.

First of all, workers' compensation is not a fringe benefit. Fringe benefits are identifiable as items which are provided by the

employer as a benefit to the employee which are includable in determining the employee's average weekly wage. Such items as vacations, bonuses, meals, tips, parking, group insurance, etc. are fringe benefits. Workers' compensation insurance is not a fringe benefit. Workers' Compensation is created by statute. It is an alternative means of redress. It is a right. Fringe benefits are not created by statute. They are voluntarily provided. Workers' compensation insurance premiums and/or benefits are not included in calculating the employee's average weekly wage. Fringe benefits are included. Accordingly, workers' compensation insurance and benefits pursuant to workers' compensation are not fringe benefits. The Court in Sasso, in equating workers' compensation benefits to fringe benefits erred. Two of the cited purposes used to justify the constitutionality of said statute:

1. Cut the payment of employment-related fringe benefits due to an old age-related decline of productivity and physical abilities , and

2. Make room in the job market for younger workers by inducing retirement of old workers through a process of wage or fringe benefit reduction.

are therefore invalid and were never intended by the Legislaure. The legislature did not eliminate all compensation benefits for 65 year old workers. The statute in 1979, pure and simple, barred a worker receiving wage loss benefits when he attained the age of 65.

The purpose of the Statute was not to rid the open labor market of older workers. Florida Statute 440.15(3)(b) states that:

> "when an injured employee reaches age 62, wage loss benefits shall be reduced by the total amount of social security retirement benefits which the employee is receiving, not to exceed 50% of the employee's wage loss benefits."

The above quoted statute allows the injured worker who is 62 to receive at least 50% of his wage loss benefits plus social security.

This section encourages older workers to continue working and be productive rather than ridding the open labor market of them. A portion of their lost earnings are also being replaced.

The initial goal of workers' compensation, which was to remove from the worker himself the burden his injury, has been violated by 440.15(3)(b) 3.d. In actuality, this subsection is approaching a head-on collision with the purpose of the act itself. In Carr, the workers' compensation law was held constitutional since the injured worker was able to obtain benefits to compensate him for his wage loss. A 65 year old worker who has obtained maximum medical improvement cannot obtain benefits to compensate him for his wage loss. A portion of actual wage loss due to the injury has not been replaced. The accident he suffered in the course and scope of his employment has become a burden on his shoulders and on society in general. Florida Statute 440.15(3)(b) 3.d. has lifted the burden off of the shoulders of industry and puts it back on the injured worker and society. This is contrary to the original and amended purposes of the act and therefore the statute is unconstitutional. Your Appellant and all workers over 65 have been discriminated against and have been deprived of the right of equal protection and due process of law.

The Court in Sasso attempts to justify the classification of age due to an alleged legislative objective to relate the Statute with a decline in the older worker's productivity and cites Cruz vs. Chevrolet Grey Iron, Division of General Motors Corp., 398 Mich. 117. The intent regarding worker productivity in Cruz was clear. Benefits were reduced gradually, i.e. 5% a year. The benefits could also not be reduced to less than 50% of the benefits the injured worker would

have received nor at any time below the minimum weekly benefits as provided in the Act itself. Florida Statute 440.15(3)(b) 3.d. allows no recovery thus alleging that a 65 year old worker who is working is totally non-productive. This is a fallacy on its face. Mr. Acosta was, is, and can still be productive,. He is not permanently totally disabled nor is he dead yet. This was not the intent of the Florida Legislature nor can this proposition save the constitutionality of this statute.

The obvious inherent discrimination due to age also cannot be rationalized by speculating that 440.15(3)(b) 3d was enacted to save costs. If this was an alternative purpose, then it would have been carried throughout the Act regarding other classifications of benefits. Sixty-five year old workers would have been barred from receiving compensation and medical. Florida Statute 440.15(3)(b) 3.d. was not drafted to save costs; however, if it was, the savings of costs in such a grossly arbitrary manner would be unconstitutional.

The simple truth is that the legislature sought to stop double-dipping. Unartfully drafted, the statute and per Sasso the intended purpose of double dipping violated constitutional protections. The Court in Sasso referred to the 1980 amendment to obtain insight into the purpose of the statute. Let us look at the 1983 amendments for further insight. Florida Statute 440.15(3)(b) 3.d. no longer exists. The right is no longer abolished. To err is human. The legislature saw that the Statute affected elderly workers in a way that was not intended. The Statute discriminated against them and was extremely harmful to them. They never intended to abolish the right of the worker over 65 years old nor deprive said worker

access to the Courts. The Statute was abolished. Today these rights again exist.

The Court in Sasso also construed 440.15(3)(b) 3.d., 1979 to affect only those who are at least 65 years old collecting O.A.S.I. The 1980 amendment to 440.15(3)(b) 3.d. affected substantive rights and therefore does not effect rights which were vested prior to the effective date of the action. However, the First District Court of Appeal in Sasso seems to ignore this and applies the 1980 Amendment. If this can be done, then the 1983 repeal of the section should allow Mr. Acosta to receive wage loss benefits. Since Florida Statute 440.15(3)(b) 3.d. is based on age and age alone, there does not exist a valid legitimate legislative purpose to justify the arbitrary classification. This Statute is unconstitutional as written.

ARGUMENT V

WHETHER SECTION 440.15(3)(b) 3.d. FLORIDA STATUTES 1979, IS IN CONFLICT WITH SECTION 440.15(10) FLORIDA STATUTES, 1979.

The caption to Florida Statute 440.15(10), 1979, is entitled "Employee Eligible For Benefits Under this Chapter and Federal Old Age, Survivors and Disability Insurance Act." However, the section is limited to disability insurance under 42 U.S.C Section 423. Florida Statute 440.(15)(10)(a), 1979 states:

> "Weekly compensation benefits payable under this chapter for disability resulting from injuries to an employee who becomes eligible for benefits under 42 U.S.C. s. 423 shall be reduced to an amount whereby the sum of such compensation benefits payable under this chapter and such total benefits otherwise payable for such period to the employee and his dependents, had such employee not been entitled to benefits under this chapter, under 42 U.S.C. s 423 and s. 402, does not exceed 80 percent of the employee's average weekly wage. However, this provision shall not operate to reduce an injured worker's benefits under this chapter to a greater extent than they would have otherwise been reduced under 42 U.S.C. s 424(a). This reduction of compensation benefits shall not be applicable to any compensation benefits payable for any week subsequent to the week in which the injured worker reaches the age of 62 years."

The Legislature intended this section to apply not only to 42 U.S.C. Section 423 but also to Sub-section 402. This intent may be inferred through continual reference throughout 440.15(10) to 42 U.S.C. 423 and 402. Florida Statute 440.15(10)(c) 1979 states, in part:

> "No disability compensation benefits payable for any week, including those benefits provided by paragraph (1)(e), shall be reduced pursuant to this subsection until the Social Security Administration determines the amount otherwise payable to the employee under 42 U.S.C. s.s. 423 and 402 and the employee has begun receiving such social security benefit payments. The employee shall, upon demand by the division, the employer, or the carrier, authorize the Social Security Administration to release disability information release disability information relating to him and authorize the Division of Employment Security to release unemployment compensation information relating to him in accordance with rules to be promulgated by the division prescribing the procedure

> and manner for requesting the authorization and for compliance by the employee...."

This intent is probable in lieu of the title of the section itself "Employee Eligible for Benefits and Disability Insurance Act". The title indicates the Legislature intended said Statute to apply to old age benefits and disability insurance benefits. Accordingly, Florida Statute 440.15(10) is in direct conflict with 440.15(3)(b) 3.d. since reductions are forbidden after the age of 62. Why would the Legislature prohibit reduction of Social Security Benefits (which can be duplicative) and allow reduction of retirement benefits? The Legislature did not intend for a reduction if the worker was receiving retirement benefits. Sixty-two is the age at which eligibility to Social Security retirement benefits pursuant to 42 U.S.C 402 begins. It is not a coincidence that the ages are the same.

Florida Statute 440.15(10)(a) and (10)(b) ties the reduction to 42 U.S.C. 424(a). Florida Statute 440.15(10)(b) states:

> "If the provisions of 42 U.S.C.s. 424(a) are amended to provide for a reduction or increase of the percentage of average current earnings that the sum of compensation benefits payable under this chapter and the benefits payable under 42 U.S.C.s. 423 and s. 402 can equal, the amount of the reduction of benefits provided in this sub-section shall be reduced or increased accordingly."

The bar to reducing benefits at or after 62 per 440.15(10)(a) is not tied into future adjustments per U.S.C. 424(a) per 440.15(10)(b). Since 424(a) only applies to Social Security disability per 42 U.S.C. Section 423, there is no reduction due when an individual receives retirement benefits (which he cannot receive until 62). It is clear that retirement benefits were not to reduce compensation. Florida Statute 440.15(3)(b)3.d. conflicts with this intent. Due to this conflict, I believe Florida Statute 440.15(3)(b) 3.d., 1979 has to be stricken.

CONCLUSION

Florida Statute 440.15(3)(b) 3.d. is unconstitutional. The statement violates the Supremacy Clause of the United States Constitution because it conflicts with 42 U.S.C., Section 403(f)(3) and 403(f)(1)(8) by eliminating the rights of an aged worker to supplement social security benefits received. The Florida Statute also conflicts with the Federal Age Discrimination Act, 29 U.S.C., Section 621, et seq., as it attempts to displace the elderly worker in order to provide additional employment opportunities for the younger worker and in so doing advocates a reduction of compensation and incentives besides advocating a reduction of costs solely due to age.

The rights of due process, equal protection and access to the Courts are also violated since the 1979 Amendments are not founded on a reasonabe classification to justify depriving a worker of wage loss benefits solely due to age. The Statute is arbitrary and does not follow a legitimate legislative purpose.

Florida Statute 440.15(3)(b)3.d. violates the main purpose of Workers' Compensation by failing to replace a portion of actual wages lost, and places the burden of the injury on the worker himself and society in general rather than the specific industry served.

Access to the Court is denied since the substitute remedy for a substitute has now been abolished. Said Statute also conflicts with Florida Statute 440.15(10) and must be stricken.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was mailed this the 14th day of May, 1984 to STEVEN KRONENBERG, ESQUIRE, 2699 South Bayshore Drive, Miami, Florida 33133.

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