IN THE
SUPREME COURT OF FLORIDA

CASE NO. 77,179

BOB MARTINEZ, et al.,

Appellant/Cross-Appellee,

vs.

MARK SCANLAN, et al.,

Appellee/Cross-Appellant.

ON APPEAL FROM A FINAL JUDGMENT OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA, CERTIFIED BY THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, AS BEING OF GREAT PUBLIC IMPORTANCE

ANSWER BRIEF OF AMICI CURIAE:

EMPLOYERS ASSOCIATION OF FLORIDA; AND FLORIDA FRUIT AND VEGETABLE ASSOCIATION SELF-INSURERS FUND

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND CONSTITUTIONAL PROVISIONS

STATEMENT OF INTEREST OF AMICI

This amicus brief is filed pursuant to Florida Rule of Appellate Procedure 9.370 on behalf of the Employers Association of Florida ("EAF") and the Florida Fruit and Vegetable Association Self-Insurers Fund ("FFVA SIF") in support of the position of the Defendants/Cross-Appellees in this case. EAF and FFVA SIF collectively comprised a substantial number of employers who represent virtually every aspect of industry covered by the Workers' Compensation system in Florida, and will be referred to collectively in this brief as the "employers".

EAF, a non-profit organization, is an association of employers organized for the purpose of creating and maintaining a stable environment of positive employee-employer relations and represent 325 employers throughout the state of Florida. Some members of EAF employ as many as 10,000 employees while other members represent small businesses that employ less than 100 employees. The members of EAF are involved in a diversity of industries including manufacturing, distributing, agricultural, research, utilities, food processing, retailing, communications, shipping, hospitality, health care, banking and construction. EAF members are subject to the Workers' Compensation law and they will be substantially affected by the decision of this Court.

FFVA SIF is the second oldest self-insurers fund in Florida and all its members are agricultural employers within the state of Florida. FFVA SIF was created to provide workers' compensation coverage to agricultural employees and to provide

its members with an alternative to the expensive conventional workers' compensation coverages. The FFVA SIF is a Florida trust organized to represent the interests of its members, who are the administrators of group self-insurance funds authorized pursuant to Section 440.57, Florida Statutes, and to provide workers' compensation coverage to eligible Florida agricultural employers. Since its creation in the late 1940's, FFVA SIF membership has grown to an estimated 2,000 members who pay $27.5 million in premiums. The members of FFVA SIF will be substantially affected by the decision of this Court.

According to the Governor's Task Force on Workers' Compensation, the general problem with the Florida Workers' Compensation system relates to the rising cost and the trend towards unaffordability associated with the increasing expense of providing benefits. The Governor's Task Force also stated that "costs of operating the Florida system have steadily increased to a point of potential crisis proportions." (See report of Governor's Task Force on Workers' Compensation, Part I, Pg. 3)

In response to the sharp increase in benefits being paid to injured workers, the State Treasurer and the Insurance Commissioner granted a 28.8% rate increase effective January 1, 1989. Florida ranks among the top five states nationwide with the highest combined loss ratio. The present rate of workers' compensation coverage in Florida according to the National Counsel on Compensation Insurance places the state of Florida among the highest in the country. Florida ranks third in

relative total costs per case for both medical and compensation payments. (See Governor's Task Force on Workers' Compensation, Page 14).

The EAF and FFVA SIF members represent a significant number of small businesses which find it increasingly difficult to afford the rising cost of premiums necessitated by the upsurge in benefit expenditures. Many of the FFVA SIF members are small farmers who are finacially distressed and disproportionately burdened during recessionary periods. The amendments in the 1990 Workers' Compensation law were intended to produce a 25% reduction in annual premiums while decreasing benefit levels required to be paid to claimants. If the court concludes that the 1990 law was unconstitutional, the premiums collected in 1990 would be inadequate to pay benefits on the claims generated during fiscal 1990. This would require a drastic increase in premium levels to compensate for the 1990 losses and to offset the higher benefit levels for 1991.

The increase in premium rate will add to the financial pressures placed upon the business and agricultural communities which are already suffering from the effects of the recession. This will force many small businesses and farmers into bankruptcy. With fewer employers and employees, the smaller financial base will further exacerbate the under funded self-insurance funds and self-insurers.

STATEMENT OF THE CASE AND FACTS

The employers adopt the Statement of the Case and the Facts of the brief filed by the Department of Legal Affairs, on behalf of the State Defendants, and of the other Appellant/Cross-Appellees in this appeal.

INTRODUCTION

In this Answer Brief of Amici Curiae, the parties shall be referred to as they stood before the Circuit Court of the Second Judicial Circuit in Leon County. Cross-Appellants shall be referred to as "Plaintiffs". Defendants' Bob Martinez, et al., and Intervenors will be referred to as "Defendants". The Florida Fruit and Vegetable Association Self-Insurers Fund, Employers Association of Florida, and other amicus curiae will be referred as "Employers" or "Amici". Reference to the record on appeal shall be designated as "R" followed by the appropriate page number. Witnesses shall be referred to by their proper names.

Chapter 90-201, Laws of Florida, which created the "Comprehensive Economic Development Act of 1990" will be referred to as the "Act". It is the position of the Amici that the Legislature's enactment of SB 8-B and HB 11-B during the 1991 Special Session B cured any possible unconstitutional aspects of the 1990 act. Since the 1991 Act is identical to the 1990 Act, it was the intent of the legislature for the 1990 provisions to continue in effect through the enactment of the 1991 Act and, therefore, any references to the 1990 Act will impliedly include the amendments of the 1991 Act.

SUMMARY OF ARGUMENT

The trial court correctly denied Plaintiffs' challenges to the multitude of sections of Chapter 90-201, Laws of Florida, and implicitly upheld the constitutionality of those sections. Legislative enactments are presumed valid and the burden is upon the challenging party to prove beyond a reasonable doubt that the statute is unconstitutional. Plaintiffs' utterly failed to produce evidence at trial sufficient to prove that these sections are unconstitutional.

Evidence of the perceived constitutional flaws presented at trial was nothing more than speculation and conjecture since the amendments to Chapter 440 were not in affect for a sufficient period of time to produce any perceived harm. The evidence presented at trial of the alleged perceived flaws was nothing more than speculation and conjecture.

The United States Supreme Court has recognized that Workers' Compensation Acts are authorized under the legislative police power as furthering a sound public policy. There is a general presumption that the amendments to Chapter 440 are valid and constitutional. Plaintiffs' have the burden of showing the statute is unconstitutional "beyond all reasonable doubt". The trial court has found that the Plaintiffs' have failed to meet this burden.

Furthermore, it is the function of the legislature, not the courts, to change to the law. The amendments to Chapter 440 reflect a reasonable legislative approach which is generally

consistent with prior judicial interpretation of the Workers' Compensation laws.

The legislature created Section 440.092, Florida Statutes, with the intent of clarifying several compensability issues by re-establishing the "causal connection" between the employee's injury and the employment. It is a fundamental rule in Workers' Compensation law that the accidents should be sufficiently related to the employer's business before the claimant may obtain benefits under the Workers' Compensation laws.

Chapter 90-201, Laws of Florida, amended Section 440.13, Florida Statutes, regarding medical benefits. The amended statute places a reasonable and constitutional limitation on referrals by health care providers. The legislature recognized the employer/carrier's right and obligation to provide "medically necessary remedial treatment", as well as, the right to monitor treatment and authorize referrals to other health care providers.

Section 440.13, Florida Statutes, also placed a reasonable limitation on the amount of attendant care awarded to the claimant's family members. The statutes directs that no family member or combination of family members providing attendant care could be compensated for more than a total of twelve hours per day. Claimant's requiring attendant care in excess of twelve hours per day may be awarded professional attendant care provided by non-family members. Additionaly, Section 440.13, Florida Statutes, places a reasonable limitation on a deposition fee charged by a health care provider to a $200.00 maximum. It is

well settled law that the Workers' Compensation Act may establish a schedule of fees charged by health care providers. Moreover, the courts have previously determined that the legislature has the general power to establish reasonable deposition fees.

Chapter 90-201, Laws of Florida, amended Section 440.19, Florida Statutes, to require that a claim be filed with certain specificity. Chapter 440 had previously placed the employer/carrier under the burden of providing benefits or filing a notice to controvert within twenty-one days (21) days after receiving notice of an accident. The decision on whether to provide benefits to a claimant had become increasingly complicated by the problem of attorneys filing "shotgun" claims. The "shotgun" claim does not provide the employer/carrier with adequate information regarding benefits being requested. The legislative intent was to avoid needless litigation and delays in benefits by requiring a certain level of specificity in the claims being filed. The amended statute is beneficial to the claimant and the employer/carrier while presenting only a minor inconvenience for the claimant's attorney.

The amendments to Chapter 440 are entirely reasonable legislative changes made to the Workers' Compensation laws and, accordingly, the trial court correctly determined that the remaining sections of Chapter 90-201, Laws of Florida, are not unconstitutional.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFFS FAILED TO SUSTAIN THEIR BURDEN OF PROOF REGARDING THE PRESUMPTION OF CONSTITUTIONALITY OF LEGISLATIVE ACTS.

The Florida State Legislature passed Chapter 90-201, Laws of Florida, which amended Chapter 440, Florida Statutes, as it applies to Workers' Compensation laws. The trial court entered a final judgment which held several sections to be unconstitutional and the Circuit Court denied all other challenges to individual provisions of Chapter 90-201, Laws of Florida, as found in Plaintiffs' Second Amended Complaint. Accordingly, the trial court found no constitutional violation of these sections of the Act and the Plaintiffs failed to sustain their burden.

Workers' Compensations Acts are authorized under the police power as furthering a sound public policy. Ward & Gow v. Krinsky, 259 U.S. 503 (1921); New York C.R. Co. v. White, 243 U.S. 188 (1917).

In matters of state policy and law making, the legislature has absolute power which is inherit and only limited by the Federal and State Constitutions. State ex rel Moodie v. Bryan, 39 So. 929 (1905).

If the statute does not violate the Federal or State Constitution, the legislative will is supreme and it is the duty

of the court to effectuate the policy of the law as expressed in the statute. McMullen v. Johnson, 135 So. 816 (Fla. 1931). Unless a legislative act is shown to be in "direct conflict" with a constitutional mandate, the court is without authority to interfere. State ex. rel. Landis v. Dyer, 148 So. 201 (Fla. 1933).

It is well settled law that the legislature establishes the public policy of the state and where the legislature has declared public policy of the state by means of a statute, the provisions of the statute control unless they are shown to be clearly in violation of constitutional law. Noble v. State, 66 So. 153 (Fla. 1914). The courts are not permitted to strike down legislative acts because they are inconsistent with their individual social theories or with what the courts deem to be sound public policy. Ball v. Branch, 16 So.2d 524 (Fla. 1944).

Legislative determinations are entitled to such weight as to require the party attacking such legislative determinations to sustain the burden of alleging and proving the contrary. Tampa v. State, 19 So.2d 697 (Fla. 1944). It is presumed that the legislature has considered and discussed the constitutionality of all enactments passed by it. McConville v. Ft. Pierce Bank & Trust Co., 135 So. 392 (Fla. 1931). Accordingly, there is the general presumption that the statutes are valid and constitutional. Seabring v. Wolf, 141 So. 736 (Fla. 1932); Ex Parte White, 178 So.2d 876 (Fla. 1938); Knight and Wall Co. v.

Bryant, 178 So.2d 5 (Fla. 1965).

The burden of proving the unconstitutionality of a statute is upon the party challenging its validity. Peoples Bank v. State, 395 So.2d 521 (1981); Brewer v. Gray, 86 So.2d 799 (Fla. 1956). The challenging party has the burden of demonstrating "beyond all reasonable doubt" the statute conflicts with some designated provision of the constitution. Biscayne Kennel Club v. Florida State Racing Com., 165 So.2d 762 (Fla. 1964); Metropolitan Dade County v. Bridges, 402 So.2d 411 (1981).

In the case sub judice, the trial court determined that the amendments did not violate the constitution and Plaintiffs have clearly failed to sustain their burden of proof. The presumption in favor of constitutionality of legislation naturally applies to a statute enacted under legislative exercise of the police power. Florida Citrus Com. v. Golden Gift, 91 So.2d 657 (Fla. 1956). Great respect should be accorded to legislative findings of fact in enacting police regulations in every reasonable presumption favors their correctness. Publix Cleaners v. Florida Dry Cleaning and Laundry Bd., 32 F. Supp. 31 (1940). Accordingly, it is the duty of the courts to construe legislation to affect a constitutional result if it is possible to do so. Chatlos v. Overstreet, 124 So.2d 1 (Fla. 1960). The Workers' Compensation statutes enacted by state legislatures should be interpreted to give effect to the legislative intent. South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940).

II.

THE TRIAL COURT CORRECTLY DETERMINED THAT THE REMAINING SECTIONS OF CHAPTER 440 ARE CONSTITUTIONAL AS THEY RELATE TO COMPENSABILITY ISSUES WHICH RELY ON A CAUSAL CONNECTION BETWEEN THE INJURY AND THE EMPLOYMENT.

Before liability for payment of compensation may be imposed on an employer, a "causal connection" between the employee's injury and the employment must be shown. Fidelity & Casualty Co. v. Moore, 196 So.2d 495 (Fla. 1940). Section 440.09(1), Florida Statutes, reads in, pertinent part, as follows:

> "Compensation shall be payable under this Chapter in respect of disability or death of employee if the disability or death results from an injury arising out of and in the course of employment."

The words "arising out of" refer to the origin or cause of the accident. Bituminous Casualty Corp. v. Richardson, 4 So.2d 378 (Fla. 1941). The phrase "in the course of employment" relates to continuity of time, space, and circumstances to the employment. Strother v. Morrison Cafeteria, 383 So.2d 623 (Fla. 1980). Whether a given accident to an employee is sufficiently related to his employer's business to make it an injury arising out of and in the course of employment is dependent on and governed by the particular circumstances. Seabreeze Industries, Inc. v. Phily, 122 So.2d 407 (Fla. 2nd DCA 1960).

The phrases "arising out" and "in the course of employment" are not synonymous and it is held that where both are used conjuctively a double condition has been imposed, both terms of

which must be satisfied in order to bring a case under the act. Ward & Gow v. Krinsky, 259 U.S. 503 (1921); New York C.R. Co. v. White, 243 U.S. 188 (1917).

Workers' Compensation laws have generally been sustained against due process objections. Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923). Furthermore, the validity of various provisions of Workers' Compensation Acts have been unsuccessfully challenged on the ground that they have denied equal protection as guaranteed by the Federal Constitution. Middleton v. Texas Power & Light Co., 249 U.S. 152 (1918); Cudahy, supra; Ward, supra.

A. Section 440.092(1), Florida Statutes (1990), Is A Reasonable And Constitutional Limitation Of Compensability Regarding Recreational And Social Activities.

In Brockman v. City of Dania, 428 So.2d 745 (Fla. 1st DCA 1983), the Court agreed with the three-prong test enunciated in Larson's Workmen's Compensation Law, Vol. IV, Section 22.00, and deemed activities to be in the course of employment when one of the following criteria are satisfied:

> (1) They occur on the premises during a lunch or recreation period as a regular incident of employment; or
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
> (3) The employer derived substantial direct benefit from the activity beyond the intangible value of improvement in employee health and moral that is common to all kinds of recreation and social life.

The First District Court in the Brockman, supra actually expanded workers' compensation coverage since previous case law had previously held that a disability which resulted from injuries while participating in recreational and social activities did not arise out of and in the course of employment. Nevertheless, the Court found that the injuries sustained by the claimant in Brockman were not compensable since the activity did not meet the criteria in the three-prong test.

In City of Tampa v. Jones, 448 So.2d 1150 (Fla. 1st DCA 1984), the claimant was a police officer who was injured while playing on the City of Tampa Police Department Basketball Team. Based upon a police department memorandum, the Deputy Commissioner found that the police department had ordered team members to participate in the game and, therefore, the injury was compensable since the required participation satisfied the second prong of the compensability test. The First District Court reversed the decision and held that the memorandum containing the alleged order was patently ambiguous and did not indicate mandatory participation on the basketball team.

In Jones, supra, there was sufficient evidence that the court could have held that the employer had "impliedly" required participation. However, the Court intentionally omitted from their analysis the word "impliedly" found in Professor Larson's test. It is a reasonable interpretation of the opinion to argue that the Court had determined that the phrase "impliedly required

participation" was too obscure in this context and susceptible to varying interpretations.

The Workers' Compensation Oversight Board recommended the adoption of a similar type of approach which was being followed by other states regarding recreational and social activities. (See Annual Report of the Florida Workers' Compensation Oversight Board (1990), pg.10). Chapter 90-201, Laws of Florida, essentially adopted Professor Larson's test as construed by the First District Court in Brockman. Section 440.092(1), Florida Statutes, reads as follows:

> **RECREATIONAL AND SOCIAL ACTIVITIES.** - Recreational or social activities are not compensable unless such recreational or social activities are an expressly required incident of employment and produce a substantial direct benefit to the employer beyond improvement in employee health and moral that is common to all kinds of recreation and social life.

In Hutchison v. Dade County School Board, 561 So.2d 1291 (Fla. 1st DCA 1990), The First District Court of Appeals continued to adhere to the test established in Brockman which was essentially codified in Section 440.092(1), Florida Statute. See also Bari Italian Food v. Rittger, 527 So.2d 255 (Fla. 1st DCA 1988), and McCoy Restaurants, Inc. v. Griffith, 15 FLW 2241 (Fla. 1st DCA, September 5, 1990). Accordingly, the statute is fundamentally congruous with prior court decisions and entirely constitutional.

Moreover, there is no denial of equal protection since all employees after July 1, 1990 are treated identically.

Additionally, Section 440.092(1), Florida Statutes, has been substantially modeled from Professor Larson's test of compensability for recreational and social activities as interpreted by the Court in Brockman and, consequently, the modest variation in statutory language does not violate due process. The legislature merely utilized unambiguous statutory language, and omitted the vague language, as a means of establishing a sufficient nexus between the injury and the employment to warrant a finding of compensability.

B. Section 440.092(2), Florida Statutes (1990), Is A Reasonable And Constitutional Limitation Of Compensability Regarding The "Coming And Going Rule".

Compensability under the Workers' Compensation law is based upon the relationship of an event to employment and, therefore, the injury forming the basis of the claim must have flowed as a natural consequence from the employment. Fidelity & Casualty Co. v. Moore, 196 So.2d 495 (Fla. 1941).

In Blount v. State Road Department, 87 So.2d 507, at 509 (Fla. 1956), this Court held the following:

> A person injured while going to or coming from work as a general rule is not protected by the provision of the Workmen's Compensation Act, F.S.A. Section 440.01 et seq. This is commonly referred to in the books as the "Going and Coming" Rule. To this rule, however, there are many exceptions. Obviously, in those cases where the journey to and from work is a part of the service of the employee to the employer, the employee is protected by provisions of such act. Larson's Workman's Compensation Laws, Vol. 1, Paragraph 16, Page 222. (Emphasis added).

In Grillo v. Gorney Beauty Shops Co., 249 So.2d 13 (Fla. 1971), this Court re-affirmed the general rule that accidents occurring when an employee is "going to" or "coming from" work are not compensable. However, the Court in Grillo also noted that there were several exceptions to this rule. Due to the "almost limitless methods of avoiding" the Coming and Going Rule it is almost impossible for employers/carriers to determine liability. See Davis, Florida Practice, Workers' Compensation (1982), Section 226, Page 398.

In Swartzer v. Food Fair Stores, Inc., 175 So.2d 36, 37 (Fla. 1965), this Court carved out a traveling exception to the "Coming and Going Rule" and stated the following:

> The rule for determining whether or not the particular facts of the case bring it within the Coming and Going Rule or make it an exception thereto was laid down for this jurisdiction by Southern States Mfg. Co. v. Wright, (1941, 146 Fla. 29, 200 So.2d 375), wherein we said:
>
> > "Generally it appears that the employer's liability in such cases depends upon whether or not there is a contract between the employer and employee, express or implied, covering the matter of transportation to and from work. This form of traveling employee exception, such as delivery and repairman, is related to the concept that the 'employee is on duty'. Corley v. Cooper Distributors of South Florida, Inc., 7 FCR 182 (1972). Included within this exception would be employees sent on 'special errands'. See Hill and Hill Truck Lines, Inc. v. Magee, IRC order 2-2949 (April 19, 1976), cert. denied Magee v. Hill and Hill Truck Lines, Inc., 342 So.2d 1102 (Fla. 1976)."

Another exception to the Coming and Going Rule is frequently referred to as the "Special Hazard" Exception. This exception requires compensability if the employees risk of travel to and from his employment exposes him to a hazard greater than the hazard to which every other traveler on public streets and highways is likewise exposed. Toyota of Pensacola v. Maines, 558 So.2d 1072 (Fla. 1st DCA 1990).

In Tampa Airport Hilton Hotel v. Hawkins, 557 So.2d 953 (Fla. 1st DCA 1990), the Court held that the claimant's injury was compensable under the "special errand" exception to the Coming and Going Rule when the employee was injured while returning the her home after attending a staff meeting called by the employer. In the Hawkins opinion, this Court distinguished the case from Krause v. West Lumber Co., 227 So.2d 486,487 (Fla. 1969), which held that exceptions to the Coming and Going Rule do not apply if the claimant's trip was "a purely personal mission that had no connection with his employment".

In response to the broadening interpretation of the statutes, the legislature enacted Chapter 90-201, Laws of Florida, which codified the Coming and Going Rule under Section 440.092(2), Florida Statutes, which reads as follows:

> **GOING OR COMING** - An injury suffered while going to or coming from work is not an injury arising out of and in the course of employment whether or not the employer provided transportation if such means of transportation was provided for the exclusive personal use by the employee, unless the employee was engaged in a special errand or mission for the employer.

Section 440.092(2), Florida Statutes, includes much of the language found in prior case law including Grillo (general coming and going rule), Krause (personal mission), and Hawkins (special errand).

Plaintiffs, Mark Scanlan and Professional Fire Fighters of Florida, argue that Section 14 of the Act Section 440.092(2), Florida Statutes, overrules the Florida Supreme Court's decision in Blount v. State Road Department, supra, among other cases. (Scanlan brief, Page 32-33). However, Cross- Appellants have mis-interpreted this Court's ruling in Blount. The claimant's injury in the Blount case could still be compensable under Section 440.092, Florida Statutes, since the claimant was considered to be returning from a "special errand" for the employer. The "special errand" exception is included in the statutory amendment. The legislative intent was to focus compensability on whether the injury arose out of and in the course of employment. Whether the vehicle was a personal car or the company car is irrelevant. (See Annual Report of the Florida Workers' Compensation Oversight Board (1990), pg.12).

Nevertheless, the legislature, as previously discussed, has wide discretion in the exercise of its police powers in the interest of public welfare. The general rule is that the Courts will abide by the legislative decision unless it is clearly erroneous, arbitrary or wholly unwarranted. Spencer v. Hunt, 147 So. 282 (Fla. 1933); Moore v. Thomas, 126 So.2d 543 (Fla. 1961).

C. Section 440.092(3), Florida Statutes (1990), Is A Reasonable And Constitutional Limitation On Compensability Regarding Deviation From Employment.

As previously discussed, a causal connection between the employee's injury and the employer must be shown before liability may be imposed on an employer. Fidelity & Casualty Co. v. Moore, supra. Where an employee deviates from his employment and is injured while engaged in a purely personal mission, he is not entitled to workers' compensation benefits. N & L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960); Foxworth v. Florida Industrial Commission, 86 So.2d 147 (Fla. 1955). An employee who deviates from his employment to engage in personal errands is not entitled to compensation for damages sustained in an accident before he returns to the course he was pursuing in interest of his employer. Maroney v. Edward A. Kelly & Sons, Inc., 195 So.2d 208 (Fla. 1967); Sunshine Jr. Food Stores, Inc. v. Thompson, 409 So.2d 190 (Fla. 1st DCA 1982).

Whether an employee has deviated from his employment to such an extent that he is barred from receiving compensation for the injuries sustained while so engaged, depends ordinarily on the circumstances of the particular case. Lee v. Florida Pine and Cypress, 157 So.2d 513 (Fla. 163).

The Workers' Compensation Oversight Board and the legislature were concerned about the broadening of the "deviation rule" by the First District Court decision in Holly Hill Fruit Products, Inc. v. Kriter, 473 So.2d 829 (Fla. 1st DCA 1985). In

Kriter, supra, the claimant left the employer's premises without permission to purchase cigarettes at a nearby convenience store and the claimant was injured when struck by an automobile while crossing the road. Apparently, the First District interpreted the employer's failure to specifically forbid the employees from leaving the premises during breaks as a form of implied consent. The court ruled that an employer-condoned off premises refreshment break of insubstantial duration is generally not a "deviation" as to remove a claimant from the course and scope of the employment.

In B & B Cash Groceries Stores v. Wortman, 431 So.2d 171 (Fla. 1st DCA 1983), the First District Court held that the employee's swimming excursion, while on the employer's payroll, was an insubstantial deviation from employment. The court alleged that the activity increased the productivity of employees and was incidentally beneficial to the employer. An employee attending to his personal comfort at the time of injury does not defeat compensability. Baker v. Orange County Board of County Commissioners, 399 So.2d 400 (Fla. 1st DCA 1981); and Cunningham v. Scotty Home Builders, 9 FCR 1 (1973), cert.den. 307 So.2d 182 (Fla. 1974).

In Turcotte v. Fowler and Torrance Concrete, 507 So.2d 785 (Fla. 1st DCA 1987), the court denied workers' compensation benefits on the grounds that the injury occurred during deviation from employment. In Turcotte, supra, the claimant was working at

a boatyard at the direction of his employer and he was injured when he volunteered his services to help move a nearby pilot house which was unrelated to his employment.

In response to the confusion concerning the "Deviation Rule" and the "Personal Comfort" doctrine, the legislature drafted Section 440.092(3) Florida Statutes, which reads as follows:

> **DEVIATION FROM EMPLOYMENT.** - An employee who is injured while deviating from the course of his employment, including leaving the employer's premises, is not eligible for benefits unless such deviation is expressly approved by the employer, or unless such deviation or act is in response to an emergency and designed to save life or property.

This statutory language is consistent with previous caselaw which hold that an injury suffered by an employee while assisting in an emergency is compensable. See Martinez v. D.L. Culiffer & Son, Inc., 556 So.2d 796 (Fla. 1st DCA 1990). Section 440.092(3), Florida Statutes (1990), was designed to reduce the expansion of the Personal Comfort Doctrine which would create employer liability without a showing of a reasonable causal connection between the employee's injury and the employment. It was also designed to avoid the confusion caused in a situation where the employee leaves the employer's premises on a personal errand when not expressly permitted by the employer.

Plaintiffs argue that employees would not be covered by Worker Compensation laws during standard breaks. There is no indication that the courts would construe the statutory language

to exclude many of the aspects of the Personal Comfort Doctrine related to reasonable activity on the employer's premises such as lunch breaks, coffee breaks and restroom breaks. Plaintiffs are attempting to anticipate that the court will interpret the statute in an unconstitutional manner. In fact, it is the duty of the courts to so construe legislation as to save it from constitutional infirmities. Seaboard Air Line v. Watson, 137 So.2d 719 (Fla. 1931).

Furthermore, the Court may continue to utilize the "Special Hazard Doctrine" to find compensability since the statute did not directly address this doctrine. See Alpert, Florida Workers' Compensation Law, 1990 Supp, Section 7-8.

Plaintiffs' also argue that removing these activities which are unrelated to employment from the workers' compensation law would expose the employer to common law damages. With respect to deviation from employment, it is the strong public policy, as reflected in the legislative intent, that both employers and employees be responsible for their actions in non-work related situations. If the employer is negligent in some manner beyond the work relationship, the injured party should certainly be able to bring a common law action.

The amended statute is consistent with the vast majority of prior judicial decisions and the original intent of the Workers' Compensation Act which is to compensate the injured worker when the industry has brought about the injury.

D. Section 440.092(4), Florida Statutes (1990), Is A Reasonable And Constitutional Limitation Of Compensability Regarding Traveling Employees.

A traveling employee who is away from the employer's premises is within the course of his employment during the trip except when there is distinct departure for a non-essential personal errand. N & L Auto Parts Co. v. Doman, 111 So.2d 270 (Fla. 1st DCA 1959). Accordingly, the concept of deviation from employment also applies to the Traveling Employee Doctrine.

When there is a substantial deviation from employment, granting compensation "would only serve to distort the purpose of the act beyond reason and logic." Sunshine Jr. Food Stores, Inc. v. Thompson, 409 So.2d 190 (Fla. 1st DCA 1982).

The Workers' Compensation Oversight Board and other concerned parties expressed indignation regarding the application of the Traveling Employee Doctrine in Garver v. Eastern Airlines, 553 So.2d 263 (Fla. 1st DCA 1989). In Garver, the claimant (a flight attendant) was a resident of Miami who experienced a one day layover in Los Angeles. She arranged to have lunch with a male companion at a restaurant and, after lunch, the two were proceeding back to the companion's home to enjoy each other's company. The companion's home was approximately twenty-six miles from the airport. Before reaching their destination, the companion said "Let me show you what my [Ferrari] can do." They were involved in an automobile accident and the claimant was injured. The court determined the proper application of the

traveling employee's rule was based upon the "reasonableness of the activity engaged in by the claimants at the time of their injuries". Garver, supra at 265. Nevertheless, the court found the personal activity "reasonable" and the injury compensable.

In Gray v. Eastern Airlines, Inc., 475 So.2d 1288 (Fla. 1st DCA 1985), the court also held that the purely recreational activity indulged in during the layover by the employee (playing basketball) was reasonable and compensable. However, the court in Eastern Airlines v. Rigdon, 543 So.2d 822 (Fla. 1st DCA 1989), found that down hill skiing was not compensable since the activity was "far more conducive to the occurrence of a serious injury". Id. at 265.

As a result of the variations of the "traveling employees" rule, the legislature drafted Section 440.092(4), Florida Statutes, which reads as follows:

> **TRAVELING EMPLOYEES.** - An employee who is required to travel in connection with his employment who suffers an injury while in travel status shall be eligible for benefits under this chapter only if the injury arises out of and in the course of employment while he is activity engaged in the duties of his employment, which shall include travel necessary to and from the place where such duties are to be performed and other activities reasonably required by the travel status.

The statutory language includes all the essential elements of prior case law interpreting traveling employees. The phrase "reasonably required by the travel status" allows for a judicial interpretation which is not inconsistent with the rationale stated in Garver, supra. As a practical matter, however, there

can be little doubt that the legislature intended that the amended statute, when read in pari materia, would yield a different result based on facts similar to Garver. The entirely reasonable restrictions found in Section 440.092(4), Florida Statutes, are directed at re-establishing the logical nexus between the injury and the essential elements of employment.

E. Section 440.092(5), Florida Statutes (1990), Is A Reasonable And Constitutional Limitation Of Compensability Regarding "Subsequent Intervening Accidents."

A subsequent injury maybe of such a kind that its consequences are the natural result of an original condition or injury which may warrant the granting of compensation based upon the original injury. Benitoa v. Maritime Machine Products, Inc., 380 So.2d 560 (Fla. 1st DCA 1980). In Sosenko v. American Airmotive Corp., 156 So.2d 49 (Fla. 1963), this Court adopted and followed Larson which reads as follows:

> But when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the common-law concepts of "direct and natural results," and of claimant's own negligence as an independent intervening cause.
>
> The basic rule is that a subsequent injury, whether an aggravation of the original injury, is compensable if it is the direct and natural result of a compensable primary injury. But if the subsequent injury is attributable to claimant's own negligence or fault, the chain of causation is broken, even if the primary injury may be contributed in part to the occurrence of the subsequent injury. Larson's Workman's Compensation Law, Vol. 1, Section 13.11. (Emphasis added).

See also Johnny's Produce Co. v. Benedict & Jordan, 120 So.2d 12, In City of Lakeland v. Burton, Fla. 1941, 147 Fla. 412, 2 So.2d 731.

The legislature drafted language which excludes from compensability subsequent intervening accidents "arising from an outside agency", but does not exclude any natural probable consequence. Section 440.092(5), Florida Statutes, reads as follows:

> **SUBSEQUENT INTERVENING ACCIDENTS.** - Injuries caused by a subsequent intervening accident arising from an outside agency which are the direct and natural consequence of the original injury are not compensable unless suffered while traveling to or from a health care provider for the purpose of receiving remedial treatment for the compensable injury. (Emphasis added)

The plain language of the statute merely excludes subsequent intervening accidents arising from an outside agency. This language was in response to the First DCA's opinion in D.O.T. State of Florida v. King, 554 So.2d 1192 (Fla. 1st DCA 1989). In King, supra, the claimant sustained an injury to her leg and, following treatment, she was allegedly walking in order to stimulate circulation in her legs. While crossing an intersection in her own neighborhood, the claimant was struck by an uninsured motorist and she suffered extensive and severe injuries. The First District found the employer/carrier to be liable under the extraordinary theory that the claimant was injured as part of her prescribed therapy.

There was strong public opinion against the decision in King which argued that the subsequent injury was not sufficiently

related to the industrial injury to be compensable. The Florida Supreme Court had previously established that the independent and intervening negligence of a third-party may place a subsequent injury outside the chain of industrial causation. D'Angelo Plastering Co. v. Isaac, 393 So.2d 1066 (Fla. 1980). In the Isaac case, an injured worker, wearing a back brace and using crutches necessitated by an industrial injury, was struck by a vehicle while he was attempting to cross an intersection. This Court properly determined that the subsequent injuries were the independent intervening acts of a negligent automobile driver.

The legislative language in Section 440.092(5), Florida Statutes (1990), would remove liability from the employer if the employee was subsequently injured by the acts of a third-party. This definition is consistent with this Court's opinion and analysis in Isaac, supra. It is clearly within the legislature's police power to statutorily define subsequent intervening accidents which remove acts caused by third-parties unrelated to the employment relationship.

There may be a break in the chain of causation when there is some intervening negligent or unusual conduct on the part of the claimant or some third-party. Orlando Precast Products v. Ciofalo, 537 So.2d 1043 (Fla. 1st DCA 1989); Sun Lakes Realty and Construction Co. v. Taylor, 555 So.2d 1216 (Fla. 1st DCA 1989).

The purpose of Section 440.09(5), Florida Statutes, is to place the burden of liability on the responsible parties. As

previously stated, it is consistent with prior case law that the subsequent injuries caused to the claimant due to his own misconduct or negligence is not compensable. Isaac, supra. It is also established public policy to hold third-party tortfeasors responsible for their negligent acts. See Singletary v. Mangham Construction Co., Inc., 418 So.2d 1138 (1st DCA 1982). When the chain of causation is broken by an intervening third-party, it is prudent public policy to allow the claimant to pursue financial compensation from the responsible third-party tortfeasor.

The statute does hold an employer/carrier liable for subsequent injuries to the employee even if caused by an "outside agency" when the injuries are "suffered while traveling to or from a health care provider for the purpose of receiving remedial treatment for the compensable injury". Section 440.092(5), Florida Statutes. This position is also consistent with prior case law. See Taylor v. Dixie Plywood Co. of Miami, Inc., 297 So.2d 553 (Fla. 1974).

The vast majority of the statutory language used in Section 440.092, Florida Statutes (1990), is consistent with prior case law and judicial interpretation of common law rights. Furthermore, the legislature drafted the statutory language to reflect strong public policy which clearly withstands constitutional scrutiny.

III.

THE TRIAL COURT CORRECTLY DETERMINED THAT THE REMAINING SECTIONS OF CHAPTER 440 ARE CONSTITUTIONAL WITH RESPECT TO MEDICAL ISSUES WHICH ARE FUNDAMENTALLY CONSISTENT WITH PRIOR JUDICIAL DECISIONS.

Section 18 of Chapter 90-201, Laws of Florida, amends Section 440.13, Florida Statutes (1990), regarding medical benefits.

A. Section 440.13(2), Florida Statutes (1990), Is A Reasonable And Constitutional Limitation Of A Medical Issue Regarding The Employer/Carrier's Right And Obligation To Provide Medical Treatment And Monitor The Administration Of Such Treatment.

Section 440.13(2)(a), Florida Statutes, reads, in pertinent part, as follows:

> Subsequent to the limitations specified in Section 440.19(1)(b), the employer shall furnish to the employees such medically necessary remedial treatment, care, and attendance by the health care provider and for such period as the nature of the injury or the process of recovery may require, including medicines, medical supplies, durable medical equipment, orthoses prostheses, and other medically necessary apparatus... (Emphasis added)

This language in Section 440.13(2)(a), Florida Statutes, was unchanged by the 1990 amendments and is consistent with the purpose of the workers' compensation law. See Gillespie v. Anderson, 123 So.2d 458 (Fla. 1960); C.F. Wheeler Co. v. Pullins, 11 So.2d 303 (Fla. 1942).

In furtherance of the employer/carrier's right and obligation to provide "medically necessary remedial treatment",

the legislature amended Section 440.13(2), Florida Statutes (1990), to include the following:

> (b) the right to conduct an independent medical examination includes, but is not limited to, instances when the authorized treating physician has provided current medical reports; determining whether over utilization by a health care provider has occurred; whether a change in a health care provider is necessary; or whether treatment is necessary or the employee appears not to be making appropriate progress in recuperation. The employer or carrier has the right to schedule an independent medical examination with a health care provider of its choice, at a reasonable time to assist in determining this status. The health care provider performing the independent medical examination shall not be the health care provider to provide the treatment or follow-up care, unless the carrier or self-insurer and the employee so agree or unless an emergency exists. (Emphasis added).

The statutory language in Section 440.13(2)(b), Florida Statutes (1990), is consistent with the prior case law in this area which requires the claimant to report for a physical examination. See Howard Johnson, Inc. of Florida v. Escobedo, 299 So.2d 582 (Fla. 1974). Since there does not need to be judicial intervention to obtain an independent medical examination, the statute is also in harmony with the intent of the workers' compensation law to be "self executing". See Miami Beach First Nat'l Bank v. Dunn, 85 So.2d 556 (Fla. 1956).

Section 440.13, Florida Statutes, (1990), reads, in pertinent part, as follows:

> (1)(c) "Independent medical examination" means an objective medical or chiropractic evaluation of the injured employee's medical condition and work status.

In Plaintiff's Second Amended Complaint (para. 109),

Plaintiffs alleged that the definition of "independent medical examination" violated several constitutional rights. However, it is a well established principle of Workers' Compensation law that the system requires an objective medical or chiropractic evaluation of the injured employee. Additionally, Plaintiffs have essentially conceded this point and failed to raise this issue on appeal. (See AFL-CIO Brief, Page 32).

The "independent medical examination" is merely a form of a "second opinion" based upon the employer/carrier's obligation to provide "medically necessary remedial treatment". The employer/carrier most certainly has the right to obtain medical information which will allow them to make an informed decision. It would be a waste of judicial resources to require a judicial review and order merely to obtain a second opinion so that the employer/carrier may properly monitor the administration of medical treatment to an employee. (See report of the Workers' Compensation Oversight Board and Governors' Task Force on Workers' Compensation).

As an extension of the employer/carrier's right and obligation to provide medical treatment, Section 440.13(2)(a), Florida Statutes (1990), was amended to include the following:

> However, no health care provider may refer the employee to another health care provider, diagnostic facility, pain program, work hardening program, therapy center, or other facility without the prior authorization from the carrier or the employer if self-insured except in cases where emergency care is required.

This section is to insure that the employer/carrier is kept informed on the health care provided and has some input in the scope and necessity of their remedial medical treatment. With the increasing level of medical related fraud and health care costs, the employer/carrier must have the ability to become involved in the administration of remedial treatment.

> "The duty [to provide remedial treatment] is imposed on the employer without necessity for an order directing him so to proceed and without any award to the employee for such service. It is one of the best examples of the self-executing nature of the Florida Compensation Act.
>
> The right to control the medical, as the statute provides, is of great importance to the carrier. Prompt reports; continuity of attention; adequate supervision; and an intelligent overall view is thus obtained."

Alpert, Florida Workers' Compensation Law, Section 17-8, (1987).

In Dept. of Transportation v. Allen, 384 So.2d 240, 241 (Fla. 1st DCA 1980), the court held that "the employer-carrier should be given the opportunity to furnish their own qualified physician". See also Broward Industrial Plating, Inc. v. Weiby, 394 So.2d 1117 (Fla. 1st DCA 1981).

Although a claimant may wish to select his own physician, it is well settled law that the employer, absent an emergency, may provide a list of authorized physicians to the claimant, rather than provide the claimant with a physician of his choice. Smith v. Walt Disney World Company, 471 So.2d 637 (Fla. 1st DCA 1985). In this manner, the employee can receive prompt, adequate and

effective treatment while the employer/carrier can monitor treatment and costs.

The statutory language in Section 440.13(2), Florida Statutes (1990), is effectively drafted as a balancing of interests for the purpose of achieving the intended objective of the workers' compensation laws which is to benefit the employee and the employer alike. See Lee v. Florida Pine and Cypress, 157 So.2d 513 (Fla. 1963). It is fundamental to the workers' compensation law that the employer/carrier be accorded the right and obligation to provide "medically necessary remedial treatment" by adequately supervising the health care providers in an effort to manage medical costs. Although employers are required to comply strictly with the statute, the legislative intent is not to make such compliance so burdensome as to render it economically impossible to live under the law. A.B. Taff and Sons v. Clark, 110 So.2d 428 (Fla. 1st DCA 1959).

Dr. Hogshead testified at trial that it was his opinion the flow of health care would be disrupted by the requirement to obtain permission for a referral. (R. 67-68). Dr. Hogshead objected to being required to obtain permission for a referral from a claims adjuster and stated that the authorization system would have a chilling affect on medical care. (R. 71). However, Dr. Hogshead revealed that he already called carriers for authorizations for referrals prior to the enactment of Chapter 90-201. (R. 93). Furthermore, he admitted that he had never

been turned down by a carrier or employer when requesting a referral authorization. (R. 87).

In McKinney v. McKinney Farms, 380 So.2d 469 (Fla. 1st DCA 1980), the court recognized the carrier's right to supervise health care providers when it held that an authorized physician should first contact the carrier and secure authorization before referring the claimant to another physician and, thereby, "subjecting [the carrier] to financial responsibility for such treatment and hospitalization". Accordingly, when the physician to whom the claimant is referred treats the claimant, the employer is not responsible for that treatment absent an emergency. Northwest Orient Airlines v. Gonzalez, 500 So.2d 699 (Fla. 1st DCA 1987). The statutory language is entirely consistent with prior case law and a reasonable exercise of legislative authority.

B. Section 440.13(2)(g), Florida Statutes (1990), Is A Reasonable And Constitutional Limitation On The Amount Of Attendant Care Awarded To Family Members.

Chapter 90-201, Laws of Florida, amended Section 440.13 (2)(g), Florida Statutes (1990), to read as follows:

> The value of non-professional attendant or custodial care provided by family members shall be determined as follows:
>
> 1. If the family member is not employed, the per hour value shall be that of the Federal minimum wage.
> 2. If the family member is employed and elects to leave that employment to provide attendant or custodial care, the per value hour of that care shall be at the per hour value of the family

> members former employment, not to exceed the per hour value of such care available in community at large. In no event shall a family member or combination of family members providing non-professional attendant or custodial care pursuant to this paragraph be compensated for more than a total of twelve hours per day. (Emphasis indicates phrases added to statute).

The amendment to Section 440.13, Florida Statutes, merely places a ceiling on the amount of attendant care which may be provided by family members. In the amended complaint, the plaintiffs alleged that the amendment to Section 440.13, Florida Statutes (1990), violated due process, equal protection, basic rights, and access to the courts. However, Plaintiffs failed to raise these arguments on appeal and, therefore, these issues are now waived and moot.

Nevertheless, the amended statute can withstand constitutional scrutiny. Section 440.13(2)(g), Florida Statutes (1990), was amended by the legislature to place reasonable restrictions on non-skilled attendant care provided by family members. If the disability of a claimant warrants more than twelve hours per day of attendant care, the treating physician may direct "attendant or custodial care" to be rendered by trained professional attendance or non-family members in addition to the attendant care provided by family members. See Section 440.13(2)(f), Florida Statutes (1990).

The legislature amended the statute for essentially two purposes. First, the limit placed on the amount of attendant care provided by family members is designed to reduce the costs

to the employer/carrier of providing attendant care in situations which are unwarranted. It is difficult, if not impossible, to determine the proportion of time a family member may spend on attendant care, as opposed to normal household duties, gratuitous acts, and unrelated activities. (See Governor's Task Force on Workers' Compensation, Part III (1989), pg.13).

Secondly, the claimant who actually requires significant attendant care exceeding twelve hours can be provided with appropriate professional or non-professional custodial care as opposed to the often inconsistent level of care provided by various family members. The seriously injured employee is the beneficiary of this amended statute.

C. Section 440.13(2)(k), Florida Statutes (1990), Is A Reasonable And Constitutional Limitation Of A Deposition Fee Charged By A Health Care Provider.

Plaintiffs alleged in their amended complaint (para. 123) that Section 440.13(2)(k), Florida Statutes (1990), is unconstitutional because it limits the deposition fees charged by the health care provider. However, Plaintiffs' briefs failed to raise a challenge to the trial court's holding that this section is constitutional. The complaint alleged that the section was an impairment of contracts and violated due process, equal protection, basic rights, and excessive to the courts. Plaintiffs' offered no evidence to support their claims.

Section 440.13(2)(k), Florida Statutes (1990), reads as follows:

> Any health care provider who gives a deposition shall be allowed a witness fee. The amount charged by such witness may not exceed $200.00. This limitation does not apply to an expert witness who has never provided direct professional services to a party or has provided only direct professional services which were unrelated to the workers' compensation case.

This statute is a legislative response to inconsistent and sometimes excessive fees charged by physicians. (See Governor's Task Force on Workers' Compensation, Part II (1989), pg.9). Claimants are disproportionately affected by excessive deposition fees which created substantial financial burdens on the claimant. Physicians have frequently charged $400 to $500 per hour for depositions. If the claimant cannot afford to depose his treating or examining physicians, the excessive physician deposition fees will have the effect of denying the claimant access to the courts.

It is well settled law that the Workers' Compensation Act may establish a schedule of charges by which health care providers may be reimbursed for the treatment of injured workers. Shelton v. Sadler, 82 So.2d 883 (Fla. 1955); Board of County Commissioners, Dade County v. Southern Florida Sanitarium and Hospital Corp., 173 So.2d 131 (Fla. 1965). In Longrove Builders, Inc. v. Haun, 508 So.2d 477 (Fla. 1st DCA 1987), the court rendered the following decision:

> This Court observed in Mt. Sinai Medical Center v. Samuels, 453 So.2d 81 (Fla. 1st DCA 1984), that the issue of whether medical bills correspond to the Medical Services Fee Schedule is handled administratively pursuant to Section 440.13(3)(a), Florida Statutes (1981)(Now 440.13(4)(a)). The administrative framework for resolving the issue is provided in Florida Administrative Code Rule 38F-7.021.

See also Eastern Elevator Company v. Hedman, 290 So.2d 56 (Fla. 1974); and Department of Health and Rehabilitation, Division of Risk Management, v. Lucas, 466 So.2d 269 (Fla. 1st DCA 1985).

The courts have repeatedly held that limits on medical charges can be established pursuant to the administration of the Workers' Compensation Act.

It must also be remembered that the health care provider has already "provided direct professional services" to the claimant and has received separate and adequate compensation from the employer/carrier. Therefore, the health care provider needs no additional preparation prior to the deposition. Furthermore, the deposition ordinarily takes place at the health provider's office and the depositions are frequently of short duration. The transcript of the deposition is usually stipulated into evidence in lieu of requiring the health care provider to appear personally at the hearing. The statute does not apply to limiting the fees of expert witnesses. Section 440.13(2)(k), Florida Statutes, (1990).

The legislature has the general power to establish and alter rules of evidence, which includes the ability to establish reasonable deposition fees. See Black v. State, 81 So. 411 (Fla. 1919); Goldstein v. Maloney, 57 So. 342 (Fla. 1911); and Campbell

v. Skinner Mfg. Co., 43 So. 874 (Fla. 1907). The right of a witness to compensation is purely statutory since at common law no witness fees were paid. See 81 American Jurisprudence 2d, Witnesses, Section 23, Pg. 47. A witness is entitled to no further compensation than that which the statute provides. Hurtado v. United States, 410 U.S. 578 (1973); Blair v. United States, 250 U.S. 273 (1919).

For the above stated reasons, Plaintiffs allegations of constitutional violations are completely without merit. In interpreting the workers' compensation statute, the Court should give consideration to the interest of the public, as well as those of the employer and employee. See 81 American Jurisprudence 2d, Workers' Compensation, Section 27. The amendment to Section 440.13, Florida Statues, is a reflection of balancing the interest of the public, the employer and the employee.

D. No Evidence Was Presented At Trial To Show That The Reimbursement Provisions Relating To Prescription Drugs Was Unconstitutional.

Plaintiffs' attack the validity of Section 440.13(4)(e), Florida Statutes (1990), which provides:

> As to reimbursements for prescription medication, the maximum reimbursement amount for a prescription shall be the average wholesale price times 1.2 plus $4.18 for the dispensing fee.

Plaintiffs' also attacked Section 440.13(1)(e), Florida Statutes (1990), which defines medicines as follows:

> Drugs prescribed by an authorized health care provider that includes only generic drugs or single-source patented drugs for which there is no generic equivalent, unless the authorized health care provider writes or states that the brand name . . .is medically necessary.

Plaintiffs failed to produce any evidence at trial of the constitutional infirmities of the section. The only evidence produced at trial regarding prescription medicines was the testimony of Mark Scanlan, a former Coral Gables Policeman who suffered a heart attack during training exercises in 1986. (R. 103-105). Although Scanlan testified that he had troubles in the past getting his prescriptions filled, he admitted it was due to the failure of the city's servicing agency to timely pay the pharmacist's bills. (R. 108-109). He has had no problems regarding reimbursement for a particular type of drug (i.e. generic brand), nor did he testify that he had problems with paying more for a drug than the servicing agent would pay under the Workers' Compensation Statute.

In fact, Plaintiff Scanlan testified the problems he experienced in obtaining his prescription arose before July 1, 1990, and that he has not had any problems under the new law. (R. 111-113). In summary, there is no evidence whatsoever that the new act will cause any problems for workers requiring prescription drugs.

E. The Evidence Presented By Plaintiffs' Failed To Show That Section Eighteen Of The Act Relating To Schedules For Payments Of Benefits Was Unconstitutional.

The constitutional validity of each provision of Section 18 should be upheld since Plaintiffs failed to introduce at trial evidence that any section was unconstitutional.

1. The Testimony Offered Failed To Show That The Schedules For Reimbursement Of Physician Charges Was Unconstitutional.

Chapter 90-201, Laws of Florida, mandates the establishment of a schedule of maximum reimbursement allowances for physician charges, which was to be adopted on or before January 1, 1991 and remain unchanged for two years. Section 440.13(4)(a), Florida Statutes (1990). The maximum reimbursement charges were not to exceed 95% of the 50th percentile of the data base of physician charges used to establish the 1988 Schedule of Maximum Reimbursement. Subsequent schedules were not to exceed the same percentages of physician charges in the division's future data base. Id. Plaintiffs alleged that this section violated "impairment of contracts, due process, equal protection, basic rights [Art. I, Section 2], and access to courts." (See Amended Complaint, Para. 126). Evidence offered a trial to support these allegations was woefully inadequate to reveal any constitutional infirmity.

At trial, Plaintiffs' offered evidence in the form of opinion testimony by Dr. Howard Hogshead, an orthopedic surgeon

having a large work place injury related practice. According to Dr. Hogshead, doctors would refuse to care for workers' compensation patients under the 1990-1991 act because reimbursement fees set therein are not competitive. (R. 60). Dr. Hogshead testified that in 1989 Department of Insurance survey showed that many orthopedic surgeons would not care for injured workers. (R. 61). However, this survey was actually taken prior to the enactment of Chapter 90-201. (R. 79). In reality, a mere 18% of the state's certified orthopedic surgeons actually said that they did not accept workers' compensation patients. (R. 80). Dr. Hogshead admitted that it was simply his opinion that the reason was related to the fee schedules in the 1988 reimbursement manual. (R. 90).

There is no shortage of doctors available to care for workers' since there are at least one hundred (100) orthopedic surgeons, in addition to those surveyed, practicing in Florida. Furthermore, Dr. Hogshead testified that doctors would not completely cease caring for workers, and that workers would still be able to obtain quality health care services. (R. 81).

Dr. Hogshead also admitted that assertions he made concerning the alleged inadequacy of the fee reimbursement schedule were pure speculation on his part. (R. 85). He acknowledged that 95% of the 50th percentile could actually be more than the existing percentile. (R. 86). Additionally, Dr. Hogshead conceded that he even accepts considerably less than his

"usual and customary" fee when dealing with other social medical programs. (R. 98-99). Indeed, only 10% - 25% of Dr. Hogshead's customers paid the full "usual and customary" fees. (R. 101).

IV.

THE TRIAL COURT CORRECTLY DETERMINED THAT THE REMAINING SECTIONS OF CHAPTER 440 ARE CONSTITUTIONAL WITH RESPECT TO THE SPECIFICITY REQUIREMENTS AND ATTORNEY FEES.

A. Section 23 Of Chapter 90-201, Laws Of Florida, Amended Section 440.19(1), Florida Statutes, In Response To Considerable Confusion Regarding The Benefits Being Claimed And The Resulting Award Of Attorney Fees.

In an effort to quickly place benefits in the hands of injured workers, the legislature enacted Section 440.34(1), Florida Statutes, which stated that the employer/carrier had up to twenty-one days after receiving notice of the claim to either provide benefits or file a notice to controvert. See also Section 440.19(1)(e)(7), Florida Statutes. If the claimant retains an attorney who is successful in securing benefits, the employer/carrier then becomes liable for claimant's attorney fees. Section 440.34(1), Florida Statutes (1978), provided:

> If the employer or carrier. . . . shall decline to pay a claim on or before the 21st day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation and the claimant shall have employed an attorney at law in the successful prosecution of the claim, there shall, in addition to the award for compensation, be awarded a reasonable attorney's fee. (Emphasis added).

This places a significant burden on the employer/carrier to

make a prompt informed decision. Considerable litigation commenced to determine whether the claim provided enough specific information to the employer. On some occasions, the courts held that the claims have not contained "sufficient information to enable to the employer to begin an investigation." All American Pools N' Patio v. Zinnkann, 429 So.2d 733 (Fla. 1st DCA 1983); Massey v. North American Biologicals, 397 So.2d 341 (Fla. 1st DCA 1981); Latt Maxcy Corp. v. Mann, 393 So.2d 1128 (Fla. 1st DCA 1981).

Since the number of claims have drastically increased over the last decade, the employer/carrier is finding it increasingly difficult to comply with the twenty-one day rule. Many attorneys representing claimants have greatly complicated the problem by filing "shotgun" claims listing all the possible benefits ever available under the workers' compensation law, without regard to when in the future the benefits may or may not become due. The "shotgun" claim does not provide the employer/carrier with adequate notice and information to determine what benefits are being requested and which issues will be litigated at a hearing. See Sparton Electronics v. Heath, 414 So.2d 642 (Fla. 1st DCA 1982).

Claimant attorneys benefit from this confusion. An attorney fee is payable by the employer/carrier when benefits are not provided within twenty-one days and, therefore, there is a financial incentive for attorneys to file vague "shotgun" claims

that cannot be adequately or timely investigated.

One of the established rules of pleading is that the facts must be stated with reasonable definiteness, certainty, and clarity in order that they may be understood by the opposing party. Parker v. Panama City, 151 So.2d 469 (Fla. 1st DCA 1963). The Federal Rules of Civil Procedure require that the pleading be "concise and direct". (See Rule 8(e), FRCP).

In United States Steel Corp. v. Green, 353 So.2d 86 (Fla. 1977), this Court vacated an order awarding attorney's fees where the claimant's attorney had filed a broad unspecific claim. In Green, supra at 87, this Court held the following:

> If either of Green's assertions were engrafted into the workman's compensation law, every proceeding would require an employer to prepare and present a defense against a claim of permanent total disability, no matter how minor or temporary the injury giving rise to the claim. Moreover, employers could never agree to lessor awards or the need for temporary benefits at a first hearing, lest they later find themselves saddled with liability for permanent total disability benefits against which they never defended.

In International Paper v. McKinney, 384 So.2d 645, 648 (Fla. 1980), this Court again ruled that "boilerplate" and "shotgun" claims were insufficient notice to the employer of a claim. The First District Court of Appeals had even requested that the Division clarify its rules regarding claims. See Ridge Pallets, Inc. v. John, 406 So.2d 1292 (Fla. 1st DCA 1981).

In response to this dilemma, the legislature amended Section 440.19(1), Florida Statutes, to require a claim to "contain the specific details of the benefits alleged to be due and the basis

for those benefits". As further clarification of the matter, the legislature codified its reasoning for the amendment in Section 440.19(1)(e)(3), Florida Statutes (1990), which reads as follows:

> The legislative intent of this paragraph is to avoid needless litigation or delay in benefits by requiring claimants to provide the employer, carrier, self-insurance fund or servicing agent with sufficient detailed information to facilitate a timely and informed decision with respect to a claim for benefits.

Obviously, the claimant and claimant's attorney are in possession of the information regarding benefits they believe have not been provided. If claimant's attorney is unaware of specific benefits requested, the employer/carrier is placed under an onerous administrative burden of making an expeditious determination of what benefits, if any, are due claimant. Specific details regarding the basis of a claim will provide the employer/carrier with adequate knowledge to make an "informed decision" on whether benefits are due an injured employee or whether it is a spurious claim.

The amended statute also provides for the mandatory dismissal of claims which fail to comply with the specificity requirements. Section 440.19(1)(e)(4), Florida Statutes (1990). However, the legislature recognized that some claimants are unrepresented and the statute provides that "the division shall assist the claimant in filing a claim meeting the requirements of this section." Id.

As stated in the other sections, the legislative amendments to the statute are entirely reasonable and designed to benefit

both the employee and the employer. The purpose of the statute and the amendments are to provide prompt benefits to those claimants that the legislature has intended to protect under the workers' compensation law while protecting employers from fraudulent claims.

CONCLUSION

Based upon the foregoing authorities, the Employers Association of Florida and the Fruit and Vegetable Association Self-Insurers Fund respectfully contend that Chapter 90-201, Laws of Florida, which amended Sections 440.09(2); 440.13; and 440.19, Florida Statutes (1990), should be held as constitutional in every respect and against all challenges made by Plaintiffs. The above mentioned Amici respectfully requests this Court to affirm the trial judge's rulings on these statutes and declare the specific sections to be constitutional which continue to remain in effect under the identical 1991 Amendments.

Respectfully Submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Delivery this 11th day of February, 1991 to all counsel listed on Attachment "A".

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