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

BRIEF OF AMICI CURIAE: LEE COUNTY ELECTRICAL COOPERATIVE, AND HARPER BROS., INC., SELF INSURED EMPLOYERS, IN SUPPORT OF POSITION OF APPELLANTS/CROSS-APPELLEES

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STATEMENT OF INTEREST OF AMICI

This brief is filed pursuant to Florida Rule of Appellate Procedure 9.370 on behalf of the Lee County Electric Cooperative and Harper Bros., Inc., self-insured employers. Harper Bros., Inc., is a self-insured contractor in southwest Florida, employing approximately 350 employees. Lee County Electric Cooperative is an electrical cooperative in southwest Florida which is also self-insured, and which employs approximately 430 persons.

Harper Bros., Inc., as a contractor, must bid on projects to be completed months in the future, basing their bid in part on the cost of workers' compensation; any unexpected change in the cost of workers' compensation may have a substantial, adverse impact upon the business of this amici.

As of the date of the filing of this brief, both Harper Bros., Inc., and Lee County Electric Cooperative are unaware of any other self-insured employers who have requested leave to file a brief as amicus curiae.

STATEMENT OF THE CASE AND OF THE FACTS

Harper Bros., Inc., and Lee County Electric Cooperative adopt the statements of the case and the facts in the brief filed by the Department of Legal Affairs, on behalf of the State defendants, and of the other defendants in this appeal. In that this brief follows service of the four initial briefs of plaintiffs, it is fashioned as an answer brief. As such, references will be made to the specific briefs and arguments of

the plaintiffs. So as to simplify citations to the respective briefs, the following designations will be utilized in this brief: Initial Brief of Plaintiff, AFL-CIO, will be cited Brief AFL-CIO; Initial Brief of Plaintiff, IBEW, Local 606, will be cited Brief IBEW; Brief of Plaintiff, Communications Workers of America will be Brief CWA; and Brief of Plaintiff, Mark Scanlan and Professional Firefighters of Florida, will be cited Scanlan Brief.

SUMMARY OF ARGUMENT

The trial court, in its final judgment, denied all challenges to the 1990 law relating to various statutory methods for the calculation of indemnity or compensation benefits. See final judgment of trial court, paragraph 13, entered on December 15, 1990.

The trial court correctly ruled that the Florida Legislature may limit the amount and duration of compensation owed to an injured worker without impairing the constitutional validity of the limiting provision or the entire law.

In that respect, the trial court was correct for two reasons. First, the 1990 law, as it applies to indemnity or compensation benefits, is not unconstitutional per se based upon precedent set forth by this court in numerous previous cases.

Second, there is no evidentiary basis upon which the trial court could find that the 1990 law, as it relates to indemnity benefits, is unconstitutional as applied.

Harper Bros., Inc., and Lee County Electric Cooperative adopt the arguments contained in the briefs of the State defendants and other amici in support of the defendants' position.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY RULED THAT THE FLORIDA LEGISLATURE MAY LIMIT THE AMOUNT AND DURATION OF COMPENSATION OWED TO AN INJURED WORKER WITHOUT IMPAIRING THE CONSTITUTIONAL VALIDITY OF THE LIMITING PROVISION OR THE ENTIRE LAW[1].

> The life of a rule of law, it has been said, rarely reaches fifty years; each generation reshapes the rules and re-states them to meet the needs of the changing society.

Alpert, Fla. Workmen's Comp. Law, §1:1 (1966).

A quarter of a century has passed since the late Leo Alpert of Miami made the above observation in the first edition of his textbook on the Florida Workers' Compensation law. The observation was made 30 years after the Florida law was first enacted.

Is it time for this generation to reshape the existing workers' compensation law of this state to meet the needs of a changing society?

It is apparent that the Florida Legislature in 1990 felt so:

". . . [T]he Legislature finds that there is a financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community . . . ."

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[1]Responsive Brief AFL-CIO, point I; Brief IBEW, point I(D); Brief CWA, point I(A) and I(B); Scanlan Brief, challenges to Chapter 90-201, sect. 20, Laws of Florida, at pages 35-41.

". . . [I]t is the sense of the Legislature that if the present crisis is not abated, many businesses will cease operating and numerous jobs will be lost in the State of Florida . . . ."

". . . [T]he reductions in benefits provided in this act are necessary to insure rates that allow employers to continue to comply with the statutory requirements of providing workers' compensation coverage, but are nonetheless calculated to provide an adequate level of compensation to injured employees . . . ."

". . . [T]he Legislature finds that there is an overpowering public necessity for reform of the current workers' compensation system in order to reduce the cost of workers' compensation insurance while protecting the rights of employees to benefits for on-the-job injuries . . . ."

". . . [T]he Legislature finds that the reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a workers' compensation system which provides adequate coverage to injured employees at a cost that is affordable to employers . . . ." Ch. 90-201, pp. 5, 6, Laws of Florida.

The 1990 law was the considered and measured response of the Florida Legislature to the economic problems it found in the workers' compensation system of this state. This Court should not substitute its judgment for that of the Legislature on these findings.

> Even if we might believe the statute fraught with unfairness, wrong in its intent, and failing to accomplish any of the goals as a reason for passage [McKee v. City of Jacksonville, 395 So.2d 222 (Fla.

1st DCA 1981)], we cannot conclude that the statute violates the provision of the equal access clause to the Florida Constitution."

Mahoney v. Sears, Roebuck & Co., 419 So.2d 754 (Fla. 1st DCA 1982).

A. MAY THE FLORIDA LEGISLATURE LIMIT THE AMOUNT AND DURATION OF BENEFITS OWED TO AN INJURED WORKER WITHOUT IMPAIRING THE CONSTITUTIONAL VALIDITY OF THE LIMITING PROVISION OR THE ENTIRE LAW?

The Florida Legislature possesses the sole authority and responsibility for the enactment of the Workers' Compensation Act, and such legislative enactment is to be construed by the judiciary to effectuate its constitutionality. Miami Dolphins, Ltd., v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981). The Legislature may limit the amount of compensation owed to an injured worker so long as the statute still expresses the fundamental purpose of a workers' compensation act. Mahoney v. Sears, Roebuck & Co., 419 So.2d 754 (Fla. 1st DCA 1982).

The Supreme Court of the United States long ago articulated the purpose of a workers' compensation law:

> . . . to provide not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.

Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932) (emphasis added).

The standard of review by this Court regarding unconstitutionality of legislation, particularly legislation in statutory form, has long been recognized to be a determination of whether the legislative classification was made on some reasonable basis, bearing a substantial relationship to a

legitimate legislative purpose. Lasky v. State Farm Insurance Company, 296 So.2d 9, 18-20 (Fla. 1974). Several District Courts of Appeal and this Court have had the opportunity to apply this standard of review, particularly after the substantial changes in Chapter 440 which were made by the Florida Legislature in 1979.

In 1979, the Florida Legislature made a mid-course correction or adjustment in the continuing evolution of this law by replacing existing schedules of disability based upon anatomic impairment with a wage-loss system in which payments for permanent partial disability were calculated based upon economic loss. In the transition from anatomic loss to economic loss, many of the previous "entitlements" were significantly modified or replaced. As a result, many cases were brought to test the constitutionality of those sweeping changes.

The District Court in Mahoney compared the 1979 amendments with the 1978 law, finding that the claimant's monetary award under the prior law "would have been significantly greater." Id. In that case, the claimant was struck in the eye by a tire iron thrown by a fellow employee and suffered loss of vision in the eye. Under the law which existed prior to the 1979 changes, he would have been entitled to recover approximately $10,000. However, under the 1979 law as amended, he was only entitled to receive $1,200 for loss of vision of that eye. In finding the statutory limitation to be constitutional, the District Court in Mahoney observed:

> To be sure, the 1979 act drastically limits the amount of compensation one may receive for such an injury. However, the statute still expresses the fundamental purpose of workers' compensation acts to provide for

> employees a remedy that is both expeditious and independent of proof of fault and for employers a liability that is limited and determinate.

Id. at 755.

Even though the 1979 law significantly diminished Mahoney's recovery, it did not totally eliminate the previously recognized cause of action. The District Court held that the certain remedy afforded by the Act was deemed to be a sufficient substitute for the doubtful right accorded by the common law.

This Court upheld the decision of the District Court in the Mahoney case in finding that the award under the 1979 amendments for loss of sight in one eye might well appear "inadequate and unfair," but the award did not render the statute unconstitutional. Mahoney v. Sears, Roebuck & Co., 440 So.2d 1285 (Fla. 1983).

This court also upheld a decision of the District Court which found the 1979 amendments to the Florida Workers' Compensation Law to be valid in the case of Acton v. Ft. Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983), and 418 So.2d 1099 (Fla. 1st DCA 1982).

The claimant in Acton received a 25% disability rating for an injury to his left leg. Under the law that existed prior to 1979, he would have been entitled to be paid compensation for a permanent partial disability based upon anatomic loss without regard to whether or not he had suffered any economic loss. The Deputy Commissioner found that Acton did not qualify for permanent impairment benefits under §440.15(3)(a) of the 1979 law because he suffered no amputation, loss of vision, or serious

facial or head disfigurements, which were the only injuries for which impairment benefits were payable under the 1979 law. He also found Acton ineligible for wage-loss benefits under §440.15(3)(b) of the 1979 law because he had returned to work at a higher monthly wage than he received before the accident, and had suffered no economic loss. Thus, the Deputy Commissioner found no further workers' compensation benefits due and payable to Mr. Acton. Clearly, under the 1978 law Mr. Acton would have been entitled to receive a substantial amount of compensation for his permanent physical impairment based solely on anatomic loss.

Although limitations were placed on a workers' entitlement to compensation for a permanent partial disability under the 1979 law such that he qualified for neither an impairment benefit nor a wage-loss benefit, this Court, in Acton, held that the law

> . . . continues to afford substantial advantages to injured workers including full medical care and wage-loss payments for total or partial disability without their having to endure the delay and uncertainty of tort litigation.

Id. at 1284.

It is worthy of note, for instance, that certain benefit categories in individual applications permit higher potential benefits to injured employees under the current law than had existed prior to the 1979 changes. Consider this Court's analysis of the potential for inequity in the pre-1979 law case Mims and Thomas Mfg. v. Ferguson, 340 So.2d 920 (Fla. 1976). The hapless "pianist" discussed in Ferguson is no longer treated "illogically" vis-a-vis the hypothetical "attorney." Before 1979, both the attorney and the pianist were treated alike for

their respective hand injuries--irrespective of the vastly different economic impact likely to befall each. Section 440.15(3)(b), enacted in 1979, restored the logic missing in the earlier law by according the attorney with the injured hand little, if any, "permanent" benefits (assuming little, if any, loss of earnings was experienced), whereas the pianist with an appreciable hand injury might qualify for the maximum compensation rate spanning the maximum allowable period of wage loss[2]. However, after a decade of observation, the Legislature has more recently determined there is a new element of "illogic" introduced in the 1979 reforms, which were need of fine tuning, hence the "stepladder" discussed below.

One of the principal challenges to the 1990 law raised by plaintiffs is the limitation imposed upon the duration or period for which wage-loss benefits are payable based upon a schedule of impairments that are determined under a new rating guide. The 1990 modification reduces the subjectivity which has existed since the wage-loss concept was enacted in 1979. The wage-loss stair steps provide an objective and determinative method of recovery. No longer will every claimant with at least a 1% permanent impairment rating be entitled to collect wage-loss benefits for 525 weeks or ten years. In reviewing the new statutory provisions, it is easy to see that the Legislature felt many people with minimal injuries were receiving an inordinate

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[2]In the IBEW Brief, reference is made at pages 20 and 21 to Ferguson, with extended quotations therefrom. The "lack of logic" is commented on, albeit uncritically, for it is not connected with either the instant controversy or the remedial measures here alluded to.

amount of benefits, and that the entitlement to draw these benefits should be tied to the severity of the injury in order to bring about equity in the allocation of these benefits. In 1979 the schedule for calculating permanent partial disability based upon anatomic impairment was largely replaced by the wage-loss scheme designed to compensate the injured worker for economic loss rather than anatomic loss. As initially conceived, the only threshold requirement for eligibility of up to 525 weeks of wage-loss benefits was "a permanent impairment." In 1990, the Legislature has made another mid-course correction by tying the length of time for which these benefits are payable to the severity of the injury. There is nothing new about this approach. Prior to 1979, a schedule of impairments existed which included stair steps. The duration of payments was based upon the severity of the impairment.

Prior to 1978, a permanent partial disability to the body as a whole was calculated by multiplying the percentage of disability times 350 weeks. See §440.15(3)(u), Florida Statutes (1977). In 1978 the Florida Legislature amended the schedule to provide for three "tiers" of disability, which had the effect of providing greater benefits to the severely impaired worker and lesser benefits to the minimally impaired worker than existed under the 1977 law.

TIERS OF WHOLE BODY PERMANENT PARTIAL DISABILITY (1978)

Percentage	Weeks	
5%	8.75	Percentage of
10%	17.5	**175** Weeks
15%	52.5	
20%	70.0	
25%	87.5	
30%	105.0	Percentage of
35%	122.5	**350** Weeks
40%	140.0	
45%	157.5	
50%	175.0	
55%	288.75	
60%	315.0	
65%	341.25	
70%	367.5	Percentage of
75%	393.75	**525** Weeks
80%	420.0	
85%	446.25	
90%	472.50	
95%	498.75	

Section 440.15(3)(u)1.2.3., Florida Statutes (1978).

If the broad-based economic projections approved by this Honorable Court in Ferguson are within the purview of the legislative power, surely the fine tuning embodied in the "stepladder" approach is well above reproach.

The amount of resources that can be provided by Florida employers to fund this program without endangering their own existence is a finite sum. The Legislature has the responsibility of allocating and reallocating those funds in the manner it deems to be the most equitable.

Under the 1979 law, and up until the 1990 law, a worker with a 1% impairment of the body as a whole was entitled to claim wage-loss benefits for the same period of time (duration) as a worker with a 50% total body disability, a period of 525 weeks or ten years. See §440.15(3)(b)1., Florida Statutes (1979-1989).

The Legislature in 1990 has simply adopted a new schedule of entitlement to wage-loss benefits in which it reallocated the available money based upon the severity of the impairment. The benefit itself, known as permanent partial disability, which has been reclassified as wage-loss benefits, has not been eliminated.

In Carr v. Central Florida Aluminum Products, 402 So.2d 565 (Fla. 1st DCA 1981), the claimant Carr appealed from the Deputy Commissioner's Order denying him certain permanent impairment benefits under §440.15(3)(a)1, Florida Statutes (1979). Id. at 566. This particular section provided for a one-time payment of $7,500 to claimants suffering one of three types of permanent injury. Id. The appellant suffered a thumb injury which left him with a 34% impairment of his thumb and an 8% impairment of the body as a whole. However, the appellant did not fall into any of the categories described in §440.15(3)(a)1. Id. The appellant contended that the 1979 statute violated his constitutional rights on several grounds, including equal

protection, due process, and access to courts. The appellant argued that under the old statute he would be entitled to 60 weeks of compensation for his lost thumb, and that now he was stripped of his right to that compensation. Id.

The Court, in reviewing the legislative intent, found that in an effort to control high costs, inequitable awards, and delays in payment of claims, the Legislature substituted permanent impairment benefits and wage-loss benefits for the disability benefits previously awarded for similar permanent injuries. Id. at 567. Sections 440.15(3)(a) and 440.15(3)(b), Florida Statutes (1979). The Court found that the classification the appellant objected to was grounded in a reasonable contemporary view of economic impact on amputations, and a legitimate legislative purpose to compensate injured workers for actual loss rather than for an anatomic disability. Id. The Court went on to hold that the legislative findings were consistent with early workers' compensation legislation that scheduled a list of injuries in order to foreclose debate and unnecessary litigation. Id. at 568. The Court further stated in Carr,

> We conclude that scheduling these obviously significant injuries for special treatment is reasonably related to the legislature's purpose of making the benefit payment system more efficient by eliminating endless debates before deputy commissioners in the courts over exactly what percentage of use of a limb, for instance, has been lost in a given case. . . . For similar reasons we conclude that section 440.15(3)(a)1. does not violate due process. The measure bears a reasonable relationship to permissible legislative objectives and is not discriminatory, arbitrary, or oppressive.

Id. at 568.

In Newton v. McCotter Motors, Inc., 475 So.2d 230 (Fla. 1985), this Court took under review §440.16(1), which requires that a death must result within one year of an accident or must follow continuous disability within five years of an accident. Id. at 230. The Deputy Commissioner refused to enforce the five-year limitation, and awarded the appellant death benefits even though her spouse died more than five years following the accident. The claimant contended that the application of this statute in this case would produce an unconstitutional result based on denial of due process of law and access to courts. Id. at 231.

The First District Court of Appeal reversed and upheld the constitutionality of the section, and this Court affirmed. In its opinion, the District Court made refence to the importance of precedent:

> In the past, this Court and the Florida Supreme Court have upheld similar attacks on other sections and subsections of Chapter 440. In light of the precedents set by those cases, we find that appellee has not sustained her burden of showing that section 440.16(1) is unconstitutional.

Id. at 231. See Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982); Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983); Morrow v. Amcon Concrete, Inc., 433 So.2d 1230 (Fla. 1st DCA 1983); Mahoney v. Sears, Roebuck & Co., 419 So.2d 754 (Fla. 1st DCA 1982); Beauregard v. Commonwealth Electric, 440 So.2d 460 (Fla. 1st DCA 1983).

In Wood v. Harry Harmon Insulation, 511 So.2d 690 (Fla. 1st DCA 1987), the appellant challenged the constitutionality of §440.151(1)(a), which provides that death from an occupational disease or last injurious exposure must occur within 350 weeks of the last exposure for death benefits to be payable. Id. at 693. The First District Court of Appeal analogized this section with §440.16(1), decided in Newton v. McCotter Motors, supra. The First District Court of Appeal approved its own decision in that case, and noted that this Court affirmed that decision and for the same reasons concluded that §440.151(1)(a) does not unconstitutionally deny the claimant access to courts. Id. at 693.

In Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984), this Court found that the rational basis test was the proper standard of review to determine whether statutory discrimination occurred. Further, this Court held that §440.15(3)(b)3, Florida Statutes, which denied wage-loss benefits to claimants upon reaching the age of 65, related to a legitimate state objective of reducing fringe benefits to reflect productivity decline with age, inducing older workers to retire to allow younger workers a chance to advance, and to reduce costs of workers' compensation premiums. Id. at 934. This Court went on to say that the District Court was correct in determining that three legitimate state objectives were furthered by the discontinuation of benefits at 65.

> We cannot disagree that the objectives are legitimate, and that the age-based discrimination was rationally related to furthering those goals. We therefore must

> agree with the District Court that §440.15(3)(b)3. does not violate Sasso's right to equal protection under the law.

See also Morrow v. Amcon Concrete, Inc., 452 So.2d 934 (Fla. 1984).

In Perez v. K-Mart Corporation, 418 So.2d 1052, the Third District Court of Appeal entered an Order affirming an adverse final summary judgment, holding that §440.11, Florida Statutes (1979), bars the appellant's cause of action against his employer. The appellant, in addition to making the argument that §440.11 was unconstitutional, made the further argument that the 1979 revision of Chapter 440, which reduced the benefits to injured employees, rendered Chapter 440, Florida Statutes (1979), unconstitutional. The Third District Court of Appeal found the appellant's contention to be without merit, and held that the 1979 revision of workers' compensation statutes reducing benefits to injured employees was constitutional.

In all of these cases, the courts followed the continuing mandate that they are obligated to search for a legitimate legislative purpose for the statutory changes, and they are further obligated to construe a statute in a way that will insure constitutional validity. Based upon that long-standing mandate, this Court should evaluate Chapter 90-201 in light of the many legislative purposes announced at the beginning of the chapter, and should construe the statute in a manner most favorable to a finding of constitutional validity. It should be noted that in all the cases cited supra involving the reduction of benefits, particularly after the 1979 amendments, this Court did not hold

any of the specific sections reducing benefits to be unconstitutional per se, since the reduction of benefits has always been related to a legislative purpose. Accordingly, this Court should continue in its precedent and find that the limitation of benefits in Chapter 90-201, Laws of Florida, challenged by the plaintiffs, does serve a legitimate legislative purpose, and therefore those limitations are facially constitutional.

Disability, as opposed to impairment, under a workers' compensation system is either (1) temporary or (2) permanent, and either (3) partial or (4) total. Thus, the four categories of disability for which compensation may be payable are temporary total disability (TTD), temporary partial disability (TPD), permanent partial disability (PPD), and permanent total disability (PTD). Wage-loss benefits are the replacement under the 1979 law for permanent partial disability.

In addition to compensation for one of the four categories of disability, all workers' compensation laws provide for medical treatment and rehabilitation services.

It is the method by which these three basic benefits are calculated, and the duration for which they are payable, that are sometimes modified by the Legislature, not the basic benefits themselves.

In Sasso, supra, this Court held that the claimant had been provided with a reasonable alternative to his common law rights, even though the statute at that time denied entitlement to wage-loss benefits for those over the age of 65 who were still

suffering a wage loss, which was the situation in which the claimant Sasso found himself. The Court pointed out that his medical expenses were covered by workers' compensation benefits and he received temporary total disability benefits during his convalescence. Permanent total disability benefits were available to him if he had qualified, and any future medical expenses related to his injury were also covered.

Under Chapter 90-201, Florida Statutes, claimants who are injured after the effective date of the law will continue to be entitled to compensation for temporary total disability, temporary partial disability, wage-loss benefits, permanent total disability benefits, as well as medical treatment and rehabilitation services. Even an attorney fee payable to the claimant's attorney for securing benefits not voluntarily or timely provided represents a benefit to the claimant under this law.

A reshaping and restructuring of all of these benefits by the 1990 Florida Legislature does not constitute an elimination of any of these benefits per se.

The cascade of troubling "whereas" clauses preceding the enactment under attack can mean, in the broadest sense, that the Legislature virtually as a whole is deceiving the people and the courts of Florida by inventing an economic crisis where there is none. There is no evidence of that. Alternatively, then, we are forced to recognize we are facing the crisis described by our elected representatives. Part of this crisis may relate to the overall decline of the Florida, indeed, of the American economy

as a whole--and part may stem from maladroit handling and interpretation of the law as previously constituted. The degree to which either or both have brought us to where we now stand is not important--the important point is that we stand there now. Let us hope the retreat is a temporary one, but it is here and the Legislature has labored to produce at least an orderly one. Plaintiffs would wish it away[3]. While their angst is understandable, interference with the Legislature's orderly and measured retreat will result in a later crash likely to be disorganized and disorderly--with potentially catastrophic results that will not serve the plaintiffs any better than does this law. It should not be forgotten that all benefits flow irrespective of fault[4]. Taken as a whole, which is how it should be taken, the new act serves the purpose for which it was designed. That it might be several degrees short of a subjective impression of what perfection might entail is constitutionally impertinent.

There is not a great deal written on the social utility of preventing payment in excess of need or actual loss where a rational scheme can be drafted. The dearth of comment does not necessarily mean more is always better. Indeed, some illuminating language is found in an older case from the Supreme Court of Pennsylvania:

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[3]Their sentiment is well embodied by the doggerel found in Brief AFL-CIO, page 12, footnote 18.

[4]Where injury results from the acts of a third-party, all common-law rights are vouchsafed for the employee, though the employer has a subrogation right in such action.

> If compensation rates are fixed so high that capital does not reap a fair share of reward from these joint endeavors (of capital and labor), or if the rate is fixed so high as to wipe out or unduly encroach on that margin of a just return to which capital is entitled, the compensation rate is unreasonable and therefore the act prescribing it is invalid and unconstitutional . . . . If the compensation required by statute in Pennsylvania makes it impossible for Pennsylvania industries employing wage earners to continue to operate with a reasonable return on the property invested, such a compensation law would have to be adjudged unreasonable as respects those industries. If they normally employ a sufficient number of wage earners to make the destruction of those industries substantially harmful to the body-economic of this commonwealth, the statute in question would have to be adjudged as failing to meet the standard of reasonableness prescribed by Article III, Section 21 of the Constitution.

Zahrobsky v. Westmoreland Coal Co., 25 A.2d 823 (Pa. 1942).

The Zahrobsky case likewise reminds us of the danger inherent in selecting, per intense scrutiny, a "worst case" statutory scenario vis-a-vis the viability of a whole workers' compensation law. A compensation act should not be judged by its weakest link. It has been held that the reasonableness of a compensation scheme depends not on the effect of such statute in an isolated case, but rather on the weight of the burden thus imposed on the State's body economic as a whole. Zahrobsky, supra at 446. See also Mattey v. Jones & Laughlin Steel Co., 38 A.2d 410.

B. THERE IS NO EVIDENTIARY BASIS UPON WHICH THE TRIAL COURT COULD FIND THAT THE 1990 LAW, AS IT RELATES TO BENEFITS, IS UNCONSTITUTIONAL AS APPLIED.

The "cornerstone" report published by the Florida Chamber of Commerce was introduced into evidence at the trial of this case. This report was, in part, relied upon by the Florida Legislature in making its findings that the cost of the workers' compensation program in Florida is having a severe negative impact on the economy and on business. Ch. 90-201, p.5, Laws of Florida.

On the other hand, numerous hypothetical examples are cited in the briefs of the plaintiffs of alleged unfairness of many of the provisions of the 1990 law. These hypothetical examples have no evidentiary base in the record.

Plaintiffs argue that the specific modification of indemnity benefits will produce unconstitutional results. See Scanlan Brief at pp. 36-41; Brief of AFL-CIO and IBEW at pp. 33-37, 72-79. The hypothetical examples cited by the plaintiffs as unfair and unworkable simply point to examples of a restructuring of benefits by the Legislature. It is important to note that many of their examples point to modification of benefits that were not in the law at all from the date of its enactment in 1935 up to the early 1970's. For example, the supplemental benefit for permanent total disability provision came into the law in 1974. See §440.15(1)(e), Florida Statutes (1974). This provision simply did not exist between 1935 and 1974. Does that mean that the law prior to 1974 was unconstitutional? Does that mean that a limitation placed on entitlement to supplemental benefits in

1990 renders the act constitutionally infirm? Plaintiffs complain that the modification of the catastrophic temporary total benefit by the Legislature in 1990 renders the law unconstitutional. This benefit also did not exist before 1974. See §440.15(2)(c), Florida Statutes (1974).

Throughout the plaintiffs' briefs there are references to the original law enacted in 1935 and re-enacted by successive legislatures with various tucks here and pulls there. The plaintiffs overlooked certain key tenets of the "venerable" law they pine for, such as an absolute and unyielding $500 limit on all medical benefits and similar unyielding caps on total compensation regardless of circumstances. Foster v. Cooper, 197 So. 117, 118 (Fla. 1940); Williams v. American Surety Co. of New York, 99 So.2d 877 (Fla. 1958). "Times have changed," plaintiffs may be heard to respond, and "we would likely not tolerate such limits today." It should be remembered these measures were "tolerated" under a constitution substantively similar to our current constitution vis-a-vis access to courts and due process arguments--but most poignant: A "times have changed" argument is not a unidirectional ratchet mechanism--it must be a crank that can turn both ways if the concept is a legitimate one. The times are changing again. The law follows accordingly and appropriately.

Arguments have been advanced that the amendments to §440.34(2), Florida Statutes, in 1989 and 1990 violated the Florida Constitution by limiting the amount of projected future medical benefits in calculating the benefits secured by an

attorney in the determination of a fee. It seems clear that the Legislature was concerned about the amount of speculation involved by including future medical expenses beyond a five-year period in the calculation of the benefits secured by the attorney. It is important to note that future medical expenses projected five years beyond the time of the award are only one of many factors used to determine the amount of benefits secured by the attorney. Additionally, the total amount of benefits secured is again only one of many factors used to determine the value of the attorney's fee. More important is the fact that 15 of the 50 states in this country have workers' compensation laws that do not provide for any attorney's fee to be charged against the employer. See Larson, The Law of Workmen's Compensation, §83.12(b)(1), app. B-18B-1 (1990).

Section 440.15(3)(b)2., Florida Statutes (1990), provides that wage-loss forms and job search reports are to be mailed to the employer, carrier, or servicing agent within 14 days after the time benefits are due. Failure of an employee to timely request benefits and file the appropriate job search forms shall result in benefits not being payable during the time that the employee fails to timely file his request for wage loss and the job search reports. Plaintiffs have challenged this new requirement on two grounds. First, they contend that the 14-day period is in effect a 14-day statute of limitations, or, in the alternative, a non-claim statute. See Scanlan Brief at 7, 8; AFL-CIO Brief at 2. Second, they argue that the new statute places an undue burden on the employee to job search, even though

he may be employed but still in a wage-loss situation. This 14-day requirement for submission of forms and job search reports is not a statute of limitations because entitlement to future wage-loss benefits is not barred by the claimant's failure to comply with this provision.

It has long been recognized that wage-loss benefits are determined period by period, or as they become due. Miller v. Richard Cole Roofing, 510 So.2d 1018 (Fla. 1st DCA 1987). In Miller, the District Court held that failure to qualify for one period does not necessarily preclude benefits for a subsequent period. Id. Additionally, nothing in the new provision alters the long-standing principle that the initial burden of the self-executing nature of the act remains with the employer/carrier. The employer/carrier are obligated to timely monitor the claimant's work status, advise the claimant of his continuing right to benefits, provide the claimant with notice to submit wage-loss forms and provide those forms, and advise the claimant of his obligation to conduct a good-faith job search. The new provision in the statute does not relieve the employer/carrier of their obligation to act in good faith or to adequately advise the claimant regarding his right to benefits. The principle behind any self-executing system is that both parties must participate equally. The employer/carrier must first meet their burden, and if they fail in their obligation then the claimant's obligation is likewise extinguished. However, if the employer/carrier meet all of the burdens of their initial obligations, then the claimant has a corresponding obligation to provide timely wage-

loss requests with job search reports. Wood v. McTyre Trucking Company, 526 So.2d 739 (Fla. 1st DCA 1988). See also Raymond v. Rapid Express Parcel Delivery of Tampa, 548 So.2d 278 (Fla. 1st DCA 1989); McCort v. Southland Corporation, 543 So.2d 232 (Fla. 1st DCA 1988), rehearing denied and opinion clarified May 17, 1989.

In Stines v. Winter Haven Hospital, 428 So.2d 818 (Fla. 1st DCA 1989), one can find an excellent example of how the initial burden remains with the carrier, and if the initial burden is not met then the claimant is relieved of all obligation to provide either wage-loss forms or evidence of a job search. Just as Stines illustrates abuses in a self-executing system by the employer and carrier, Wilbanks v. Cianbro Corp., 512 So.2d 300 (Fla. 1st DCA 1987), demonstrates abuses by the employee/claimant. In Wilbanks, the claimant fell, injuring his right leg and hip, on January 27, 1984. His accident was accepted as compensable. Id. at 301. He was treated, and in August, 1985, the claimant was found to have a 5% permanent physical impairment rating of the body as a whole and was placed under several restrictions regarding bending and lifting, pushing and pulling. Id. The appellant returned to work with his former employer on October 21, 1985. Id. After working two hours on the job, the claimant left, complaining of pain. The employer offered to find the claimant a job within his restrictions, but the claimant never returned to work. The claimant moved from Fort Lauderdale to Live Oak, Florida, in October of 1985, and then back to Fort Lauderdale one month later, where he was

employed for two weeks in December of 1985. The claimant moved back to Live Oak and stayed there until February 20, 1986, where he conducted no good-faith job search. The deputy commissioner found that between February and May of 1986, the claimant sought work from five employers. Id. at 302. It was determined that the employer/carrier had properly notified the claimant of his obligation to submit forms and to conduct a good-faith job search, and that his former employer had made available a job within his limitations, but that the claimant had refused the employer's offer. Based upon the claimant's conduct, the District Court of Appeal affirmed the deputy commissioner's denial of benefits on the grounds that the claimant failed to accept a job offered by his former employer in October of 1985, and did not conduct a good-faith job search at any time thereafter during the period for which the benefits were claimed. The Court went on to hold, however, that entitlement to wage-loss benefits should be determined monthly, and even though the claimant was not entitled to benefits as claimed because he failed to comply with the requirements of a good-faith job search, this did not preclude benefits for any subsequent periods, assuming the claimant conducted a good-faith job search. Id.

Both the Stines case and the Wilbanks case show how abuse and high administrative costs provide the Legislature with a legitimate purpose for requiring wage-loss forms and job search reports to be mailed within 14 days after the time benefits are due. Neither the employer/carrier's obligations nor the

claimant's obligations have changed in a substantive way since the inception of the wage-loss procedures in 1979. If nothing else, the 14-day time frame acts as a legislative prod to one requesting and one providing wage-loss benefits in a timely manner.

With regard to the challenge by plaintiffs that a claimant who has found employment within his restrictions but is still entitled to wage-loss must continue to submit a job search report, the Legislature has provided a fail-safe to the number of job searches required by the inception of the language that the Judge of Compensation Claims may determine fewer job searches are justified due to the availability of suitable employment. Therefore, both the working claimant and the non-working claimant are protected, future benefits are not barred, while a legitimate Legislative purpose is met in the new provision requiring wage-loss forms and job search forms to be submitted within 13 days after the time benefits are due.

Although the plaintiffs provide examples of how the 1990 Workers' Compensation Act might apply to certain facts, no litigated factual situation, resulting in a final order, is presented.

In Fruggiero v. Best Western Resort Inn, 461 So.2d 254 (Fla. 1st DCA 1984), the claimant appealed the Deputy Commissioner's reduction of benefits by 50% in accordance with §440.15(3)(b)4, Florida Statutes (1982). Until amended in 1983, Chapter 440.15(3)(b)3.d. also provided that persons 65 years of age and over were ineligible for wage-loss benefits. In attacking that

section, the claimant alleged that such a reduction was a violation of the equal protection clause. However, the claimant was 63 years old at the time she challenged §440.15(3)(b)3.d. The First District Court of Appeal rejected the claimant's constitutional argument because she did not have standing to raise the issue, since the section conflicted with 42 U.S.C. §403(f)(3), which affects persons 65 years and older.

In Izquierdo v. Volkswagen Interamericana, 450 So.2d 602 (Fla. 1st DCA 1984), the appellant challenged the constitutionality of §440.15(3)(b)3d, Florida Statutes (1979). However, the final Order from the Deputy Commissioner contained no findings that the claimant would be entitled to wage-loss benefits but for those provisions. Id. at 603. Therefore, the Court held that the appellant did not have standing to challenge §440.15(3)(b)3d. Id. at 603.

In Richmond v. Liberty Mutual Insurance Company, 420 So.2d 360 (Fla. 5th DCA 1982), the appellant filed a third-party liability action against his employer. In conjunction with his lawsuit, the appellant attacked the wage-loss provision of §440.15(3), Florida Statutes (1981), as unconstitutional. However, the appellant's workers' compensation claim stemming from this date of accident was still pending, and the Fifth District Court of Appeal held that the appellant lacked standing to raise his constitutional question. Id. at 361.

In Rhaney v. Dobbs House, Inc., 415 So.2d 1277 (Fla. 1st DCA 1982), the appellant challenged several findings made by the Deputy Commissioner. Specifically, the appellant argued that

§440.15(3)(a)3, Florida Statutes (1979), requiring that the American Medical Association Guides be used to determine impairment until the Division of Workers' Compensation adopted a permanent schedule, was unconstitutional. Id. at 1279. The First District Court of Appeal noted that the appellant did not have standing to challenge the constitutionality of the section, since she could not provide any evidence of harm by that section. Id.

On rehearing, the First District Court of Appeal did review the constitutionality of §440.15(3)(a)3. Id. at 1279. The Court felt that the provisions of §440.15(3)(a)3. were not unconstitutional per se. Specifically, the Court determined that the constitutionality of the provisions would have to be determined in their application (emphasis added). Id. at 1279. The Court went on to find that when applied properly, §440.15(3)(a)3. was constitutional.

In Mathis v. Kelly Construction Company, 417 So.2d 740 (Fla. 1st DCA 1982), the Court revisited §440.15(3)(a)3. and §440.15(3)(b)1., Florida Statutes (1979). The appellant argued that these sections denied substantive due process of law because evaluation of permanent physical physical impairment was limited to the American Medical Association's Guides to the Evaluation of Permanent Impairment. Id. at 740. However, the Court held that since the appellant's injury was covered by the Guides, then §440.15(3)(a)3 and §440.15(3)(b)1 were constitutional as applied. Id.

Proper application of a specific provision against an established set of facts is the appropriate method for determining the constitutionality of Chapter 90-201 in the specific sections of the Workers' Compensation Act. Two decisions of this Court are analogous representations of how judicial review requires the application of a statute to facts before constitutionality can be determined.

In Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), this Court held that the State Medical Mediation Act was constitutional on its face, even though there was a ten-month limitation period in which the judicial referee could mediate petitions. The issue was revisited in Aldana v. Holub, 381 So.2d 231 (Fla. 1980). This Court stated that, although originally held constitutional on its face, the Court also had the ability to determine the practical application and effect of the statute. Id. at 235.

> Unfortunately, the infirmities in the medical mediation act extend beyond the set of facts before us now. A painstaking examination of over seventy cases cited to us by the parties . . . and those of which we take judicial notice leads us to the inexorable conclusion that the jurisdictional periods in section 768.44(3) have proven intrinsically unfair and arbitrary and capricious in their application. . . . It should be emphasized that today's decision is not premised on a reevaluation of the wisdom of the Carter decision.

Id. at 236-237 (emphasis added.)

Therefore, this Court should find that the 1990 law is facially valid, and that the 1990 law as a whole and all of its provisions are not unconstitutional as applied because no set of facts has been presented with an evidentiary record base which

would render the law or any of its provisions unconstitutional in its practical application.

CONCLUSION

The cost of the workers' compensation program of this state has become prohibitive and is severely impacting the Florida economy, which not only affects business interests but also the availability of jobs for Florida workers.

The 1990 law was written to deal with this problem in a way that would reallocate available funds in a more equitable manner. The decision of the trial court to uphold all provisions of the 1990 law which dealt with the calculation of indemnity or compensation benefits was correct, and should be affirmed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amici Curiae, Lee County Electric Cooperative, and Harper Bros., Inc., self-insured employers, in support of the position of the appellant-cross appellees, was served by regular United States mail to the counsel on the attached service list this 11th day of February, 1991.

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