IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,179

BOB MARTINEZ, ET AL.,

Appellant/Cross-Appellee,

vs.

MARK SCANLON, 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.

INITIAL BRIEF OF FLORIDA CHAMBER OF COMMERCE AND AMICUS CURIAE FLORIDA CHAMBER OF COMMERCE SELF-INSURANCE FUND IN SUPPORT OF POSITION OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

This brief is filed jointly on behalf of the Florida Chamber of Commerce Workers' Compensation Commercial Self-Insurance Fund (Chamber Fund) and the Florida Chamber of Commerce (the Chamber). This joint filing is done in an effort to avoid duplication in the filing of briefs. The brief is filed on behalf of the Chamber Fund pursuant to Florida Rule of Appellate Procedure 9.370, the Chamber Fund having been granted permission to file briefs as an amicus curiae in this cause of action. The Florida Chamber of Commerce had been made a party to the initial proceeding by order of the circuit court.

The Chamber and the Fund adopt the Statement of the Case and Facts of the Department of Legal Affairs representing Tom Gallagher, Hugo Menendez, Bob Martinez and Gerald Lewis. In addition, the Chamber and the Fund add the following facts. The Florida Chamber of Commerce was made a party to the proceedings below by order of the circuit court on January 16, 1991. The Chamber Fund and the Chamber filed a motion to appear as amicus curiae on behalf of the Appellants/Cross Appellees. Permission to appear as amicus curiae was granted by the Court on January 25, 1991.

The Chamber and Chamber Fund would point out the following additional facts as pertinent to the Court's consideration of the issues raised in this case.

The Florida Chamber of Commerce is the nation's largest state chamber of commerce. The Chamber has 10,000 members which employ over half a million workers. Approximately 8500 of the members are small employers. The Chamber acts as a spokesman for large and small Florida businesses on a variety of subjects including workers' compensation.

The Florida Chamber Commercial Self-Insurance Fund is a non-profit organization organized and administered pursuant to sections 624.460-.488 of the Florida Statutes, which allow a pooling of liabilities of its member/employers to provide them, among other things, workers' compensation insurance. The Fund has almost 4,000 members. The Fund collects insurance premiums from its members, pays workers' compensation benefits to the members' employees, and returns a surplus, if any, to its members.

Since September 1, 1990, the Fund has collected premiums consistent with the 25% reduction in annual premiums enacted by the 1990 revisions to the Workers' Compensation Act, which reductions were designed to reflect the decreased benefit levels stated in the revised Act. If the trial court's ruling that the 1990 revisions are unconstitutional is upheld by this Court, the Fund must retroactively collect from its members additional premiums at the levels required prior to the 1990 revisions in order to fund the higher benefits in effect prior to these revisions.

Additionally, the Fund has adjusted all new claims for

accidents occurring after July 1, 1990 under the 1990 Act and has paid benefits accordingly. There have been approximately 200 new lost time claims monthly and between 700-800 new medical only claims monthly since July 1, 1990. If the 1990 Act is declared unconstitutional and the ruling is not made prospective, it will be necessary to reopen all claims arising after July 1, 1990 and adjusting the benefits.

By Executive Order 88-213 dated September 28, 1988, Governor Martinez established the "Governor's Workers' Compensation Task Force." The Task Force was charged with examining the Florida Workers' Compensation system and identifying problems, finding solutions to those problems and recommending legislation as needed. The Task Force produced three reports entitled Florida Workers' Compensation System Part I: Problems; Part II: Possible Solutions; and Part III: Recommendations for Solving Problems. The third part contained proposed legislation and was the basis for part of the 1990 amendments contained in Chapter 90-201, Laws of Florida.

PRELIMINARY STATEMENT

The Chamber and the Chamber Fund hereby adopt the arguments presented by the Department of Legal Affairs and in the initial brief of amicus curiae Florida Construction Commerce and Industry Self-Insurers Fund, Florida Association of Self-Insurers and Florida Group Risk Administrators Association as to what are, frankly, the primary issues before this Court. That is, the question of whether Chapter 90-201, Laws of Florida (here and after referred to as the 1990 Act) is unconstitutional as a result of the constitutional violations of the single subject rule and separation of powers doctrine found by the trial court. The Chamber and Chamber Fund are in complete agreement with the points raised by Appellants/Cross Appellees that the trial court erred in finding the violation of the separation of powers doctrine and the single subject rule. They also agree that these violations were cured by the subsequent action of the Legislature in re-enacting Chapter 91-201, Laws of Florida. Further, they are in complete agreement with the position that the alleged violation of the separation of powers doctrine did not require invalidation of the entire 1990 Act.

In an effort to avoid duplication of argument and to assist in this Court's review of the issues raised by the trial court decision, the Chamber and Chamber Fund will

limit their arguments in this brief to the part of the final judgment of the circuit court which invalidated portions of Section 18 and Section 20 of the 1990 Act.

After finding all of Chapter 90-201, Laws of Florida, to be invalid for violation of the separation of powers doctrine and the single subject rule, the trial court went on to find certain provisions of Section 18 and 20 of Chapter 90-201 to be invalid. These provisions related to the so-called "super doctor" provision in §440.13(2), F.S.; the amendment to §440.15(1)(b), F.S., amending the burden of proof to establish entitlement to permanent total disability; and the amendment to the burden of proof to establish wage loss benefits set out in Section 20 of the 1990 Act. Each of these provisions was re-enacted in the 1991 Act.

It was the contention of Appellees below that the above-cited provisions and other challenged provisions were invalid as a matter of law rather than invalid as applied to the particular circumstances of the Appellees. In other words, the contention of the Appellees was that the provisions were facially invalid as a matter of law.

SUMMARY OF THE ARGUMENT

This brief on behalf of the Florida Chamber of Commerce and, as amicus curiae, the Florida Chamber of Commerce Self-Insurance Fund addresses only those portions of the trial court's finding portions of §§18 and 20 of Chapter 90-201, Laws of Florida facially invalid. It is the responsibility of a court to interpret a legislative enactment in such a manner as will support constitutional validity. Since it is not alleged that these statutes were applied in an unconstitutional manner the burden is on the Plaintiffs/Appellees to demonstrate the statutes cannot be applied constitutionally.

The amendment of §440.13 providing for appointment of a neutral physician whose opinion is then binding absent clear and convincing contrary evidence is in response to the practice of "doctor shopping." This is a legitimate reason for legislative action. The neutrality of the appointed physician warrants a rebuttable presumption as to the correctness of his opinion. There is no derogation of the functions of the trier-of-fact and no due process or access to courts violation.

The amendment to §440.15 requiring a showing of no light work within 100 miles of the claimant's residence as a precondition to an award of permanent total disability benefits is not constitutionally invalid on its face. The trial court apparently assumed its operation would be unconstitu-

tional.

The amendment of the burden of proof requirement for wage loss claims is a legislative response to a lack of consideration of the effect of the permanent impairment on the work customarily done by the employee. It may act to limit entitlement to wage loss benefits but not to the degree as to result in constitutional invalidity.

ARGUMENT

POINT I

THE PROVISIONS OF §18 OF CHAPTER 90-201 PROVIDING FOR APPOINTMENT OF A NEUTRAL HEALTH CARE PROVIDER IS NOT CONSTITUTIONALLY INVALID ON DUE PROCESS OR ACCESS TO COURTS GROUNDS.

The trial court found that the portion of Section 18 of the 1990 Act which amends §440.13(2), Florida Statutes, and establishes what has been referred to as the "Super Doc" provision was unconstitutional on both the basis of the due process provision of Article I, Section 9 and the access to the courts provision of Article I, Section 21 of the Florida Constitution. The Court noted there was no rational basis for the granting of greater credibility to the doctor chosen from a list provided by the Division of Workers' Compensation and that by requiring clear and convincing evidence to contradict the opinion of by the selected health care provider the province of the trier-of-fact was invaded.

The provision in question provides in relevant part:

> If there is disagreement in the opinions of health care providers, if two health care providers have determined that there is no medical evidence to support the claimant's complaints or the need for additional medical treatment, or if two health care providers agree that the employee is able to return to work, then within 15 days after receipt of the written request of the injured employee, employer, or the carrier, the judge of compensation claims shall order the injured employee to be evaluated by an appropriate health care provider from a list provided by the division. The opinion of the health care provider shall be presumed correct unless there is clear and convincing evidence to the contrary as determined by the judge of

> compensation claims. The medical issues in the evaluation may include the following: whether the injured employee is able to perform any gainful employment temporarily or permanently; what physical restrictions, if any, would be imposed on the employee's employment; whether the injured employee has reached maximum medical improvement; the existence and extent of any permanent physical impairment; and the reasonableness and necessity of any medical treatment previously provided, or to be provided, to the injured employee.

That statute also provides for access to the employee's medical records for the appointed health care provider; termination of indemnity benefits in the event of non-cooperation by the employee; partial immunity from liability for the health care provider; and submission of a report to the judge and parties.

The perceived evil which this amendment is meant to correct is the practice on the part of some claimants and some employer/carriers to "doctor shop." For example, if a claimant is found able to return to work by his treating physicians and released he can demand another physician. If the carrier fails to authorize another doctor it does so at its peril since the employee can either seek authorization before the judge of compensation claims or go to another physician and seek reimbursement on a showing that such treatment was reasonable and necessary. See e.g. Fuch's Baking v. Estate of Szolek, 466 So.2d 415 (Fla. 1st DCA 1985). This can continue until an accomodating physician is found who agrees with the employee's contention that he is unable to work. The employer/carrier is then faced with

paying benefits or attempting to refute the health care provider who is the employee's "current treating physician" and whose opinion is usually given great deference by judges of compensation claims.

Under the challenged provision either of the parties could seek an evaluation by a health care provider from a list established by the Division. This physician, who should be dubbed the "Neutral Doc" rather than the "Super Doc", would evaluate the employee and render his opinion which could be rejected only upon clear and convincing evidence.

The Governor's Task Force on Workers' Compensation (Task Force) in its first report, Florida Workers' Compensation System Part I: Problems (Task Force Report I) found that increased medical costs contributed to the rapid increase in workers' compensation premiums. The Task Force found one element of increased medical costs was "change of physicians with multiple doctors providing care, each with different opinions as to maximum medical improvement and type of care needed." Task Force Report Part I at 15. In its second report, Part II: Possible Solutions, the Task Force again noted that multiple physicians chosen sequentially by this injured worker had proven very costly and was "not conducive to good medical care with probable detrimental effect on the claimant's return to work." Task Force Report Part II at 9. It was suggested legislation was

needed to curb the practice. Possible legislative solutions included: limiting payment to the first two physicians chosen by the employee; limiting selection of health care providers by the parties and incorporating use of physicians from a list of the Division of Workers' Compensation; and considering utilization of more than two physicians in the same specialty as cause for over-utilization review. Task Force Report Part II at 9-10. In its third report, the Task Force recommended amendment of "utilization review" to include requests for sequential health care by different health care providers. Task Force Report Part III at 12.

Considering the problem being addressed, the "Neutral Doc" provision is a logical and rational response. Reference to the neutral health care provider may be had upon written request of a party whenever there is disagreement between health care providers or if two health care providers find no support for the employee's complaints or any need for further treatment, or if two agree that the employee may return to work. It should be noted that this scheme actually favors the employee. Even if there is no disagreement by the health care providers, the employee can request an examination by a neutral doctor if two doctors find he can return to work or find no basis for or need for treatment. The employer cannot avail itself of the neutral doctor when there is no disagreement among treating physicians and they find the claimant cannot return to work or

that there is need for continued treatment. This represents an equitable arrangement since the employer/carrier has the authority to make the initial choice of health care provider.

The trial court found no basis to give greater credence to the neutral physician. The Legislature could clearly decide that as a disincentive to doctor shopping by both employees and employer/carrier it would be logical to grant a rebuttable presumption of correctness to the neutral physician. To pretend that employees and their attorneys and employer/carriers do not at least sometimes select treating physicians whom they anticipate will give opinions favorable to their position is naive. The neutrality of the health care provider is a sufficient basis to give a rebuttable presumption of correctness to his opinion.

In reviewing this provision and the challenge to Section 20 of the 1990 Act, it must be remembered that the Appellees recited no facts to show the statutes operate in an unconstitutional manner. Instead it is alleged that the challenged provisions are constitutionally invalid on their face. Chapter 90-201, Laws of Florida, like all legislative acts comes before this court clothed with the presumption of constitutionality. Department of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So.2d 879 (Fla. 1983). Legislative enactments are facially void only if they cannot be applied constitutionally to any factual situation. Voce v. State,

457 So.2d 541 (Fla. 4th DCA 1984). Additionally, as this Court held in United States Fidelity and Guaranty v. Department of Insurance, 453 So.2d 1355, 1362 (Fla. 1984): The fact that a statute may not accomplish its intended goals is not a sufficient reason for declaring the statute unconstitutional. The test is whether the legislature at the time it enacts the statute had a reasonable basis for believing that the statute will accomplish a legitimate legislative purchase.

That a statute might be applied unconstitutionally is no ground for finding the statute itself unconstitutional. The Court has recognized that it has a duty to avoid a holding of unconstitutionality if a fair construction of the legislative enactment will allow such a holding State v. Ecker, 311 So.2d 104 (Fla. 1975).

The "Neutral Doc" provision was found unconstitutional as it denied due process and of the access to courts provision. In Jones v. May, 402 So.2d 1169 (Fla. 1981), this Court held that the test to be applied to determine whether a statute is in violation of the due process clause is whether it hears a reasonable solution to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. As already noted, this provision is an attempt to discourage "doctor shopping" which has been perceived to be contributing to the increased costs of the the workers' compensation system. By creating a source of neutral health

care providers whose opinions will be followed in the absence of clear and convincing evidence both employee and employer/carriers will be discouraged from trying to shop for favorable opinions. The neutrality of the health care provider selected under the statute warrants deference to his opinion through the creation of a rebuttable presumption.

The finding by the trial court of violation of the access to the courts provision of the Florida Constitution apparently springs from a belief that the so-called "Super Doc" provision diminishes the fact-finding responsibility of the judge of compensation claims. What the provision does do is create a presumption that is rebuttable by clear and convincing evidence.

Florida has long recognized the creation of such rebuttable presumptions as expressions of social policy. See Caldwell v. Division of Retirement, 372 So.2d 438 (Fla. 1979) where this Court upheld the presumption that certain impairments suffered by firemen were presumed to be accidental and suffered in the line of duty absent contrary competent evidence. This Court noted that there were two types of rebuttable presumptions. The vanishing presumption has no probative value and vanishes when credible contrary evidence is selected. The other type of presumption is based on social policy. This Court continued:

When such evidence rebutting such a presumption is

> introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case. This may be by a preponderance of the evidence or by clear and convincing evidence, as the case may be. (Emphasis supplied).
>
> * * *
>
> The statutory presumption is the expression of a strong public policy which does not vanish when the opposing party submits evidence. Where the evidence is conflicting, the quantum of proof is balanced and the presumption should prevail. This does not foreclose the employer from overcoming the presumption. However, if there is evidence supporting the presumption the employer can overcome the presumption only by clear and convincing evidence. In the absence of cogent proof to the contrary the public policy in favor of job relatedness must be given effect. The holding of the First District Court of Appeal in the case sub judice that the presumption was overcome where there was conflicting evidence of causation is in error and should be quashed.

372 So.2d 438, 440-41.

Apparently, the trial court assumed that there would be no way to overcome the opinion of the neutral doctor. The trial court erred in assuming that the Act created an unconstitutional irrebutable presumption. While the Act might be unconstitutionally applied if no evidence were considered adequate to overcome the presumption such a presumption of unconstitutional application of the Act was error. The judge of compensation claims in each case will have to consider all contrary medical opinions to be sure such evidence did not overcome the presumption. Such facts as qualifications of the health care providers, correctness of the

history used in diagnosis, and other facts would have to be reviewed.

This Court should interpret the "Neutral Doc" provision as creating a rebuttable presumption and reverse the finding of unconstitutionality.

ARGUMENT

POINT II

THE REQUIREMENT OF §20 OF CHAPTER 90-201 REQUIRING AN EMPLOYEE SEEKING PERMANENT TOTAL DISABILITY BENEFITS TO SHOW INABILITY TO LIGHT WORK AVAILABLE WITHIN 100 MILES OF HIS RESIDENCE DOES NOT DENY ACCESS TO THE COURTS IN VIOLATION OF ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION.

Section 20 of the Chapter 90-201 amended §440.15(1)(b), Florida Statutes, which defines permanent total disability to read:

> Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof or paraplegia or quadriplegia shall, in the absence of conclusive proof of a substantial earning capacity, constitute permanent total disability. In all other cases, permanent total disability shall be determined in accordance with the facts. In such other cases, no compensation shall be payable under paragraph (a) if the employee is engaged in, or is physically capable of engaging in, gainful employment; and the burden shall be upon the employee to establish that he is not able uninterruptedly to do even light work available within a 100-mile radius of the injured employee's residence due to physical limitation.

The underlined language is the challenged amendment to the Act. The trial court found this provision violated the access to the courts provision of Article I, Section 21 of the Florida Constitution.

As noted in Point I, this Act comes to this Court clothed with the presumption of correctness and must be upheld unless it cannot be applied constitutionally. Department of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So.2d 879; Voce v. State, 457 So.2d 541.

In Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984), a 78-year-old employee was injured and suffered a permanent impairment. Upon reaching maximum medical improvement, he was found ineligible for permanent total disability benefits and denied wage loss benefits because §440.15(3)(b) (1979) provided for termination of wage loss benefits at age 65. He challenged the Act on the grounds that he was denied any reasonable alternative to suit against his employer by the Workers' Compensation Act in violation of Article I, Section 21. This Court found that the claimant was provided a reasonable alternative. His medical expenses and temporary disability benefits were paid and permanent total disability benefits were available if he qualified. This Court noted:

> Such partial remedy does not constitute an abolition of rights without reasonable alternative as contemplated in Kluger v. White, [281 So.2d 1 (Fla. 1973)]

452 So.2d at 934.

In Alterman Transport Lines, Inc. v. State, 405 So.2d 456, 459 (Fla. 1st DCA 1981), the District Court interpreting Kluger v. White held:

> No substitute remedy need be supplied by legislation which only reduces but does not destroy a cause of action. Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981). Nor does the elimination of one possible ground of relief require the Legislature to provide some replacement.

In Jetton v. Jacksonville Electric Authority, 399 So.2d 396

(Fla. 1st DCA 1981), petition for review denied, 411 So.2d 383 (Fla. 1981) the Court noted:

> In Kluger, the Supreme Court held only that the complete abolition of a prior common law right to recover for automobile accident property damages violates the right to redress provision, absent either a substitute remedy "to protect the rights of the people of the State to redress for injuries" or a legislative demonstration of "overpowering public necessity," 281 So.2d at 4.
>
> Guided by case law subsequent to Kluger, we narrowly construe the instances in which constitutional violations will arise: The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action.
>
> As discussed in Kluger and borne out in later decisions, no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action. The Court pointed out that legislative changes in the standard of care required, making recovery for negligence more difficult, impede but do not bar recovery, and so are not constitutionally suspect. Kluger, 281 So.2d at 4, discussing McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867 (Fla. 1942) (automobile guest statute).

The amendment of the permanent total disability statute may make the proof of entitlement more difficult but does not bar recovery.

Clearly, the "100 mile" amendment does not eliminate entitlement to permanent total disability benefits and no violation of the access to courts provision applies. However, the trial court was apparently nonplussed by the 100 mile radius requirement so an explanation would appear to be in order. The employee seeking permanent total disability benefits has had the burden "to establish that he is not

able uninterruptedly to do even light work due to physical limitation." This incapacity may be established either by medical evidence of physical limitation totally precluding even light work or by a lengthy, exhaustive, unsuccessful job search. See H.S. Camp and Sons v. Flynn, 450 So.2d 577 (Fla. 1st DCA 1984).

An employee is currently not required to look for work beyond his immediate area of residence as part of a job search to help establish entitlement to permanent total disability benefits. An individual who commuted for years from his rural or economically depressed place of residence to his place of employment is not currently required to look for work beyond his area of residence even if he had never been employed in that area. This amendment is meant to insure that the job search to establish entitlement to permanent total benefits is a bona fide search for employment.

It was suggested that the literal language of the statute would require a resident of Key West to look for employment in Cuba. This Court should not assume that the Act will be applied in such a manner as to render it unconstitutional.

The requirement is intended to insure that an injured employee maintaining entitlement to permanent total benefits must exhaust the possibility of employment within 100 miles of his residence. The purpose is to force the employee to look for jobs in larger population centers where jobs are

generally more available.

Assuming that the Act is applied in a constitutional manner it should be anticipated that some employees would be excused from the requirement due to physical limitations making a long commute to work impossible. However, anticipation of unconstitutional application of the Act cannot be used to invalidate it on constitutional grounds. See State v. Ecker, 311 So.2d 104, 110.

The 100 mile radius employment requirement not resulting in an abolition of any right, the trial court's holding of unconstitutionality must be reversed.

ARGUMENT

POINT III

THE AMENDMENT OF SECTION 440.15 BY SECTIONS 90-201 WHICH ALTERED THE BURDEN OF PROOF IN WAGE LOSS CLAIMS IS NOT CONSTITUTIONALLY INVALID.

Section 20 of Chapter 90-201 amending the wage loss statute which was found constitutionally invalid provides:

> In the case of an employee whose permanent impairment from the injury is at least 1 percent but no more than 20 percent of the body as a whole, the burden is on the employee to demonstrate that his post-injury earning capacity is less than his preinjury average weekly wage and is not the result of economic conditions or the unavailability of employment or of his own misconduct. In the case of an employee whose permanent impairment from the injury is 21 percent or more of the body as a whole, the burden is on the employer to demonstrate that the employee's post-injury earning capacity is the same or more than his preinjury wage.

The trial court found this provision to be "constitutionally offensive" for unspecified reasons in light of the decisions of the First District Court of Appeal in Regency Inn v. Johnson, 422 So.2d 870 (Fla. 1st DCA 1982) and City of Clermont v. Rumph, 450 So.2d 573 (Fla. 1st DCA 1984). Nothing in either of the cited cases compels the conclusion of the trial court.

The 1990 Act also provides for a "sliding scale" of periods of eligibility for wage loss based upon degree of physical impairment. Although challenged, that portion of the 1990 Act was upheld by the trial court.

Before the 1990 amendment, the statutory burden of

proof was set out in §440.15(3)(b)2, Florida Statutes:

> Whenever a wage-loss benefit was set forth in subparagraph 1 may be payable, the burden shall be on the employee to establish that any wage loss claimed is the result of the compensable injury. It shall also be the burden of the employee to show that his inability to obtain employment or to earn as much as he earned at the time of his industrial accident is due to physical limitation related to his accident and not because of economic conditions or the unavailability of employment or his own misconduct.

In Regency Inn v. Johnson, the First District Court sitting en banc considered the effect of economic conditions on the employee's entitlement to wage loss benefits. The District Court ultimately concluded that unavailability of jobs due to economic conditions did not preclude recovery of wage loss benefits and it was thus unnecessary for the claimant to present evidence that his refusal of employment was not due to unavailability of jobs resulting from economic conditions. Regency Inn, 422 So.2d at 879.

Although not expressly stated by the trial court, it apparently is not the ultimate holding of the court in Regency Inn that is the basis for this decision, on the District Court's comment regarding the employer/carrier's argument that there was an implicit intent in the 1979 Act to consider economic conditions. The District Court citing Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982) said:

> Furthermore, the employer/carrier's view is fundamentally flawed by its failure to take into account the aspect of "certainty" of recovery

> which is said to contribute to the constitutional validity of the workers' compensation system.

Regency Inn, 422 So.2d at 876.

In the other case relied upon by the trial court, City of Clermont v. Rumph, 450 So.2d 573, the District Court considered the 1983 amendment to §440.15(3)(b)(2) which provided:

> It shall also be the burden of the employee to show that his inability to obtain employment or to earn as much as he earned at the time of his industrial accident, is due to physical limitation related to his accident and not because of economic conditions or the unavailability of employment.

The District Court first found the amendment to be a procedural burden of proof enactment rather than a substantive change in the law and thus applicable regardless of the date of accident. The Court went on to reject the argument that the claimant must establish economic conditions do not affect his employability in order to secure wage loss benefits. The Court cited the above-quoted language from Regency Inn and noted that the Court was required to construe statutes in a manner as to uphold their constitutionality. The Court interpreted the amendment to preclude the award of wage loss benefits predicated solely on economic conditions unrelated to the claimant's physical limitations and to require the claimant to present evidence that the physical limitations are a contributing causative factor to the wage loss. City of Clermont, 450 So.2d at 576. This

could be established by a job search where employers were aware of the claimant's limitations rather than with direct testimony that the claimant was not hired due to his handicap.

Both Regency Inn and City of Clermont cite Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982). In Acton, the District Court considered the constitutionality of the wage loss system in a case where the claimant suffered a permanent impairment (which did not entitle him to permanent impairment benefits) but suffered no wage loss. The Court rejected the claimant's access to courts argument that his common law tort remedy was not adequately replaced, citing the multiple advantages of the workers' compensation system to the claimant:

> While the adoption of comparative negligence has improved the ability of the tort system to handle industrial accidents, there are still important advantages to the workers' compensation system, and the 1979 amendments were designed to enhance these. Workers' compensation provides a more certain, although not as lucrative, payment to the injured worker. Litigation expenses, including those borne by the claimant are reduced by the administrative handling of claims. Litigation delays are also reduced. The cost of inevitable injury is spread throughout the industry. The employee further benefits by not having any recoverable damages reduced by the proportionate fault of the employee. Certainty and efficiency are given in exchange for potential recovery. This satisfies the requirements of Article I, Section 21, Florida Constitution.

Acton, 418 So.2d at 1101.

There is remarkable similarity between the language

regarding the claimant's burden of proof in City of Clermont v. Rumph, and that of the 1990 Act. The 1983 amendment required a showing that inability "to find employment or to earn as much as he earned" at the time of accident is due to physical limitations and "not because of economic conditions or unavailability of employment." The 1990 Act provides that an employee with 20% or less permanent impairment has the burden of proof showing his "post-injury earning capacity" is less than his pre-injury earnings and is "not the result of economic conditions or the unavailability of employment or his own misconduct." "Earning capacity" rather than post-injury earnings is thus the chief change in what was previously found by the District Court to be a constitutional statute.

The concept of "earning capacity" was apparently adopted in response to the lack of any consideration under the 1979 law to the effect of the permanent impairment on the work customarily performed by the employee and the employee's ability to return to that employment. See Task Force Report Part II at 29 and Task Force Report Part III at 21 and 24. The over-cited example used before the Governor's Task Force and elsewhere that under the pre-1990 wage loss system the laborer who lost a finger tip has potential entitlement to the same wage loss benefits (even though the impairment did not affect his ability to work) as a concert pianist whose ability to perform was totally destroyed.

"Wage earning capacity" was, before the 1979 adoption of wage-loss, the theoretical basis for disability benefits rather than loss of earnings at least for non-scheduled injuries. For example, in Horace Z. Brunson v. Plumbing and Heating Co. v. Mellander, 130 So.2d 273 (Fla. 1961), this Court noted that "it is the intention of the workmen's compensation law to compensate not for loss of wages but loss of earning capacity." Mere loss of earnings without more did not necessarily establish disability. Under pre-1979 law, decreases in earning capacity were not necessarily proportional to physical impairment. The courts noted that no one standard was determinative of loss of earning capacity, but such factors as the employee's physical condition, age, work history, education and inability to obtain work within his physical capacity should be considered. See, for example, Ball v. Mann, 75 So.2d 758 (Fla. 1954). Attacks upon the constitutionality of the pre-1979 Act were repeatedly rejected. See e.g. Carroll v. Zurich Insurance Co., 286 So.2d 21 (Fla. 1st DCA 1973); Chittick v. Eastern Airlines, 403 So.2d 595 (Fla. 1st DCA 1981) and cases cited therein. See also A. Larson, Workermen's Compensation Law, §5.20 regarding constitutionality of workers' compensation acts generally.

There is thus nothing explicit in either the opinions of Regency Inn, City of Clermont, or Acton to compel the result reached by the trial court especially when the con-

stitutional attack is on the facial validity of the Act. There is no denial of access to courts where a cause of action is reduced but not abolished. Jetton v. Jacksonville Electric Authority, 399 So.2d 396. By comparing the employee's post-injury earning capacity rather than his post-injury earnings, it is possible that in some instances recovery may be reduced but this does not result in constitutional invalidity. The majority of the benefits to the employee that the Court enumerated in Acton are not affected by this amendment.

It should be noted that the invalidated provision provides that the burden of proof shifts to the employer when the permanent impairment rating is greater than 20%. In Regency Inn, the District Court responded to a suggestion that it establish a series of presumptions for determining post-injury earning capacity based on such criteria as impairment rating. The Court noted that this was appropriate for legislative rather than judicial action. Regency Inn, 422 So.2d at 877, footnote 5. The Legislature did precisely that by establishing different burdens of proof based upon degree of disability.

The amendment in Section 20 to wage loss does not on its face restrict the claimant's right to recover to the extent that there is a constitutional and the trial court's order should be reversed.

CONCLUSION

Plaintiffs alleging facial invalidity of legislative enactments must show beyond reasonable doubt the acts are unconstitutional. Appellees failed to carry this burden and the trial court's invalidation of the cited portions of Section 18 and 20 of the Chapter 90-201 must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to all counsel listed on the attached service list on this 28th day of January, 1991.

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