IN THE SUPREME COURT OF FLORIDA
CASE NO. 77,179

BOB MARTINEZ, et al.,

Appellants/Cross-Appellees

vs.

MARK SCANLAN, et al.,

Cross-Appellants and/or Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT,
SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

BY: JOEL S. PERWIN

TABLE OF CONTENTS

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

AUTHORITIES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

I
STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers is filing this brief on behalf of appellees/cross-appellants Mark Scanlan, the Professional Fire Fighters of Florida, Inc., the Communication Workers of America, Bill Stanfill, Ralph Ortega, Albert Darryl Davis, the Florida AFL-CIO, the International Brotherhood of Electrical Workers, Local 606, and the Florida Police Benevolent Association. All of these parties were plaintiffs below, either directly or by intervention, seeking to establish the constitutional invalidity of various amendments to the Florida Workers Compensation Act, Ch. 90-201, Laws of Florida and § 43 of Ch. 89-289, Laws of Florida. We hereby adopt the statement of the case and facts contained in the briefs filed by these parties.

II
ISSUE ON APPEAL

WHETHER THE TRIAL COURT WAS RIGHT FOR THE WRONG REASON IN DECLARING THE FACIAL INVALIDITY OF CHAPTER 90-201, LAWS OF FLORIDA, BECAUSE CHAPTER 90-201 VIOLATES THE GUARANTEE OF ACCESS TO COURTS OF ARTICLE I, § 21 OF THE FLORIDA CONSTITUTION.

III
SUMMARY OF THE ARGUMENT

As the Court can see from the record, this litigation, principally challenging the constitutionality of the 1990 amendments to the Florida Workers Compensation Act, already has generated enough paper to fill several file cabinets. The plaintiffs below challenged each individual provision of Chapter 90-201, as well as designated portions of Chapter 89-289, on a variety of grounds; and in addition the plaintiffs argued that Chapter 90-201 is facially invalid in its entirety--also on a number of different grounds. Of these many arguments, the trial court accepted a handful of challenges to specific provisions of Chapter 90-201, and then severed them out from the rest of the Act (R. 2695-98). In addition, the trial court accepted two of the facial challenges, holding that

Chapter 90-201 violates the single-subject requirement of Article III, Section 6 of the Florida Constitution, and that it violates the separation-of powers doctrine of Article II, Section 3 (R. 2693-95). All of the other constitutional arguments--general and specific--the trial court rejected, without explanation (R. 2699).

The Academy filed its motion to appear as amicus on January 10, 1991, but it was not granted until February 7, 1991--after the time specified for the service of all appellants' and cross-appellants' briefs. Accordingly, the Court's order states that the Academy should file its brief on the timetable scheduled for appellees' briefs. In any event, even without their cross-appeal, it is well settled that the appellees are empowered to resurrect all of the constitutional arguments which they presented to the trial court below, under a right-for-the-wrong-reason theory.[1/] In the Academy's view, of the many arguments which were presented to the trial court, one of the strongest, if not the strongest, is that Chapter 90-201, on its face, violates the constitutional guarantee of access to courts. Mindful that the appellees will be reviewing each of the many arguments which they presented below, the Academy will confine itself to the single question of access to courts.

IV
ARGUMENT

THE TRIAL COURT WAS RIGHT FOR THE WRONG REASON IN DECLARING THE FACIAL INVALIDITY OF CHAPTER 90-201, LAWS OF FLORIDA, BECAUSE CHAPTER 90-201 VIOLATES THE GUARANTEE OF ACCESS TO COURTS OF ARTICLE I, § 21 OF THE FLORIDA CONSTITUTION.

[1/] *See MacNeill v. O'Neal,* 238 So.2d 614, 615 (Fla. 1970); *Cerniglia v. C. & D. Farms, Inc.,* 203 So.2d 1, 2-3 (Fla. 1967); *Hall v. Florida Board of Pharmacy,* 177 So.2d 833, 835 (Fla. 1965); *Gellert v. Eastern Airlines, Inc.,* 370 So.2d 802, 808 (Fla. 3d DCA 1979), *cert. denied,* 381 So.2d 766 (Fla. 1980); *Bosem v. A.R.A. Corp.,* 350 So.2d 526, 528 n.1 (Fla. 3d DCA 1977); *Hester v. Gatlin,* 332 So.2d 660 (Fla. 2d DCA 1976); *State v. Moss,* 206 So.2d 692, 695 (Fla. 2d DCA 1968).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

A. The Legal Framework. Article I, Section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In construing this provision, the place to start is with *Kluger v. White,* 281 So.2d 1 (Fla. 1973), in which the Court struck down a portion of Florida's no-fault automobile law, which required $550.00 in property damages as a prerequisite to tort actions arising from automobile accidents. The constitutional right of access to the courts, the Court held, applies to all causes of action recognized prior to the adoption of the 1968 Florida Constitution, including of course actions for negligence arising out of automobile accidents--even those resulting in less than $550.00 in property damage. To permit the legislative abolition of such a right, the constitution requires either the provision of a reasonable alternative, or an overpowering public necessity, coupled with the demonstration that no reasonable alternative exists, for the abolition of such a right:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the declaration of rights of the Constitution of the State of Florida, or where such a right has been a part of the common law of the State pursuant to Fla. Stat. § 2.-01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. at 4. On the specific issue in *Kluger*, the statute had provided no alternative means of redress for those suffering less than $550.00 in property damage, and reflected no overpowering public necessity for the abolition. It thus was unconstitutional. *Id.* at 4-5.

In light of the recognition that "[a]ccess to Courts and appellate review are constitutionally recognized rights and any restrictions thereon should be liberally

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

construed in favor of the right," *Lehman v. Cloniger,* 294 So.2d 344, 347 (Fla. 1st DCA 1974),[2] the courts of Florida have strictly applied the *Kluger* formula to invalidate statutes which constricted or abolished a pre-existing right of access to the courts, in the absence of either a reasonable alternative remedy or commensurate benefit on the one hand, or on the other an overpowering public necessity which could not be met by any other means. For example, in *Overland Construction Co. v. Sirmons,* 369 So.2d 572 (Fla. 1979), the Court struck down a statute of repose creating "absolute immunity from suit for certain professionals and contractors connected with the construction of improvements to real property after the expiration of twelve years from the completion of the building," because the principles of repose which had motivated such a cut-off date (for example, "the difficulty of proof which naturally accompanies the passage of time") were insufficiently compelling to overcome the pre-existing common-law right of action, and because the Legislature had provided no alternative to its abolition. And in *Smith v. Department of Insurance,* 507 So.2d 1080 (Fla. 1987), the Court struck down a statutory cap of $450,000.00 on non-economic damages in personal-injury cases, which provided no alternative remedy, because, however "rational" had been the Legislature's motivation in prescribing the cap, "[r]ationality only becomes relevant if the legislature provides an alternative remedy," and the statute failed because there was no "overpowering public necessity" and no showing "that no alternative method of meeting that necessity exists." *Id.* at 1088-89.[3]

---

[2] *Accord, G.B.B. Investments, Inc. v. Hinterkopf,* 343 So.2d 899, 901 (Fla. 3d DCA 1977) ("Any restrictions on such access to the courts must be liberally construed in favor of the constitutional right").

[3] The *Smith* decision also made clear that the statute was invalid even though "the legislature has not totally abolished a cause of action," but "only placed a cap on damages which may be recovered . . . ." As the Court put it: "[I]f it were permissible to restrict the constitutional right by legislative action, without meeting the conditions set forth in *Kluger,* the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace or, as Mr. Smith [the

In keeping with these pronouncements, the Florida courts have upheld statutes against the access-to-courts challenge only if the Legislature either has provided a reasonable alternative, or has shown a compelling objective for the constriction which could not be achieved by any other means. Thus in *Lasky v. State Farm Ins. Co.,* 296 So.2d 9 (Fla. 1974), the Court upheld those portions of the no-fault automobile insurance statute which had not been invalidated in *Kluger*--specifically, the requirement of $1,000.00 in medical expenses as a predicate for recovering such intangible damages as pain and suffering. As against the access-to-courts challenge, the Court repeatedly emphasized the specific and substantial benefits provided as a quid pro quo to those who were denied a pre-existing right of access by virtue of the new statute: 1) it required all automobile owners to maintain no-fault insurance coverage, thus increasing the injured party's chances of recovering his economic losses, and it provided for no tort immunity in the absence of such coverage, 296 So.2d at 13-14; 2) it assured an accident victim of some recovery even if himself at fault, *id.* at 14-15; 3) it not only limited a claimant's potential recovery if below the no-fault threshold, but it likewise limited that claimant's potential exposure in actions below the threshold brought against him by others, *id.* at 14; and 4) it relieved a potential claimant of any obligation to prove fault

---

petitioner] puts it, 'majoritary whim.'" *Id.* at 1088. In reaching this conclusion, the Court implicitly disapproved of some earlier district-court decisions--one of them in the area of workers compensation--which had suggested that the partial constriction of a pre-existing right of access would be permissible notwithstanding the *Kluger* test. *See Sasso v. Ram Property Management,* 431 So.2d 204 (Fla. 1st DCA 1983), *aff'd*, 452 So.2d 932 (Fla. 1984) (upholding certain workers' compensation provisions); *Jetton v. Jacksonville Electric Authority,* 399 So.2d 396 (Fla. 1st DCA 1981), *review denied,* 411 So.2d 383 (Fla. 1983) (upholding statute abolishing sovereign immunity only to a certain dollar amount). Although this Court had affirmed *Sasso*, and also denied review in *Jetton*, it adopted the rationale of neither decision. Indeed, in *Smith* itself, the Court recalled that in an earlier sovereign-immunity decision, *Cauley v. City of Jacksonville,* 403 So.2d 379 (Fla. 1981), "we made a point of noting *Jetton* and distancing ourselves from the reasoning on which appellees rely." *Smith*, 507 So.2d at 1089. As *Smith* held explicitly, a statute is subject to the access-to-courts requirement even if it merely cuts back a pre-existing right rather than abolishing it entirely.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

in cases below the threshold, *id.* at 15. Thus, the *Lasky* Court concluded that while "[t]he property provisions considered in *Kluger* did not allow any reasonable alternative to the traditional tort actions . . . the provisions of [the statute at issue] do provide a reasonable alternative to the traditional action in tort, and therefore do not violate the right of access to courts . . . ." 296 So.2d at 15.[4/]

Similarly, in *Florida Patient's Compensation Fund v. Von Stetina,* 474 So.2d 783, 788-89 (Fla. 1985), the Court upheld the Florida Patient's Compensation Fund, because it did not abolish or significantly constrict a claimant's right of recovery above $100,000.00, but merely created a different source for that recovery: "The scheme that makes the fund party to the medical malpractice action and responsible for portions of awards in excess of $100,000 does not substantially violate or change any of the plaintiff's vested rights." Indeed, the new statutory scheme "in fact is designed in part,

---

[4/] In *Smith*, the Court took pains to point out that the *Lasky* decision could only have been justified on the basis of the substantial compensating benefits provided by the statute upheld, 507 So.2d at 1088:

> [In *Lasky* and *Chapman v. Dillon*, 415 So.2d 12 (Fla. 1982), reaffirming *Lasky*], the legislature had provided such plaintiffs with an alternative remedy and a commensurate benefit. First, the vehicular no-fault insurance statute required that all motor vehicle owners obtain insurance or other security to provide injured persons with minimum benefits. This was essentially a contractual arrangement; if the defendant vehicle owner failed to purchase the required insurance, the defendant's immunity was nullified and the plaintiff retained the right to sue below the threshold. Second, under the no-fault insurance statute, any given vehicle owner was as likely to be sued as to sue and giving up the right to sue was compensated for by obtaining the right not to be sued. Thus, unlike here, the legislation we upheld in *Lasky* provided a reasonable trade off of the right to sue for the right to recover uncontested benefits under the statutory no-fault insurance scheme and the right not to be sued.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

to ensure that sufficient funds exist to pay substantial judgments to medical malpractice victims." *Id.* at 788. Thus, there are a variety of cases in which the deprivation of a pre-existing right of access to the courts has been justified by the provision of substantial compensating benefits.[5/]

B. The Workers'-Compensation Decisions. Throughout its history, from the employees' perspective, the Florida Workers' Compensation Act has survived the access-to-courts challenge only because its abolition of the pre-existing common-law cause of action was accompanied by a constitutionally-equivalent quid pro quo, constituting a "highly significant social and economic value to the working man." *Seaboard Coast Line R. Co. v. Smith,* 359 So.2d 427, 429 (Fla. 1978). *Accord, Employers Ins. Co. of Wassau v. Abernathy,* 442 So.2d 953, 954 (Fla. 1983); *University of Miami v. Mathews,* 97 So.2d 111, 115 (Fla. 1957); *Grice v. Suwanee Lumber Mfg. Co.,* 113 So.2d 742, 745-46 (Fla. 1st DCA 1959). From the employees' perspective, the workers'-compensation statute provided at least six specific compensating benefits for the common-law rights which it took away: 1) immediate payment of medical expenses and lost wages without the delays of litigation; 2) certainty of recovery as opposed to doubt; 3) recovery without a showing of fault; 4) immunity from fellow-servant or comparative-negligence defenses;

[5/] To this category of cases should not be added those which uphold statutory limitations or modifications upon rights which themselves have been created by prior statutes--but had not existed at common law. For example, in *Cauley v. City of Jacksonville,* 403 So.2d 379 (Fla. 1981), the statutory limitation of $100,000 in the amount of money damages recoverable in a tort action against a municipality did not deny access to courts, because there had been no common-law right of action against a municipality in the first place. *See Smith v. Department of Insurance,* 507 So.2d at 1089 (the asserted analogy to *Cauley* "fails to recognize that [the statute in *Cauley*] waived sovereign immunity and its primary effect was to permit suits which had previously been prohibited. The right of a legislature to waive sovereign immunity and to place conditions on the waiver is plenary under article X, section 13, Florida Constitution"). Similarly, in *White v. Clayton,* 323 So.2d 573, 575-76 (Fla. 1975), statutory modifications to the recovery available for wrongful death were permissible, because "[a]n action for wrongful death was not authorized at common law, and is a creature of the legislature."

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

5) presumptions of coverage, of sufficient notice, and of the absence of willful wrongdoing; and 6) the recovery of lost wages even after maximum medical recovery.[6/]

As the court noted in *Fidelity & Casualty Co. of New York v. Bedingfield,* 60 So.2d 489, 492 (Fla. 1952):

> The Workmen's Compensation Law was unknown to the Common Law. Prior to the enactment of these laws an injured employee could not be compensated for damages received for personal injuries, or damages occasioned by an

---

[6/] *See Weathers v. Cauthen,* 152 Fla. 420, 12 So.2d 294, 295 (1943) (statute assures prompt care and compensation; must be strictly construed in favor of employee, because in derogation of common law); *Whitehead v. Keene Roofing Co.,* 43 So.2d 464, 465 (Fla. 1949) (purpose of statute is to assure that the industry in question, and not society, pays for a work-related injury); *Di Giorgio Fruit Corp. v. Pittman,* 49 So.2d 600, 602 (Fla. 1950) (statute must be construed liberally, resolving all doubts in favor of worker); *Florida Game and Freshwater Fish Commission v. Driggers,* 65 So.2d 723, 725 (Fla. 1953) (prompt medical care and compensation; all doubts resolved in favor of worker); *Sullivan v. Mayo,* 121 So.2d 424, 430 (Fla. 1960), *cert. denied,* 133 So.2d 647 (Fla. 1961) (purpose of statute is to place the burden on the industry in which the worker is employed); *Gillespie v. Anderson,* 123 So.2d 458, 463 (Fla. 1960) (statute must be liberally construed in favor of employee, in light of its remedial purpose); *Lee v. Florida Pine & Cypress,* 157 So.2d 513, 516 (Fla. 1963) (statute must "expedite claims"); *Thompson v. W.T. Edwards Tuberculosis Hospital,* 164 So.2d 13, 15 (Fla. 1964) ("[T]he philosophy of workmen's compensation [is] to the end that an employee shall receive the benefits to which he is entitled with reasonable promptness"); *Clenney v. Walker Hauling Co.,* 217 So.2d 114 (Fla. 1968) ("The Workmen's Compensation Act was passed in order to secure an expeditious method of settlement of claims of those injured in industrial accidents"); *Mullarkey v. Florida Feed Mills, Inc.,* 268 So.2d 363, 366 (Fla. 1972), *appeal dismissed,* 411 U.S. 944, 93 S. Ct. 1923, 36 L. Ed. 2d 406 (1973) ("Protracted litigation is superseded by an expeditious system of recovery. . . . [T]he employee trades his tort remedies for a system of compensation without contest, thus sparing him the cost, delay and uncertainty of a claim in litigation"); *De Ayala v. Florida Farm Bureau Casualty Ins. Co.,* 543 So.2d 204, 206-07 (Fla. 1989) (A "reasonably adequate and certain payment for work place accidents"; liberal interpretation required); *Steed v. Liberty Mutual Ins. Co.,* 355 So.2d 1239, 1241 (Fla. 2d DCA 1978) ("[T]he intent of the Workmen's Compensation Act [is] to provide immediate relief as a substitute for the wages of the working man with little, if any, delay or long deliberation"); *Florida Erection Services, Inc. v. McDonald,* 395 So.2d 203, 209-10 (Fla. 1st DCA 1981) (system is "expeditious and independent of proof of fault," and the "benefits should be self-executing, and . . . paid without the necessity of any legal or administrative proceedings," with "reasonable promptness," and aided by liberal construction and a presumption of coverage); *John v. GDG Services, Inc.,* 424 So.2d 114, 116 (Fla. 1st DCA 1982), *aff'd,* 440 So.2d 1286 (Fla. 1983) ("[T]he employee trades his common-law remedy for a sure, expeditious method of settling claims").

> accident, from the employer unless his claim was based upon the negligence of such employer. Law suits were expensive and the employer had the right to raise such defenses as contributory negligence, fellow-servant's negligence and assumption of risk. Workmen's Compensation Laws have been enacted in all of the states in the Union so that employees could be at least partially compensated for injuries received in highly organized and hazardous industries of modern times whether the injury was caused by negligence of the employer or otherwise. These laws create administrative boards and commissions and provide for immediate and certain payment to be borne by the employer and without the necessity of proof of negligence or long drawn-out and expensive law suits and the uncertainty of the result of such law suit. As a part of these compensation laws we have the compensation insurer, whereby for certain premiums paid by the employer, the compensation insurer undertakes to make the payment provided for by law in the case of accident which produces injury.

Or as the Court put it in *Kluger v. White,* 281 So.2d at 4: "Workmen's Compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who was injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury."

Throughout its history, each successive amendment to the Worker's Compensation Law has been tested in the crucible of this critical balance between the rights forgiven and the rights acquired, to ensure that the overall scheme left standing after the amendment did not significantly alter that balance in favor of either the employer or the employee.[7/] In those cases in which amendments to the statute have been sustained, it

---

[7/] It is worth pausing for a moment to emphasize this point--that each new amendment is not judged in a vacuum, but rather is judged by the effect it has on the overall scheme, as compared to the common-law tort system which that scheme replaced. *See, e.g., Mahoney v. Sears, Roebuck and Co.,* 440 So.2d 1285, 1286 (Fla. 1983), *review denied,* 447 So.2d 887 (Fla. 1984) (the question is whether, after the amendment, "[w]orkers' compensation . . . still stands as a reasonable alternative"); *Acton v. Ft. Lauderdale Hospital,* 440 So.2d 1282, 1284 (Fla. 1983) (question is whether "[t]he Workers' Compensation Law remains a reasonable alternative to tort litigation"). *See generally*

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

is because the court has assured itself that the essential balance of the original act has not been disturbed. For example, in a series of decisions, the district courts and this Court upheld 1979 amendments which abolished the pre-existing schedule of payments based on specifically-enumerated injuries, each reflecting an estimated degree of disability based upon an assumed loss of wage-earning capacity, and substituted a wage-loss system based on actual wage losses, coupled with special impairment benefits in a few specifically-designated classes of injuries. As the Court noted in *Acton v. Ft. Lauderdale Hospital,* 440 So.2d 1282, 1284 (Fla. 1983):

> The change from lump sum payments for permanent partial disability to a system offering such payments only for permanent impairments and wage-loss benefits for other types of partial disability may disadvantage some workers, such as Mr. Acton. On the other hand, the new system offers greater benefits to injured workers who still suffer a wage loss after reaching maximum recovery. The Workers' Compensation 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. [The amendments] do not violate the access to courts provision of the Florida Constitution as interpreted in *Kluger v. White.*[8/]

Chapman v. Dillon, 415 So.2d 12, 17 (Fla. 1982) ("The changes made by the legislature . . . have not fundamentally changed this essential characteristic of the no-fault law"). *Compare Carter v. Sparkman,* 335 So.2d 802, 806 (Fla. 1976), *cert. denied,* 429 U.S. 1041, 97 S. Ct. 740, 50 L. Ed. 2d 753 (1977) (the "pre-litigation burden cast upon the claimant [by medical mediation procedures] reaches the outer limits of constitutional tolerance"), *with Aldana v. Holub,* 381 So.2d 231, 238 (Fla. 1980) (to interpret the medical mediation statute in a manner which would "increase the prelitigation burden cast upon the plaintiffs . . . would transcend those outer limits of constitutional tolerance . . . . [Therefore] the medical mediation act is unconstitutional in its entirety").

8/ *See John v. GDG Services, Inc.,* 424 So.2d 114, 116 (Fla. 1st DCA 1982), *aff'd*, 440 So.2d 1286 (Fla. 1983); *Carr v. Central Florida Aluminum Products, Inc.,* 402 So.2d 565, 568 (Fla. 1st DCA 1981) ("These legislative findings are wholly consistent in principle, and to some extent in detail, with earlier workers' compensation legislation . . . . 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 and the courts over exactly what percentage of the use of a limb, for instance, has been lost in a given

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

C. Chapter 90-201, Laws of Florida, Radically Alters the Pre-Existing Balance of the Workers' Compensation Laws, to the Detriment of the Employee, and Therefore Violates the Employees' Constitutional Right of Access to Courts. We will leave to the primary appellees (the plaintiffs below) the task of dissecting Chapter 90-201 section by section, demonstrating the constitutional infirmities inherent in the individual provisions themselves. Our objective is to demonstrate that the cumulative effect of these changes was to radically reduce the pre-existing benefits to employees under the workers' compensation scheme, with no compensating benefit. The result is that the pre-existing balance between employers and employees has been impermissibly altered, rendering the statute unconstitutional.

1. Procedural Changes. Chapter 90-201 makes a number of historic and radical changes in the procedures for administering workers' compensation claims, in a manner which significantly undermines the worker's pre-existing substantive benefits. To begin with, § 26 of the Act repeals the pre-existing § 440.26, which had created presumptions that a worker's claim came within the provisions of Chapter 440; that sufficient notice of such a claim had been given; that the injury had not been occasioned by the willful intention of the injured employee to injure or kill himself or another; and that the injury was not occasioned primarily by the intoxication of the injured employee. In the place of these presumptions, a new § 440.015 is created, providing that "the facts in a workers' compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer," and "disputes concerning the

---

case. In Larson's view, the addition of 'partial loss of use' of body members to scheduled permanent injuries was responsible for much of the complexity and litigiousness that attended the system in recent years, which the Florida legislature sought in 1979 to obviate"). *See generally Florida Erection Services, Inc. v. McDonald,* 395 So.2d 203, 210 (Fla. 1st DCA 1981) (1979 amendments generally designed "to provide increased benefits to severely injured workers").

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

facts in workers' compensation cases are not to be given a broad liberal construction in favor of the employee on the one hand or the employer on the other." *See* R. 818-19.[9/]

We have cited already (*see supra* note 6) the many cases recognizing the fundamental importance of the pre-existing presumptions, and especially the presumption in favor of workers' compensation coverage. As the Court put it in *Sanford v. A.P. Clark Motors,* 45 So.2d 185, 187-188 (Fla. 1950): "This court is committed to the doctrine that when a serious injury is conclusively shown and a logical cause for it is proven, he who seeks to defeat recovery for the injury has the burden of overcoming the established proof and showing that another cause of the injury is more logical and consonant with reason. . . . No other rule could possibly give the force and effect to Workmen's Compensation that the makers proposed for it. Even in doubtful cases the doubt should be resolved in favor of the claimant."[10/]

In the place of old § 440.26(4), § 11 of the Act creates § 440.09(3), providing that a positive drug test creates a presumption "that the injury was occasioned primarily by the intoxication of, or by the influence of the drug upon, the employee," and that this presumption "may be rebutted by clear and convincing evidence" only "[i]n the absence of a drug-free workplace program . . . ." Thus, if there is a drug-free workplace program, the worker is subject to a conclusive presumption that his injury was caused by drugs or alcohol; and if there is not a drug-free workplace program, he can rebut the

---

[9/] At the same time, however, the new Act does not abolish § 440.185(1)(b), providing that a Judge of Compensation Claims may excuse the worker's failure to give statutory notice of injury, but "every presumption shall be against the validity of the claim." Thus, the drafters preserved existing presumptions in favor of the employer, abolishing only those which favored the employee.

[10/] *See Looney v. W&J Construction Co.,* 289 So.2d 723, 724 (Fla. 1974); *Snipes v. Gillman Paper Co.,* 224 So.2d 276 (Fla. 1969); *Carraway v. Amour and Co.,* 156 So.2d 494 (Fla. 1963); *Greene v. Mackle Co.,* 142 So.2d 283 (Fla. 1962); *Foxworth v. Florida Industrial Commission,* 86 So.2d 147 (Fla. 1956).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

presumption only by clear and convincing evidence. The intended result, of course, is not only to forbid claims which clearly would have been compensable under the old statute, by virtue of the pre-existing presumption, but also to forbid claims in which the accident is not, in fact, drug- or alcohol-related, and the worker could prove it if given the chance.

In addition, § 20 of the Act creates § 440.15(5), providing that no benefits are payable if the employee, at the time of entering into employment, falsely represented in writing that he had not previously been disabled or compensated because of a previous disability impairment, anomaly or disease. That abolishes the rule of *Martin v. Carpenter,* 132 So.2d 400 (Fla. 1961), which forbid compensation only if the employer demonstrated that the employee had made a false representation which the employee knew to be false, that the employer had relied on it, and that such reliance had resulted in consequent injury to the employer. As the court noted in *Doric Food Co. v. Allen,* 383 So.2d 316, 317-18 (Fla. 1st DCA 1980), the old rule encouraged employers to make a thorough investigation of employees at the time of hiring, and at the same time protected those employers who had suffered in reliance upon knowing misrepresentations. Now the employee is precluded from receiving benefits upon proof of any misrepresentation, even without a showing of any causal relationship between the misrepresentation and either the accident or the resulting disability. The result is a pure windfall to the employer.

Sections 17-18 of the Act, creating the "Super Doc" provisions of a new § 440.13, further undermine the pre-existing presumptions in favor of coverage, by providing that in the case of certain disagreements between health-care providers, the compensation judge "shall" order the evaluation of a single doctor, whose opinion "shall be presumed correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims." Under the pre-existing system, the Judge of

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Compensation Claims was empowered to resolve any differences in the medical testimony. The "Super Doc" provisions replace that neutral decisionmaking with an essentially-unreviewable decision by a single doctor (*see* R. 242, 564-65, 804-17).

In addition, the new Act radically changes the procedural context for adjudicating wage-loss claims. Under the old statute (§ 440.15(3)(b)2), the worker was required to make a threshold showing (which might be based soley on his subjective complaints) of his entitlement to compensation, based on a diminution of wage-earning capacity, but he did not bear the additional burden to show that economic conditions were not a factor in causing his wage loss. Indeed, "[t]o regard a workers' compensation claimant otherwise would represent a drastic departure from the long-accepted doctrine that the workers' compensation law is intended to relieve society of the burden of caring for injured workers and to place the responsibility on the industry served. . . . We hold that the unavailability of jobs due to economic conditions does not preclude recovery of wage loss benefits, and, accordingly, it is not necessary for a wage loss claimant to present evidence that his refusal for employment was not due to unavailability of jobs resulting from economic conditions." *Regency Inn v. Johnson,* 422 So.2d 870, 878-79 (Fla. 1st DCA 1982), *review denied,* 431 So.2d 989 (Fla. 1983) (reviewing 1979 statute). *See City of Clermont v. Rumph,* 450 So.2d 573, 576 (Fla. 1st DCA 1984), *review denied,* 458 So.2d 271 (Fla. 1984) (to construe the 1983 statute otherwise "would seriously imperil the constitutional validity of the workers' compensation law").

But the new Act effects precisely the change which the court found "would seriously imperil the constitutional validity of the workers' compensation law." Section 20 creates new § 440.15(e), placing the burden on any worker suffering a permanent impairment of 1-20% (of the body as a whole?--the statute doesn't say) "to demonstrate [through evidence "not based solely on subjective complaints"] that his post-injury earning capacity is less than his pre-injury average weekly wage and is not the result of economic

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

conditions or the unavailability of employment or of his own misconduct." Above 21% (what happens between 20 and 21 percent?), the burden is on the employer to demonstrate that the worker's post-injury earning capacity is the same or more than his pre-injury wage. Thus, the new Act abolishes the fundamental philosophy of providing wage-loss compensation for work-related injuries notwithstanding that economic conditions might hinder future employment; and it also punishes those workers whose wage losses are *not* the result of economic conditions, but are unable to prove it (*see* R. 271, 293-94).

Section 20 of the Act also amends § 440.15(1) to require, as a condition of permanent total disability payments, that the worker demonstrate his inability to do even light work without interruption within a 100-mile radius of his residence. The pre-existing reasonable-man test required the worker to show that he had made a reasonable effort to find suitable work commensurate with his physical limitations. *See Chicken 'N Things v. Murray,* 329 So.2d 302 (Fla. 1976). Thus, in the place of a perfectly-reasonable balance between the interests of employers and employees, the new Act substitutes a mechanical geographic test which would be irrational in any state, and is particularly irrational in a narrow state like Florida.[11/] It would require a worker in populated areas like Miami to meet a staggering and impossible burden, given the number of potential employers. And it would require rural workers to sustain onerous transportation costs (*see* R. 275-76, 567-71, 597-99, 605-06, 830).

It is clear that these procedural changes alone radically and fundamentally alter the pre-existing philosophy of the workers' compensation laws--a philosophy which was central to the constitutional acceptability of those laws. As the Florida courts have repeatedly noted, the workers' compensation scheme abrogates a fundamental pre-existing

---

[11/] As one practioner has put it, a worker in Key West would have to show that there are no jobs available in Cuba.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

right of access to the courts, and it can do so only by providing benefits to workers which are commensurate with the rights taken away. The pre-existing presumptions and procedures were a fundamental aspect of those benefits, because they resolved all doubts in favor of compensation, and thus assured compensation in all cases except those in which the worker's claim unquestionably lacked merit, thus providing a certain if smaller remedy, in the place of an uncertain if larger remedy. The new statute has now made the smaller remedy no less uncertain than the former larger remedy. It has eliminated the key presumptions, and has created a series of procedural hurdles to a statutory remedy which was supposed to be virtually certain.

2. *Outright Reductions in Benefits.* In addition, the cumulative effect of a number of disparate provisions of the Act is to substantially reduce the benefits which are payable to a worker, even if he overcomes the new procedural barriers which the Act creates.

a. Wage-Loss Benefits. Under the old statute, permanent-impairment wage-loss benefits were 95% of the difference between 85% of the worker's average weekly wage (including intangibles) pre-injury, and the average weekly wage (including intangibles) post-injury. Now, § 20 of the Act amends § 440.15(3), to award only 80% of 80%, and § 9 of the Act redefines wages to exclude wages from outside or concurrent employment, to exclude fringe benefits, and to exclude all gratuities which are not reported. However, the Act's computation of after-injury earnings *does* include second-job earnings and fringe benefits, effectively loading the formula for the payment of minimum wage-loss benefits against the worker, and raising the floor so high that many claims are cut out altogether. *See* R. 434-35, 560, 937-38.

Under the old statute, as this Court recognized repeatedly, it was fundamental to the philosophy of workers' compensation that wage-loss benefits be based on the reality of the worker's loss--and not upon artificial distinctions between first and second jobs:

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> If the injury occurring on the part-time job has disabled the employee from working at his full-time job, his capacity as a wage earner is impaired beyond the limits of his part-time job and his compensation should be based on the combined wages. The purpose of the Act is to compensate for loss of wage earning capacity due to work-connected injury. It is the capacity of the "whole man" not the capacity of the part-time or full-time worker that is involved.

American Uniform & Rental Service v. Trainer, 262 So.2d 193, 194 (Fla. 1972). *See Jones Shutter Products, Inc. v. Jackson,* 185 So.2d 476 (Fla. 1966). Under the new system, the worker who earns $500 a week at his day job and is injured at his second job, on which he earns $100--for total weekly earnings of $600--will receive compensation at a rate of $66.67 a week; and if after treatment he is left with a 9% impairment of the body as whole, he will be entitled to wage-loss benefits for 78 weeks, but only if he is unable to earn $80 a week, and even then his wage-loss benefits will be calculated as 80% of the difference between $80 and what he actually earns. For this pittance, he gives up his right to sue the second-job employer for negligence. The result is that workers who do have second jobs are taking the risk of losing their primary income, with no compensation, and many workers will think twice before supplementing their income, and thus their family's standard of living, by taking second jobs.

Section 20 of the Act also provides that the right to wage loss benefits will terminate if within any two-year period there are three occurrences of certain events, including the employee's voluntary termination of his income for reasons unrelated to his compensable injury. The new Act thus repeals the "deemed earnings" rule, under which the courts recognized that voluntary termination of employment does not alter the pre-existing injury, and may be justified by both economic and non-economic factors. The Act thus substitutes a conclusive and inflexible presumption for a case-by-case analysis, which had provided wage-loss compensation in proper cases.

Section 20 of the new Act also alters the prior availability of 520 weeks for wage

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

losses, which were calculated in a manner proportionate to the seriousness of the permanent physical impairment involved, by tailoring benefits to provable losses in earning capacity. The old system was tailored to the worker's actual loss of earning capacity.

The new system creates an impairment schedule--not a disability schedule. It substitutes a sliding scale of maximum weeks of benefits depending solely upon the size of the permanent impairment rating, up to 150 weeks of eligibility for ratings up to 15% (higher ratings would usually result in permanent total disability). The result is an artificial cut-off based upon inflexible presumptions about the losses caused by a particular injury, as compared to the pre-existing system's allowance of increases above the minimum formula upon proof of greater losses in earning capacity. For example, if two workers--one a teacher and one a fireman--each suffer a hand injury which constitutes a 5% impairment of the body as a whole, each is limited to eligibility for wage-loss benefits for up to 26 weeks, even though the fireman's career may be over--the teacher's barely affected. Can it be said, in any realistic sense, that the fireman has received a quid pro quo for the common law rights foresaken?

Section 20 of the Act also provides that supplemental benefits for permanent total disability will end at the age of 62 if the employee is eligible for social security benefits--benefits for which the employee, of course, himself has paid, and which themselves are reduced by 20% by the federal act if the claimant applies for them at age 62. The effect of the new Act, therefore, is to force an employee to take the lesser benefits at age 62, because his mere eligibility for those benefits automatically terminates his permanent total disability benefits under the state law. Thus, the new Act not only cuts off the worker's permanent total disability payments, but also forces him to get 20% less in social security benefits (*see* R. 250-51, 571-72).

b. Definition of Compensable Injuries. Section 14 of the Act, creating

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

§ 440.092, abolishes a series of rules which had allowed compensation in the gray areas of this subject, in order to secure the underlying philosophy of compensating work-related injuries. Sub-section (1) provides that injuries during recreational and social activities are not compensable unless those activities are "expressly required incident of employment and produce a substantial direct benefit to the employer beyond improvement in employee health and morale that is common to all kinds of recreation and social life." The pre-existing rule allowed compensation for activities required expressly or by implication, *or* which produced a substantial direct benefit to the employer. *See City of Tampa v. Jones,* 448 So.2d 1150 (Fla. 1st DCA 1984); *Brockman v. City of Dania,* 428 So.2d 745 (Fla. 1st DCA 1983). The new Act thus replaces a rule which was balanced, in favor of a rule which denies compensation in cases which in fact are work related, solely because the employer has not said so.

Sub-section (2) of § 14 (§ 440.092(2)) abolishes the pre-existing exceptions to the going-and-coming rule, by enforcing the rule notwithstanding that the employer has provided transportation to the employee, if that transportation also was available for personal use, unless the employee was engaged in a special errand or mission for the employer. That overrules *Huddock v. Grant Motor Co.,* 228 So.2d 898 (Fla. 1969), *Swartzer v. Food Fair Stores, Inc.,* 175 So.2d 36 (Fla. 1965), *Blount v. State Road Department,* 87 So.2d 507 (Fla. 1956), and a number of other cases. The philosophy of those cases is that the employer is liable to the general public if he furnishes his employee's automobile, and is responsible for its condition in maintenance; indeed, the employer may require the use of a company car as a condition of employment. The injury in such circumstances is inherently work-related, and should be compensable.

Sub-section (3) of § 14 (§ 440.092(3)) overrules the "personal comfort rule" first announced in *Bituminous Casualty Co. v. Richardson,* 4 So.2d 378 (Fla. 1941), which permitted compensation even if the employee was injured during a slight deviation from

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

a work-related function. The rule reflected the inherent truth that employees cannot be working every minute, and the new Act tramples that truth.

Subsection (4) of § 14 (§ 440.092(4)) provides that injuries to traveling employees are compensable only while the employee is in a travel status, and only if the injury arises in the course of employment, including necessary travel. That overrules *Garver v. Eastern Airlines,* 553 So.2d 263 (Fla. 1st DCA 1989), *review denied,* 562 So.2d 345 (Fla. 1990), and *Gray v. Eastern Airlines,* 475 So.2d 1288 (Fla. 1st DCA 1985), *review denied,* 484 So.2d 8 (Fla. 1986), and other cases which recognized, in keeping with the liberal construction philosophy of the Act, that workers on business travel engage in a variety of activities that they would not engage in "but for" the business travel, which thus should be compensable. The previous rule, therefore, depended upon a case-by-case appraisal of the extent to which the worker had departed from his work-related activities, and rejected "a rule that would inflexibly bar a traveling employee from compensation simply because at the time the employee suffered his or her injuries, the employee had not yet returned from a personal mission to the work site or the point of departure." *Garver,* 553 So.2d at 267. The new rule embraces precisely such inflexibility, purposefully sacrificing cases in which a review of the facts unquestionably would demonstrate that the injury is work related.

Finally, sub-section (5) of § 14, creating sub-section (5) of § 440.092, provides that "[i]njuries 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." That overrules *Johnnie's Produce Co. v. Benedict & Jordan,* 120 So.2d 12 (Fla. 1960), and subsequent cases holding (consistent with the worker's pre-existing common-law rights, *see J. Ray Arnold Corp. of Oluster v. Richardson,* 141 So. 133 (Fla. 1932)) that where the primary injury is

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

compensable, every natural and probable consequence of that injury is also compensable, unless the chain of causation is broken by the employee's own contributory negligence. Thus, under the old statute, if the employee suffered additional injury at the hospital while being treated for a compensable injury, he was covered; under the new Act, he is covered only if the injury occurs while traveling to the hospital. The result of course is a substantial reduction in the benefits available under the prior statute (*see* R. 824-26).[12/]

c. Miscellaneous Provisions. Section 20 of the Act amends § 440.15(2), to provide that the catastrophic loss rate for temporary total disabilities terminates six months after the accident, whereas it used to terminate six months after the date of injury. *See Bordo Citrus Products v. Tedder,* 518 So.2d 367 (Fla. 1st DCA 1987). That means that if the worker's injury does not manifest itself until six months after the accident, there is no compensation at all! The result is a substantial diminution in the benefits payable, in addition to the utter absurdity of this provision.

Section 31 of the Act permits the employer to satisfy his legal obligations by contracting for medical treatment by an HMO or PPO plan paid for by the employer, which plan may utilize deductibles and co-insurance provisions which require the employee to pay a portion of the medical care received. If the employer buys an HMO with a $1,000.00 deductible, the employee pays that deductible. That result is absurd, and completely undermines the central philosophy that the employee gives up his common-law right of action in exchange for the employer's obligation to pay his medical

---

[12/] The new § 440.092(5) is devastating on its face, but it also creates a secondary risk to the employee, in light of the fact that the employer or carrier can determine the treating physician. If that physician is incompetent, and carries no medical-malpractice insurance, the result is that the worker gets no compensation benefits, and no common-law recovery, even though the physician's negligence was a foreseeable consequence of the initial injury. In short, the system rewards the employer or carrier for recommending an incompetent doctor.

costs.

Finally, § 20 of the Act amends § 440.15(2), to reduce temporary total disability payments from 350 to 260 weeks (*see* R. 441). It also excludes concurrent earnings from the definition of wage losses, just as it does for permanent-impairment wage-loss benefits, *see supra* pp. 16-17.

3. Attorneys' Services and Fees. Under the pre-existing statute, if the employer failed to pay the claim within 21 days, which ran from receipt of the notice of claim (so long as the notice contained sufficient information to induce the employer to investigate), the employee was entitled to attorneys fees if he hired an attorney in order to secure payment. Even this system was of questionable constitutional validity, since it provided no compensation if the dispute was only about the amount (rather than the fact) of the employee's entitlement, which is characteristic of "[t]he vast majority of litigated compensation cases," and "dramatically illustrates why, in disputed compensation cases where a claimant can pay attorney's fees only out of the benefits recovered, competent attorneys are motivated to decline representation of claimants based on the pure adverse economic consequences of doing so," even though the "claimant's need for representation, though somewhat abated by [the 1979] changes, nevertheless has continued to be significant." *Aramburo v. Cargo Development, Inc.,* 455 So.2d 567, 568 (Fla. 1st DCA 1984). *Accord, Dale v. Landrum Temporary Services Inc.,* 458 So.2d 32 (Fla. 1st DCA 1984) ("[s]ince the present legislative scheme seriously impacts upon injured claimants' ability to secure the services of competent attorneys in cases in which the absence of such assistance is tantamount to a forfeiture of benefits conferred by law," the Legislature should rethink the question).

The new provision, adopted in the 1989 statute and tightened in the 1990 Act, is worse. Now, under § 440.19(1)(e), the 21 days runs from the carrier's receipt of "acknowledgment" of the claim by the Division of Workers Compensation, which is

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

subject to no apparent time limit for providing the acknowledgment. And § 440.19(1)(e) also prescribes an elaborate set of requirements for the initial claim--including the "basis and necessity for any medical treatment sought," the "details of any defect in the calculation of the average weekly wage and the details and basis therefore," and a "detailed description of the percentage of permanent impairment and corresponding entitlement to increased wage-loss benefits." Even a defense expert admitted that the complexities of the old system required the services of an attorney (R. 423), and thus it is not surprising that less than 1% of the claimants under the old system filed their own claims (Tr. 600). The new system is far more complex. And yet, new § 440.19(1)(e) requires the dismissal of any claim not filed in compliance with those requirements, "unless the claimant is not represented by counsel." In other words, the claimant is severely penalized for having a lawyer, if the lawyer fails to file a proper claim. And § 440.19(1)(e) also provides that "a judge of compensation claims shall not award an attorney's fee or penalties based on a claim for benefits that does not satisfy the requirements of this sub-section." Therefore, notwithstanding the increased complexities of the claims procedure, which themselves undermine the quid-pro-quo of administrative simplicity, *see infra*, and which reasonably would induce most employees to hire a lawyer, the Act discourages doing so, by disallowing fees and prescribing dismissal if the attorney's efforts are erroneous.

Moreover, the new Act significantly constricts the fees which remain potentially awardable. Notwithstanding that § 440.34 contains a guideline for awarding a reasonable fee based on a percentage of the benefits secured, § 29 of the new Act says that "benefits secured" "means benefits obtained as a result of the claimant's legal services rendered in connection with the claim for benefits," but "does not include future medical benefits to be provided on any date more than 5 years after the date the claim is filed." (The 5-year limit was first enacted in 1989, but it now runs from the date the claim is

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

filed, rather than the time of the fee hearing, so that, theoretically, the right to fees could be cut off before the hearing). In short, consistent with many of the other provisions of the Act, in the place of a case-by-case analysis of the attorney's efforts, the statute embraces a conclusive presumption that medical benefits received after five years are not the product of the attorney's efforts.

And on top of all this, even when the claimant might otherwise be entitled to fees, they may be taken away by the "Super Doc" provisions of §§ 17-18 of the Act, creating § 440.13. For example, even if the employer has violated the 21-day rule of § 440.34, thus creating a potential entitlement to fees, and even if the employee's counsel has put in substantial time thereafter in preparing the claim, the appointment of a "Super Doc" automatically starts the 21-day period running again, and of course the employer can escape liability for fees by acquiescing within that period of time. The attorney can therefore put in substantial time with a reasonable expectation of receiving fees, and then lose them. As in *Aramburo v. Cargo Development, Inc.,* 455 So.2d 567, 568, "competent attorneys are motivated to decline representation of claimant's based on the pure adverse economic consequences of doing so."

The result of all of this is that claimants are discouraged from (and indeed penalized for) hiring attorneys, attorneys are discouraged from taking these cases, the employee's fortunes in pursuing contested claims are significantly undermined, and the pre-existing rights of employees are undermined with them (*see* R. 310). Here too, the new Act significantly devalues a worker's pre-existing rights.

4. Administrative Burdens. As we have noted, one of the key benefits to employees under the workers'-compensation system has been that it provided "immediate relief," *Steed v. Liberty Mutual Ins. Co.,* 355 So.2d 1239, 1241 (Fla. 2d DCA 1978), through "an expeditious system of recovery." *Mullarkey v. Florida Feed Mills, Inc.,* 268 So.2d 363, 366 (Fla. 1972), *appeal dismissed,* 411 U.S. 944, 93 S. Ct. 1923, 36 L. Ed. 2d

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

406 (1973). All that has changed. As we have noted, new § 440.19(e) now prescribes an impossible set of procedural requirements for the claimant. As one expert put it: "[T]he legislature has created virtually an impossible claims-filing procedure by the specificity requirement of 440.19. I understand the reasoning behind the specificity requirement. . . . But the changes that were made to try to do away with anyone being sandbagged in this sort of thing has gone so far that it is virtually impossible to file a claim to meet the specificity requirements of 440.19" (R. 252-53). As the expert put it, when you factor in the paperwork requirements of the 100-mile job-search requirement, "[t]he paperwork in itself is overwhelming" (R. 266). *See* R. 298, 575-76, 821-23.

Moreover, even after the employee complies with the claims procedure, he may suffer unconscionable delays in receiving benefits. The old system required 15 days' notice before any hearing, but nothing more, and a pre-trial hearing was not required. Now §440.25 requires a pre-trial hearing before the compensation hearing, no earlier than 30 days after the date of filing the request for a hearing, and no later than 60 days after that date, but with 15-days' notice. Then the Judge of Compensation Claims is required to give the parties at least 90 additional days in which to conduct discovery, unless they consent to an earlier hearing date. All together, the new procedures create a built-in delay exceeding 5 months before a claimant can obtain any kind of hearing, no matter what type of emergency might require immediate relief.[13/] And all of this is done under a statute which guarantees "the quick and efficient delivery of disability and

---

[13/] During those 5 months, the worker is now required to file a claim every two weeks, because claims are now only good until the date of filing. And if the claim is for wage-loss benefits, the statute creates a non-claim penalty providing that if the worker fails to file his wage-loss request within 2 weeks of the time the benefits allegedly are due, the claim is lost forever. Thus, if a claimant reaches maximum medical improvement and becomes eligible for the wage-loss program, but does not immediately understand what to do, and waits more than 2 weeks before filing, he loses his wages for those 2 weeks. Moreover, § 440.12(1) changes the "waiting period" for benefits from 2 weeks to 3 weeks. The benefits start the first week after 3 weeks of disability, instead of 2.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

medical benefits to an injured worker at a reasonable cost to the employer." §440.15.

5. The Legislative Scheme Created by Chapter 90-201 Violates the Workers' Constitutional Right of Access to Courts. Viewed in isolation, of course, there is no question that Chapter 90-201 intentionally sacrifices the rights and benefits of workers to the economic interests of insurers and employers, in the name of some higher good. All of the witnesses on both sides were very candid in admitting that. The clear purpose of the Act is to cut employers' payments, by cutting insurance premiums, by cutting compensation benefits to workers (*see* R. 28-29, 416, 429, 433, 499-500, 908, 918, 981). And as one state official frankly admitted, the Act itself provides no compensating monetary benefits to workers of any nature (R. 592). In short, the purpose of the new Act is to take compensation benefits out of the pockets of workers, so that insurers can lower their premiums, and employers will save money.

As we have noted, however, *supra* note 7, Chapter 90-201 cannot be viewed in isolation, but must be appraised according to its effect upon the overall workers'-compensation scheme. The question, then, is whether the new Act effects a reduction which is sufficiently substantial to alter the constitutional balance.

It is impossible, of course, to quantify the entire dollar loss to claimants which is occasioned by the cumulative effect of all of these changes (*see* R. 942). For example, no one attempted to estimate the cost in benefits occasioned by the various procedural changes which we have discussed, eliminating presumptions in favor of the workers and in some cases creating presumptions against them, and creating substantial delays and procedural barriers, because it would be impossible to quantify the effects of such changes (*see* R. 942-43, 946). There was, however, a good deal of evidence about the savings expected from the reduction in benefits. The Ernst & Young report commissioned by the Florida House of Representatives (Exhibit 1) found "an overall effect on benefit cost of about -34.9%, due largely to the changes in the Wage Loss

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

System" (p. 3). In short, the study calculated a reduction in benefits of more than one-third. That includes a reduction of 39% of permanent total benefits (pp. 11-12);[14/] "an effect of -64.6% of benefits under the existing Wage Loss System" (p. 13); a reduction of 16% in temporary total disability payments (pp. 14-15); and a reduction of 6.4% in medical benefits (p. 17). *See* R. 868-70, 902-915, 948.

The bottom line is that the quantitative reduction in benefits occasioned by these amendments is so staggering as to constitute a qualitative reduction. The delicate balance between the rights of workers and employers which has withstood constitutional scrutiny in prior cases has been radically altered, by the reduction of benefits on the employees' side of the ledger by over one-third. Even apart from the presumptions and procedures discussed above, the reduction of benefits alone is enough to demonstrate the constitutional invalidity of Chapter 90-201.

The new Act significantly and qualitatively undermines the procedural balance created by the prior statutes, the substantive benefits created by the prior statutes, the involvement with counsel permitted by the prior statutes, and the administrative efficiency of prior statutes--all to the serious detriment of the employee, with no compensating benefits. The delicate balance between the rights of employers and employees, which has passed constitutional muster in prior cases, has been substantially undermined. The cumulative effect of the changes of Chapter 90-201 is to significantly constrict the benefits to employees, and to alter the constitutional balance. The Act unquestionably violates the workers' constitutional rights of access to the courts.

V
CONCLUSION

For the reasons given, it is respectfully submitted that the judgment of the circuit

---

[14/] The report also calculated that between 1979 and 1989, the new provisions would have permitted about $24 million less in permanent partial benefits than the old system (Exhibit 4.5).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

court should be affirmed.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of February, 1991, to all counsel of record on the attached service list.

Respectfully submitted,

The Academy of Florida Trial Lawyers
218 South Monroe Street
Tallahassee, Florida 32301
By: Paul Jess, Esq.

-and-

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By: _____
JOEL S. PERWIN

42290\BR\AC

SERVICE LIST

RICHARD A. SICKING, ESQ.
(Plaintiffs Scanlan, PFFF, Stanfill, Ortega & Davis)
2700 S.W. Third Avenue, Suite 1E
Miami, Florida 33129
(305) 858-9181

STEPHEN MARC SLEPIN, ESQ.
Slepin & Schwartz
(Plaintiffs Scanlan, PFFF, Stanfill, Ortega & Davis)
1114 East Park Avenue
Tallahassee, Florida 32301
(904) 224-5200

KELLY OVERSTREET JOHNSON, ESQ.
(Plaintiff/Intervenor Fla. PBA)
Broad & Cassel
P.O. Box 11300
Tallahassee, Florida 32302-0671
(904) 681-6810

TALBOT D'ALEMBERTE, ESQ.
(Florida Construction, Commerce and Industry Self-Insurers Fund Amicus on Behalf of Defendants)
Steel, Hector & Davis
200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131
(305) 577-2816

RAYFORD H. TAYLOR, ESQ.
MARY ANN STILES, ESQ.
(Defendant/Intervenor AIF)
Stiles, Allen & Taylor, P.A.
108 Jefferson Street, Suite B
Tallahassee, Florida 32301
(904) 222-2229

JEROLD FEUER, ESQ.
(Plaintiffs IBEW & AFL-CIO)
402 N.E. 36th Street
Miami, Florida 33137
(305) 573-2282

DANIEL C. BROWN, ESQ.
MARGUERITE H. DAVIS, ESQ.
(Defendants/Intervenors NCCI and Employers Insurance of Wausau)
Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A.
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301
(904) 224-9634

H. LEE MOFFITT, ESQ.
MARK HERRON, ESQ.
KIRBY C. RAINSBERGER, ESQ.
(Defendants/Intervenors Tampa Bay Area NFL, Inc. and South Fla. Sports Corp.)
Moffitt, Hart & Herron, P.A.
216 South Monroe Street
Suite 300
Tallahassee, Florida 32301
(904) 222-3471

FLETCHER N. BALDWIN, ESQ.
(Plaintiffs IBEW & AFL-CIO)
University of Florida
College of Law
2500 S.W. Second Avenue
Gainesville, Fla. 32611
(904) 392-2260

S. JAMES BRAINERD, JR.
General Counsel, Florida Chamber
of Commerce
(Defendant/Intervenor Fla.
Chamber of Commerce)
136 S. Bronough St.
Tallahassee, Florida 32301
(904) 222-2831

THOMAS J. MAIDA, ESQ.
(Defendants' Amicus AIA)
McConnaughhay, Roland, Maida
Cherr & McCrainie, P.A.
101 North Monroe Street, Suite 950
Tallahassee, Florida 32302

KATHLEEN E. MOORE
HARRY F. CHILES
MITCHELL D. FRANKS
(State Defendants)
Assistant Attorneys General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573, 488-8253

STEPHAN D. BARRON, ESQ.
(Defendant Menendez)
Dept. of Labor & Employment
Security
Hartman Bldg., Room 307
2012 Capitol Circle, S.E.
Tallahassee, Fla. 32399-0657
(904) 488-6498

DANIEL SUMNER, Director
(Defendant Gallagher)
Dept. of Insurance, Division
of Legal Services
412 Larson Bldg.
200 West Gaines St.
Tallahassee, Fla. 32399-0300
(904) 488-3440