IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,179

BOB MARTINEZ, ET AL.,

Appellant/Cross-Appellee,

vs.

MARK SCANLAN, et al.,

Appellee/Cross-Appellant.

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

ANSWER BRIEF OF CROSS-APPELLEE FLORIDA CHAMBER OF COMMERCE

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STATEMENT OF THE CASE AND FACTS

This brief is filed by the Florida Chamber of Commerce. The Florida Chamber of Commerce was made a part to the initial proceeding by order of the Circuit Court. This brief is filed in response to the Initial Briefs filed by Plaintiffs/Cross-Appellants Florida AFL-CIO and International Brotherhood of Electrical Workers, Local 606 hereafter (AFL-CIO/IBEW) and Plaintiffs/Cross-Appellants Mark Scanlan and Professional Firefighters of Florida hereafter (Scanlan/Firefighters).

The State of the Case and Facts set out in the briefs of Defendants Martinez, Gallagher and Menendez are adopted herein.

PRELIMINARY STATEMENT

In the interest of clarity, parties will be referred to as Plaintiffs and Defendants as they appeared in the Circuit Court proceeding from which this appeal is taken.

In the interest of brevity and judicial economy, this brief addresses only certain portions of the amendments to Chapter 440 made by Chapter 90-201, Laws of Florida. The Florida Chamber of Commerce specifically adopts all arguments made by the other party Defendants and the amicus curiae appearing on their behalf in both the briefs filed by Defendants as Appellants and the briefs filed as Cross-Appellees.

Subsequent to the decision of the trial court, the Legislature re-enacted the comprehensive amendment of Chapter 440. This legislation sought to cure the alleged single subject defect in Chapter 90-201 found by the circuit court. The 1991 legislation also eliminated the Industrial Relations Commission and the Oversight Board. The 1991 Act also changed the law relating to coverage for certain contractors. The 1991 Act was otherwise identical to Chapter 90-201 in that all other amendments to Chapter 440 made in Chapter 90-201 were re-enacted. Amendments to all the portions of Chapter 440 referred to in this brief appear in both the 1990 and 1991 Acts. In the interest of simplicity, references are made to the 1990 Act and these references are

intended to include the identical provisions in the 1991 Act.

SUMMARY OF ARGUMENT

This brief addresses the constitutional validity of portions of Chapter 90-201, Laws of Florida, relating to the burden of proof. The trial court upheld the constitutionality of these provisions. To prevail on appeal, Plaintiffs must show that these provisions are unconstitutional beyond a reasonable doubt and cannot be applied in a constitutional manner.

Mandating that the facts of a workers' compensation claim are not to be construed liberally in favor of either party does not deprive claimants of an adequate remedy. No support is cited for the allegation that repeal of statutory presumption and establishment of a "level playing field" constitute a denial of due process. Requiring the workers' compensation claimant to carry the burden of proving the elements of his claim is in accord with the law in Florida and other jurisdictions.

The requirement that an employee working in employment with a drug free workplace program established pursuant to §440.102, F.S. be "drug-free" in order to be eligible for workers' compensation benefits is a reasonable legislative response to the problem of drug use on-the-job.

Establishing a presumption of causation between the employee's intoxication and accident when a drug test is positive in employment where no drug free workplace has been

established is not a denial of due process or of access to the courts. A rebuttable presumption requiring clear and convincing evidence to overcome it may be established by the legislature as a matter of social policy.

No constitutional violations occur in establishing a specific job search requirement to demonstrate entitlement to wage loss. Termination of wage loss benefits for a series of acts establishig that loss of earning capacity is due to non-injury related factors and termination of such benefits for conviction of a crime directly affecting the claimant's employability are a reasonable means of achieving a legitimate end and do not deprive the injured worker of an adequate remedy.

The barring of benefits for aggravation of a pre-existing condition when an employee makes a false statement regarding the condition is not a constitutional violation.

ARGUMENT

POINT I

PLAINTIFFS HAVE FAILED TO CARRY THEIR BURDEN OF PROVING THAT §§440.015, 440.09(3), 440.15(3), 440.15(5) AND 440.26 AS INCLUDED IN CHAPTER 90-201 ARE UNCONSTITUTIONAL.

The Florida Chamber of Commerce will address challenges raised by Plaintiffs to certain provisions of Chapter 90-201, Laws of Florida (1990 Act), which generally relate to the burden of proof. Specifically, these provisions are:

1. Section 8 of Chapter 90-201 creating §440.015 which expresses the Legislative intent that the facts in a workers' compensation case not be interpreted liberally in favor of either the employer or carrier or that disputes concerning the facts be not given a broad liberal construction in favor of either the employee or the employer;

2. Section 11 of the 1990 Act amending §440.09(3), Florida Statutes, relating to the intoxication defense;

3. Section 20 of the 1990 Act amending §440.15(3)(b) and (5) to:

> (a). provide that a permanent impairment such as to entitle a claimant to wage loss benefits not be based entirely on subjective complaints and result in work-related physical restrictions which are directly attributable to the injury;
>
> (b) establish requirements for a job search and

wage loss requests;

(c) provide for temporary disqualification and termination of the right to wage-loss benefits in certain circumstances; and

(d) adopt a modified Martin v. Carpenter requirement providing that written misrepresentations by employees of their prior history of injury or disability would disqualify them from receipt of benefits; and

4. Section 26 of the 1990 Act which repeals §440.26 which contained presumptions relating to compensability, adequacy of notice of the claim and willful intent of an employee to injure himself or another.

Plaintiffs allege that the previously cited provisions (and virtually every other provision) of the 1990 Act are facially invalid as violative of the Florida Constitution. The individual constitutional challenges to each of these provisions was rejected by the circuit court. As pointed out to this Court by the Defendants and amicus curiae, all legislative acts come before this Court clothed with the presumption of constitutionality and legislative enactments are facially void only if they cannot be applied constitutionally to any factual situation. A legislative enactment is not required to be perfect nor does "unfairness" render a legislative enactment unconstitutional. See In Re Estate of Greenberg, 390 So.2d 40 (Fla. 1980) and Williams v. Newton, 236 So.2d 98 (Fla. 1970) [citing Watson v. Buck, 313 US 387 403 (1940)]. It is sufficient that the legislature had a reasonable basis for believing that the statute would

accomplish a legitimate legislative purpose even if the statute may not accomplish the intended purpose. United States Fidelity and Guaranty Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984). No such showing of invalidity was made for any of the provisions of the 1990 Act discussed herein.

POINT II

THE REPEAL OF LEGISLATIVELY-CREATED PRESUMPTIONS AND THE REQUIREMENT OF EQUALITY OF THE PARTIES IN BURDEN OF PROOF ARE NOT UNCONSTITUTIONAL.

Chapter 90-201, Laws of Florida, created §440.015 which provides:

> Legislative intent.-It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits. The workers' compensation system in Florida is based on a mutual renunciation of common law rights and defenses by employers and employees alike. In addition, it is the intent of the Legislature 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. Additionally, the Legislature hereby declares that disputes concerning the facts in workers' compensation cases are not to be given a broad liberal construction in favor of the employee on the one hand or of the employer on the other hand.

Section 26 of the 1990 Act repealed §440.26, Florida Statutes, which provided:

> Presumptions.-Except as otherwise provided in this chapter, in any proceeding for the enforcement of

> a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary:
>
> (1) That the claim comes within the provisions of this chapter.
>
> (2) That sufficient notice of such claim has been given.
>
> (3) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

Plaintiffs, Scanlan/Firefighters allege that various provisions of Chapter 90-201 including §440.015 which they dub the "open field" provision and repeal of §440.26 violates constitutional guarantees of due process and equal protection. It is contended that §440.015 overrules the "logical cause" doctrine, alters the judicially created burden of proof, and changes the basic philosophy of the workers' compensation law thereby denying a claimant due process. While numerous authorities are cited as to the application of the logical cause doctrine no authority is cited to support the proposition that a change in the burden of proof and repeal of presumptions violates due process. No allegation of an equal protection argument is made. Plaintiffs AFL-CIO/IBEW in their voluminous brief cite the change in the burden of proof and repeal of §440.26 as a violation under Kluger v. White, 281 So.2d 1 (Fla. 1973) in that a remedy provided by Workers' Compensation was changed and reduced to such an extent is no longer a viable alternative to common law remedies.

The cases cited by Plaintiffs hold that the Florida Workers' Compensation Act is remedial legislation. It is axiomatic that remedial statutes are to be liberally construed to effectuate their beneficient purposes. E.g., Cook v. Georgia Grocery, Inc., 125 So.2d 837 (Fla. 1961).

The repeal of presumptions and creation of §440.015 in no way alter the requirement that the statute shall be liberally construed. What §440.015 does is require that the facts of the case not be interpreted liberally in favor of either party.

The requirement that the facts not be interpreted liberally is different than the requirement that the statute be construed liberally. Admittedly, this is a distinction that may have been eroded by judicial decisions in Florida. Many of the earliest cases citing liberal interpretation of Chapter 440 dealt not with the facts of the case but with the remedies provided by the law when the facts of the case were not disputed, E.g., McCall v. Motor Fuel Carriers, 22 So.2d 152 (Fla. 1945) (liberal construction in determining whether parents of deceased employee were "dependent"); (C.F. Wheeler Co. v. Pullino, 11 So.2d 303 (Fla. 1943) (statute providing for benefits to posthumous or acknowledged illegitimate child "liberally" interpreted to apply to posthumous and illegitimate child); DiGiorgio Fruit Corp. v. Pittman, 49 So.2d 600 (Fla. 1950) (provision relating to medical treatment liberally construed

to provide for treatment of chronic condition resulting from accident). Under this line of cases it is the workers' compensation law itself which is to be construed "liberally in order to accomplish the beneficient purposes and objectives implicit in legislation of this type." Cook v. Georgia Grocery, Inc., 125 So.2d. 837.

The liberal construction of the law did not alter the fact that the claimant had to prove the elements of his claim such as causal connection between the employment and injury. See, for example, Glasser v. Youth Shop, 54 So.2d 686 (Fla. 1951) ("While there is a presumption a claim comes within the Act, the claimant is not relieved of burden of proving injury arose out of and in course of employment.") and City Ice and Fuel Division v. Smith, 56 So.2d 329 (Fla. 1952) (no presumption will be indulged as to injury resulting from accident but both injury and its relation to employment must be proved).

The changes wrought by the 1990 Act do no more than require the claimant to prove his case by preponderance of the evidence. This can hardly be considered an onerous burden. It is certainly not an unusual burden under workers' compensation statutes in other jurisdictions, all of which constitute an alternative remedy to common law rights. Arthur Larson summarizes the existing burden of proof in state workers' compensation systems as follows:

The burden of proving his case beyond speculation

> and conjecture is on the claimant. This means that the claimant must establish the work connection of his injuries, the causal relation between a work-related injury and his disability, the extent of his disability and all other facets of his claim by a preponderance of the evidence; he cannot prevail if the evidence is merely evenly divided.

A. Larson Workmen's Compensation, §80.33(a) (1989).

The apparently universal maxim that workers' compensation statutes are to be liberally interpreted so as to carry out their beneficient purposes has been widely held not to apply to the interpretation of the facts or burden of proof in a workers' compensation case. McFall v. Farmers Tractor and Truck Company, 302 S.W.2d 801 (Ark. 1957) (liberal construction rule does not relieve claimant of burden of proving causal relation between accident and injury); Hoffman v. Cudahy Packing Co., 167 P.2d 613 (Kansas 1946) (liberal construction not to favor employee or employer on question of coverage); Pierce v. Kentucky Galvanizing Co., 606 S.W.2d 165 (Ky. Ct. App. 1980); (liberal construction rule does not apply to evidentiary matters); Fava v. Jackson Brewing Co., 86 So.2d 135 (La. Ct.App. 1956) (liberal construction doctrine not applicable to proof); Hogue v. Wurdack, 292 S.W.2d 576 (Mo. Ct.App. 1957) (burden of proof on claimant; "liberal construction with view toward public welfare" does not excuse proof of essential element of claim); Crable v. Great Western Sugar Co., 90 N.W.2d 805 (Neb. 1958) (rule of liberal construction

applies to law not to evidence supporting claim); Bowen v. Olesky, 120 A.2d 461 (N.J. 1956) (claimant must sustain burden of proof; liberal construction of act is not substitute for required proof of claim); Garza v. W.A. Jourdon, Inc., 572 P.2d 1276 (N.M. Ct.App. 1977), cert. denied, 572 P.2d 1257 (N.M. 1977) (liberal construction doctrine appeals to law not facts); Matter of Compensation of Gormley, 630 P.2d 407 (Ore. 1981) ("Doctrine of liberal construction is not transferable to fact finding process to adjust burden of proof."); Wold v. Meilman Food Industries, 269 N.W.2d 112 (S.D. 1978) (liberal construction applies only to law not evidence offered to support claim); Farris v. Yellow Cab, 222 S.W.2d 187 (Tenn. 1949) (mandate of statute requires liberal construction in favor of employee but claimant has burden of proof to show facts); D'Amico v. Conguista, 167 P.2d 157 (Wash. 1946) (statute is liberally construed to those coming within restrictions but claimant held to strict proof of right to receive benefits); and Olson v. Federal American Partners, 567 P.2d 710 (Wyo. 1977) (rule of liberality not to be applied to evidence offered; burden of proof on claimant).

The doctrine of liberal construction is cited as the basis for the so-called "logical cause doctrine." The logical cause doctrine holds that when a serious injury is conclusively shown and the evidence presents a sufficiently logical explanation of a causal relationship between the

accident and the subsequent injury, the burden of proof shifts to the employer/carrier to show a more logical cause for the injury. E.g., Sanford v. A.P. Clark Motors, 45 So.2d 185 (Fla. 1990). Plaintiffs contend that the adoption of §440.015 and repeal of §440.26 amount to a legislative repeal of the logical cause doctrine.

It is not necessary for this Court to decide whether that contention is true. This Court is not called upon to assess the wisdom of the logical cause doctrine or the impact of the amendments on the logical cause doctrine. What this Court must decide is whether the change amounts to a constitutional violation. It is doubtful exactly what the impact of the alleged change in the burden of proof will be. With the exception of cases where the logical cause doctrine applies, the burden of proof is already on the claimant to establish the elements of his claim. Stone-Brady, Inc. v. Heim, 12 So.2d 888 (Fla. 1943). Some Plaintiffs note that the logical cause rule is not used a great deal. (Initial Brief of Plaintiff Scanlan/Firefighters p.6) Assuming the amendments do abolish the logical cause doctrine, this apparently slight shift in the burden of proof will affect only a very limited number of cases - those where the facts are so close or unclear as to necessitate reliance upon the logical cause doctrine.

Kluger v. White, 281 So.2d 1, is inapplicable since no remedy is being significantly impaired much less abo-

lished. No violation of the access to courts provision of the Florida Constitution occurs when the burden of proof is altered with the result that recovery under a cause of action becomes more difficult. Alterman Transport Lines v. State, 405 So.2d 456, 459 (Fla. 1st DCA 1981); Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981).

Assuming that the Plaintiffs are correct and that the changes wrought by §440.015 and the repeal of §440.26 do eliminate the logical cause doctrine, there is no violation of Section 21 of Article I of the Florida Constitution. The Florida Workers' Compensation Law has been recognized as a viable alternative to common law suit. It provides means of recovery without proof of negligence. The alternative remedy for an injured employee would be the availability of a civil action against his employer. In such an action, the claimant would also have to establish his claim by showing negligence by a preponderance of the evidence. The employer would also have various defenses including that of comparative negligence available against the claim. Even if the burden of proof on the claimant is the same under the workers' compensation system as it would be if a civil cause of action were brought, the workers' compensation system, due to the abrogation of employer defenses and the lack of a requirement that the employee establish negligence, remains a system under which recovery is more certain. It therefore

remains constitutionally viable as noted in Kluger v. White.

There is no due process violation in demanding the claimant in a workers' compensation proceeding establish his claim by a preponderance of the evidence. The test to be applied to determine if a particular statute is in violation of the due process clause is whether it bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. Johns v. May, 402 So.2d 1166 (Fla. 1981). The Legislature sets out its intent in §440.015 that workers' compensation systems, being a mutual renunciation of common law rights and defenses by employers and employees, should be decided upon their merits. The requirement that the facts in a case not be interpreted to favor either party can by no stretch of the imagination be deemed to be discriminatory, arbitrary, or capricious. Certainly, the mandating of equitable proceedings fair to both sides is a legitimate legislative objective. As noted previously, no authorities were cited by Plaintiffs to support their contention that a requirement that an employee seeking workers' compensation benefits be required to establish the elements of his claim is a violation of due process.

POINT III

SECTION 11 OF CHAPTER 90-201 AMENDING THE "INTOXICATION DEFENSE" DOES NOT VIOLATE THE FLORIDA CONSTITUTION.

Section 11 of Chapter 90-201 amended §440.09(3), Florida Statutes. The statute, as amended, provides:

> No compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee; by the influence of any drugs, barbiturates, or stimulants not prescribed by a physician, which affected the employee to such an extent that the employee's normal faculties were impaired; or by the willful intention of the employee to injure or kill himself, herself, or another. If there was at the time of the injury, 0.10 percent or more by weight of alcohol in the employee's blood, or if the employee has a positive confirmation of a drug as defined in this Act, it shall be presumed that the injury was occasioned primarily by the intoxication of or by the influence of the drug upon, the employee. In the absence of a drug-free work place, this presumption may be rebutted by clear and convincing evidence that the intoxication or influence of the drug did not contribute to the injury. Percent of weight of alcohol in the blood shall be based upon grams of alcohol per hundred milliliters of blood. However, if, prior to the accident, the employer had actual knowledge of an expressly acquiesed in the employee's presence in the work place while under the influence of such alcohol or drug, the presumption specified in this section shall not apply.

Plaintiffs Scanlan/Firefighters argue that this amendment violates due process and equal protection by failing to allow a rebuttal of the presumption that an accident was causally related to the employee's intoxication if it occurs in a drug free work place or by requiring clear and convincing evidence to rebut the presumption of causation if the accident did not occur in a drug free work place. It is also argued that due process is denied since there is no requirement of causal relationship between the intoxication and the accident. Plaintiffs AFL-CIO/IBEW argue that there

is an irrebutable presumption if the accident occurs in a drug free work place. It is also argued that the requirement lessens the quid pro quo requirements of the system and places a chilling effect on the right to privacy.

The drug free work place provisions of §440.09 and §440.102 are addressed in the brief of Defendants, Martinez, Menendez and Lewis, and will not be addressed here. Argument here is confined solely to the presumptions raised regarding the "intoxication defense."

In virtually all jurisdictions intoxication of an employee may amount to deviation from employment which would preclude the award of benefits. In 37 states, intoxication of an employee is the basis of a separate statutory defense. 1 A. Larson Workmen's Compensation, §34.31 (1989). Whether any causal connection between the intoxication and the accident is required varies from state to state. Two other states, Nevada and Texas, require no proof of causal relation between the intoxication of the employee and the accident. See Texas Revised Civil Statutes Annotated Art. 8309 §1 and Nevada Revised Statutes §616-565.

Plaintiffs categorize the portion of §440.09 which is applicable to employees whose employer has instituted a drug free work place program as being an irrebutable presumption. Section 440.09(3) provides in relevant part:

> If the employee has a positive confirmation of a drug as defined in this Act, it shall be presumed that the injury was occasioned primarily by the

intoxication of the employee.

This provision applies only where the employer has established a drug free work place program in compliance with §440.102.

This provision is enacted to further the intent of the Legislature as expressed in Section 12 of Chapter 90-201. Citing its intent to promote drug free work places, this Section provides in part:

> It is further the intent of the Legislature that drug abuse be discouraged and that employees who choose to engage in drug abuse face the risk of unemployment and the forfeiture of workers' compensation benefits. If an employer implements a drug free work place program which includes notice, education, and testing for drugs and alcohol pursuant to rules developed by the Division, the employer may require the employee to submit to a test for the presence of drugs or alcohol, if a drug or alcohol is found to be present in the employee's system at a level prescribed by rule adopted pursuant to this Act, the employee may be terminated and shall forfeit his eligibility for medical and indemnity benefits upon exhaustion of the procedures prescribed in §440.102(5). However, a drug free work place program shall require the employer to notify all employees that it is a condition of employment to refrain from taking drugs on or off the job and if the injured worker refuses to submit to a test for drugs or alcohol, he forfeits his eligibility for medical and indemnity benefits.

Section 440.102 sets out specified notice and testing requirements. That section also provides that the requisite notice to employees of testing must be given at least 60 days prior to the institution of a drug testing program. Therefore, no employee faces the loss of workers' compensation benefits under this provision without having

had ample warning of the consequences of his actions.

If as argued by Plaintiffs, this provision simply created an irrebutable presumption that when an employee covered by this provision tested positive for drugs or alcohol any accident was conclusively presumed to be caused by that intoxication, the provision would have to be stricken as unconstitutional. See Straughn v. Kay and Kay Land Management, Inc., 326 So.2d 421, 424 (Fla. 1976). The provision does not create an irrebutable presumption as to causation, it establishes what is in effect a condition for entitlement to benefits for an employee of an employer who has instituted a drug free work place. Those employees must test drug-free to be entitled to workers' compensation benefits. This is a logical requirement given the increased risk that intoxicated or drug-abusing employees present to themselves and their fellow employees.

The statute is a penal statute and as such would be strictly construed and any ambiguities under the law will be resolved in favor of the employee. See Lester v. Department of Professional and Occupational Regulation, 348 So.2d 923 (Fla. 1st DCA 1977). The burden of proof will be on the employer/carrier to establish the intoxication of the employee.

The employee is not without remedies. Section 440.102 provides strict standards for administration of the testing and confirmation procedures. The employee may challenge the

accuracy of the test results. If the testing procedure did not meet the strict requirements of the statute and were not properly confirmed as required by the statute, the claimant would be entitled to workers' compensation benefits. The results of this statute are admittedly harsh but employees are adequately warned of the consequences of their actions and are given adequate protection to ensure that testing procedures are accurate and may be challenged.

In the absence of a drug free work place program, the presumption that the accident was occasioned primarily by the intoxication and influence of the drug may be rebutted by clear and convincing evidence. Plaintiffs also allege this to be a due process violation although no case authority to support that proposition is offered. This is a rebuttable presumption expressing the social policy noted in Section 12 of Chapter 90-201 that the Legislature intended to promote a drug free work place for the benefit of both employers and employees. Section 90.303(2), Florida Statutes, expressly recognizes the presumption affecting the burden of proof which imposes upon the party against whom it operates the burden of proof concerning the non-existence of the presumed fact. For a discussion of this type of presumption under Florida law, see Charles Ehrhardt, Florida Evidence, §302.1-.302.2, (2nd Ed. 1984).

In Caldwell v. Division of Retirement, 372 So.2d 438 (Fla. 1979), this Court upheld a statutory presumption in

§440.112 that certain health impairments suffered by firemen would be presumed to have been accidental and suffered in the line of duty unless the contrary was shown by competent evidence. This Court discussed the two types of rebuttable presumptions and noted:

> When evidence rebutting such 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.
>
> * * *
>
> 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 jobrelatedness must be given effect.

Caldwell, 372 So.2d at 440-41.

There is thus obviously no infirmity in requiring the employee in the absence of a drug free work place program to prove by clear and convincing evidence that his accident was not due to intoxication when testing indicates the presence of specified drugs or alcohol.

POINT IV

AMENDMENTS AFFECTING THE BURDEN OF PROOF RELATING TO CLAIMS FOR WAGE LOSS AND SUSPENDING OR TERMI-

NATING ENTITLEMENT TO WAGE LOSS IN SPECIFIED CIRCUMSTANCES ARE NOT UNCONSTITUTIONAL.

In Section 20 of the 1990 Act, certain amendments are made to §440.15(3)(5). In order to be entitled to wage loss, an employee must show that he suffered a permanent impairment which is not based solely on subjective complaints and results in one or more work-related restrictions which are directly attributable to the injury. An employee is required to file appropriate job search forms showing he has looked for a minimum of five jobs in each bi-weekly period unless the judge of compensation claims determines that no job search is justified due to the availability of suitable employment. The burden of establishing that the claimant's post-injury earning capacity is less than his pre-injury average weekly wage and is not the result of economic conditions or other factors shifts from the employee to the employer if the claimant's impairment rating is 21% of the body as a whole or greater.

If an employee voluntarily terminates his employment for reasons unrelated to his injury, refuses an offer of suitable employment within his restrictions and abilities, is terminated from his employment due to his own misconduct or voluntarily limits his income, he is temporarily disqualified from receiving benefits. If within a two-year period there are three occurrences of any of those incidents, his right to wage loss benefits terminates. Addi-

tionally, his right to wage loss benefits terminates if he is convicted or subject to imprisonment for conduct which directly affects his ability to perform the activities of his usual or other appropriate employment.

Under §440.13(3)(b)1, Florida Statutes, the injured worker must first show that he suffered permanent impairment. This permanent impairment must be determined in accordance with the schedule adopted pursuant to §440.13(3)(a)3 and "not based solely on subjective complaints" and result in "one or more work-related physical restrictions which are directly attributable to the injury." These changes are the result of the perception that the threshold requirement for entry into the wage loss system should be more specifically defined so as to require "some physician-imposed restrictions that are of significance to the injured worker's ability to engage in employment activities." Governor's Task Force on Workers' Compensation, Florida Workers' Compensation System, Part II: Possible Solutions 29 (Exhibit 7). In response to that perceived problem, the Governor's Task Force specifically recommended that there be a threshold for payment of wage loss benefits which required not only the existence of a permanent physical impairment but also that such physical impairment affect the employee's ability to perform appropriate employment. See Florida Workers' Compensation System, Part III: Recommendations for Solving Problems 21

(Exhibit 8) and the recommended legislative solution at page 24 of the legislative proposal contained in that same report.

This provision was upheld by the trial court and the Plaintiff's in their initial briefs do not challenge this particular provision and have waived their attack upon it rendering the question moot. Nevertheless, the provision is clearly a reasonable and a non-arbitrary means of achieving the goal of linking entitlement to wage loss benefits to injuries effecting the worker's earning capacity.

Under §440.13(3)(b)2, the injured employee, in order to be entitled to wage loss benefits, is required to:

> file the appropriate job search forms showing he has looked for a minimum of five jobs in each bi-weekly period (unless the judge of compensation claims determines fewer job searches are justified due to unavailability of employment) after the employee has knowledge that a job search is required.

This amendment was in response to the large amount of litigation involving what constituted an adequate job search when the job search requirement was not statutorily mandated but was purely a creation of judicial decisions. See Flesche v. Interstate Warehouse, 411 So.2d 919, 922 (Fla. 1st DCA 1982) where the court noted that the "work search" test is merely the evidentiary vehicle by which employability or lack of it is proven. A recommendation was made by the Governor's Task Force that an injured employee be required to perform a good faith job search and that a statutory

definition of a good faith job search be provided. See Governor's Task Force on Workers' Compensation Florida Workers' Compensation System, Part II: Possible Solutions, 31 and Part III: Recommendations for Solving Problems, 21 (Exhibits 7 and 8).

Plaintiffs Scanlan/Firefighters, in their initial brief, complain that this provision is unreasonable since it abandons the old method of determining reasonableness of a job search strictly upon the particular circumstances of the individual case and because it requires an individual who has already found a full-time job to continue a job search unless specifically excused by the judge of compensation claims. Although not specifically stated, this apparently is a challenge that the provision denies due process.

On its face, there is no denial of due process by this provision. The provision simply sets a definite statutory minimum burden of proof in place of the case-by-case determination established by the courts. The injured employee is required to contact no more than five potential employers in a two-week period. It cannot be said by any stretch of the imagination that this requirement is in any way onerous and it serves the salutory purpose of reducing litigation regarding the adequacy of a job search. As previously noted, there has been a great deal of litigation even at the appellate level in which the question of how many job contacts with potential employers were needed to

constitute a bona fide job search was presented. E.g., Musgrove v. State Department of Transportation, 466 So.2d 1238 (Fla. 1st DCA 1985) (three employer contacts in four months was inadequate job search) and Acree Oil Company v. Peterson, 467 So.2d 346 (Fla. 1st DCA 1985) (14 employer contacts in six months was inadequate).

Plaintiffs contend that under this provision the injured worker who finds full-time employment will still be required to do a job search and that this provision is therefore so unreasonable and arbitrary as to be a denial of due process. This Court is required to assume that the provision will be applied in a constitutional manner. Chatlos v. Overstreet, 124 So.2d 1 (Fla. 1960). There is nothing on the face of the statute to mandate the interpretation suggested by the Plaintiffs. It has already been held that the finding and holding of a full-time job is an adequate replacement for a job search as a requirement for establishing wage loss. Rios v. Fred Teitelbaum Construction, 522 So.2d 1015 (Fla. 1st DCA 1988) and Western Union Telegraph Company v. Perri, 508 So.2d 765 (Fla. 1st DCA 1987). Even self-employment may excuse a job search. An effort to establish one's own business even if not as financially rewarding as pre-injury employment may be adequate to excuse a job search. Whether such efforts to establish one's own business are bona fide is a question to be decided based upon the circumstances of the case.

Western Union Telegraph Company v. Perri, 508 So.2d 765.

This provision provides that the employer/carrier may controvert payment of wage loss benefits even where the employee is holding full-time employment and require a judicial determination of whether the employment is appropriate. However, the Workers' Compensation Act is self-executing and the mere fact that the employer/carrier can seek such a determination in no way requires them to do so before paying wage loss benefits. Given the established case law, the employer/carrier has no reason to challenge entitlement to wage loss benefits of an employee working full time unless it believes it can establish that such employment or self-employment is not appropriate given the circumstances of the case. In Department of Public Health v. Wilcox, 543 So.2d 1253 (Fla. 1989), this Court held the Social Security off-set provision to be self-executing and allowed the employer/carrier to unilaterally determine the off-set. The Court specifically noted there was little incentive for the employer to miscalculate the off-set given the availability of review. Similarly, there is no incentive for an employer to require a hearing when the employee ceases a job search after securing appropriate employment. Plaintiffs establish no constitutional infirmity in this provision.

Plaintiffs again challenge in their Initial Briefs the shifting burden of proof for establishing the reduction of

post-injury capacity in §440.15(3)(b)4.e. This provision was held invalid by the trial court as being "constitutionally offensive" in light of the holdings 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). In the initial briefs of the Florida Chamber of Commerce and the Florida Chamber Self-Insurance Fund as well as the initial brief of Associated Industries of Florida, the constitutionality of this provision was addressed and it will not be addressed further in this brief.

Under the 1990 Act, the right to wage loss benefits terminates if:

> Within a two-year period, there are three occurrences of any of the following incidents:
>
> (a) The employee voluntarily terminates his employment for reasons unrelated to his compensable injury.
>
> (b) The employee refuses an offer of reasonable or suitable employment within his restrictions and abilities.
>
> (c) The employee is terminated from employment due to his own misconduct as defined in §440.02(16).
>
> (d) The employee voluntarily limits his income.

Each of the three occurrences must be in a different bi-weekly period. Additionally, for each of the above occurrences, the employee may be disqualified from receiving wage loss benefits for three bi-weekly periods.

The 1990 Act also provides:

> The right to wage loss benefits shall terminate if an employee is convicted of conduct punishable under §775.082 or §775.083 or is subject to imprisonment under Chapter 316 which directly affects the employee's ability to perform the activities of his usual or other appropriate employment. For purposes of this subparagraph "convicted" means that an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or nolo contendere; or a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation.

It is the intent of these amendments to alter existing case law whereby an employee terminated for misconduct or even for theft in post-injury employment did not lose his entitlement to wage loss benefits. See Johnston v. Super Food Services, 461 So.2d 169 (Fla. 1st DCA 1984) (claimant discharged for excessive tardiness and absenteeism entitled to wage loss benefits); Sparks v. Aluma Shield Industries, 523 So.2d 680 (Fla. 1st DCA 1988) (claimant fired for insubordination; claimant is eligible for wage loss "even if a worker is justifiably fired or is otherwise terminated for reasons unrelated to his injury"); Western Union Telegraph v. Perri, 508 So.2d 765 (Fla. 1st DCA 1987) (claimant fired for refusal to follow instructions entitled to claim wage loss while operating his own business).

The amendments to wage loss provision are clearly intended to ensure that the injured worker is compensated only for the wage earning capacity lost attributable to the permanent injuries sustained in the accident. The amendments terminate benefits when within a two-year period

three of the enumerated incidents occur, each in a different two-week recording period. Eligibility for wage loss benefits only terminates where the claimant has established through a series of employments and termination from those employments for causes unrelated to his physical limitations that his loss of earnings is due to non-employment related factors.

If the claimant attempted to work at some employment and was forced to quit when he found that he could not perform the job due to the physical limitations resulting from his injuries, the voluntary termination would not fall within the provisions of this section. Refusal to accept employment which was not within his physical limitations or which for some other reason was not suitable would also not fall within this provision. Employee "misconduct" such as to fall within this provision is specifically defined in §440.02(16). The definition of misconduct is identical to that provided in the Unemployment Compensation Law. See §443.036(26), Florida Statutes. There is a large body of law interpreting what constitutes "misconduct" and the standard is neither vague nor overbroad.

The Plaintiffs contend that the provision is arbitrary and capricious and a denial of due process. The provision is a reasonable means of ensuring that the injured employee is compensated only for his earning capacity losses suffered as a result of physical restrictions and not due to

unrelated factors including his own misconduct. On its face, it is neither arbitrary nor capricious. The provision affects only wage loss benefits. An employee disqualified from further wage loss under this provision is still entitled to medical and other indemnity benefits.

The right to wage loss benefits terminates if an employee is convicted of a criminal offense which directly affects the employee's ability to perform his usual or other appropriate employment.

This provision is obviously in response to the decision of the First District Court of Appeal in Garrick v. William Thies and Sons, 547 So.2d 232 (Fla. 1st DCA 1989). The District Court reversed a denial of a claim for temporary partial disability and wage loss benefits. The District Court noted the apparent reliance by the deputy commissioner on a Michigan rule that provided if an employee is terminated for just cause involving "voluntary" acts, he is not entitled to workers' compensation benefits. The District Court held:

> we are aware of no provision in Florida law that would support a similar result. Whether to bar the employee who acts with "malice" or in a "mean-spirited" or "destructive" way toward his employer from workers' compensation benefits is a matter to be resolved in the political forum. Absent such a resolution, however, the distinction urged by the deputy commissioner would undermine the month-to-month nature of wage loss and would hinge eligibility for such benefits upon a highly subjective determination concerning the degree of a claimant's culpability.

The Legislature has now acted to bar an employee acting in a method so contrary to the employer's interest as to be actually convicted of a crime. There is certainly no due process or equal protection infirmity here. The only employees treated differently are the class of employees convicted of a crime which directly affected the interest of their employers. This is on its face a legitimate classification.

The Plaintiffs complain that certain traffic offenses are included in this provision. Only traffic offense which are punishable by imprisonment under Chapter 316 are covered by this provision. These 9 offenses are referenced at §316.655(4), Florida Statutes. The offenses include the more serious "criminal" traffic offenses such as reckless driving (§316.192); leaving the scene of an accident (§316.027 and §316.061); driving under the influence (§316.193); and fleeing or attempting to elude a police officer (§316.1935). The violations of the Florida Uniform Traffic Control law that subject an injured employee to possible termination of wage loss benefits are thus extremely limited.

The injured worker must not only be convicted as defined in the Act but the conviction must directly affect the employee's ability to perform activities of his usual or other appropriate employment. The limitation would, for example, apply where an employee was arrested for stealing

from his employer and was subsequently convicted. It would apply where a truck driver in the course of his employment was arrested and convicted for driving under the influence and as a result had his license suspended. The provision is clearly facially valid and the trial court's upholding of this provision should be affirmed. It must be kept in mind that this provision affects only entitlement to wage loss benefits. It does not effect entitlement to medical care or any other class of indemnity benefits. The claimant thus continues to have a remedy under the Act. Cf. Sasso v. Ram Property Management, 452 So.2d 933 (Fla. 1984).

POINT V

AMENDMENT OF §440.15(5) TO BAR BENEFITS FOR AGGRAVATION OF A PRE-EXISTING CONDITION IF THE EMPLOYEE MAKES A FALSE STATEMENT REGARDING THE CONDITION IS NOT UNCONSTITUTIONAL.

Paragraph 440.15(5)(a), Florida Statutes, was amended to read:

> The fact that an employee has suffered previous disability, impairment, anomaly, or disease, or received compensation therefore, shall not preclude him from benefits for a subsequent aggravation or exacerbation of the pre-existing condition nor preclude benefits for death resulting therefrom except that no benefits shall be payable if the employee at the time of entering into the employment of the employer by whom the benefits would otherwise be payable, falsely represents himself in writing as not having previously been disabled or compensated because of previous disability, impairment, anomaly, or disease.

(The underscored portion of the statute is the new language added by the 1990 Act.

Plaintiffs Scanlan/Firefighters complain that this provision legislatively overrules the decision in Martin v. Carpenter, 132 So.2d 400 (Fla. 1961) and violates due process and equal protection by providing that misrepresentation is a bar to recovery even if there is no causal relation between the misrepresentation and the accident or injury. It is also alleged that this is an ex post facto law since it effects contracts of hire entered into prior to the 1990 effective date of the Act. Plaintiffs AFL-CIO/IBEW attack this provision alleging that it establishes a conclusive presumption between a misrepresentation as to physical condition and a subsequent injury or accident and goes beyond the objective of Martin v. Carpenter in preventing fraud in the job application process.

Martin v. Carpenter, 132 So.2d 400 (Fla. 1961), citing Larson Workmen's Compensation and decisions in other jurisdictions, created in Florida a defense based upon pre-employment misrepresentation by the employee. Benefits were precluded if: an employee made a false representation as to physical condition or health in procuring employment; the employee knew the representation to be false; the employer relied upon the false representation; and such reliance resulted in consequent injury to the employer. This Court noted there were two reasons for creating this defense. The first was that the employer takes the employee as he finds him and the presumption would allow the employer to

determine before employment what risks it was assuming in hiring an infirm employee. This Court stated:

> We do not find that the misrepresentations of an employee should be allowed to defeat the efforts of the employer to protect himself from this presumption and the assumed risk.

This Court also noted that the Special Disability Trust Fund which allowed an employer to be reimbursed for compensation paid an employee for disability due to pre-existing condition required that the employer must have had knowledge of the pre-existing condition when it hired the employee or have continued the employment after obtaining such knowledge.

> Thus, an employee who misrepresents a condition which is causally related to a subsequent claim for benefits not only robs the employer of making a choice as to whether he will or will not hire the employee with the risks intendant thereon, but also denies the employer resort to the Special Disability Fund.

Martin v. Carpenter, 132 So.2d at 406. See also Colonial Care Nursing Home v. Norton, 566 So.2d 44 (Fla. 1st DCA 1990).

A careful reading of the statute shows that this amendment does not alter the requirement that the condition misrepresented be related to the injury suffered by the claimant. This paragraph deals only with compensation for aggravation or exacerbation of a pre-existing condition. Benefits for such aggravation of the pre-existing condition are precluded only if there is a misrepresentation regarding

the previous disability. For example, if an employee makes a misrepresentation about a pre-existing back injury and subsequently suffers a knee injury, benefits are still due since the claimant did not suffer an aggravation or exacerbation of the pre-existing condition.

The amendment does alter one of the criteris in the Martin v. Carpenter defense--the requirement of employer reliance upon the misrepresentation. Under prior case law, it was necessary to show that the employer either would have not hired the claimant or would have investigated further had the representation not been made. Colonial Care Nursing Home v. Norton, 566 So.2d 44.

This alteration in the requirement of pre-employment knowledge is necessary in light of recent changes in federal law. Under the Americans with Disabilitites Act of 1990 (Public Law 101-336), covered employers will be prohibited from making inquiries of a job applicant as to whether the applicant has a disability or as to the nature or severity of such disability. See Public Law 101-336, §102. Without knowledge of the disability, the employer will be unable to seek reimbursement from the Special Disability Trust Fund (SDTF) in the event the employee suffers a compensable accident. Under federal law, employers will be permitted to seek information from employees regarding their disability after they are hired and thus establish basis for claims against the SDTF. The amendment to §440.15(5) precludes

benefits in cases where the misrepresentation by the employee at the time of hiring (not before) has the probable result of barring the employer's claim against the SDTF. The amendment thus has an extremely limited effect upon the Martin v. Carpenter defense. The amendment is a reasonable legislative response to allow employers to continue to protect their eligibility for reimbursement from the SDTF.

Even in cases where the employee did seek benefits for aggravation of a pre-existing condition, the defense would be subject to further limitations. Unlike the requirement in Martin v. Carpenter, any misrepresentation under the 1990 Act would have to be in writing. As under existing case law, broad or vague questions as to the claimant's prior health would apparently be inadequate to support the defense. There appears to be no reason to assume that such decisions as Public Gas Company v. Smith, 386 So.2d 258 (Fla. 1st DCA 1980) would be altered. In that case, a negative response to the question "list all physical defects" was held inadequate to form the basis of a Martin v. Carpenter defense where the employee might have known that he had had an abnormal X-ray of his back some years before.

It is suggested by the Plaintiffs that the element of employee knowledge of the falsity of the statement is somehow removed. It appears to be implicit that in order to "falsely represent himself in writing" the employee would

have to know that the statement he was making was false. Obviously, such knowledge could be proven by circumstantial evidence but the requirement would appear to remain.

Recovery from the SDTF is meant to encourage the employment of the physically handicapped by protecting employers from excess liability for compensation. §440.49(2), Florida Statutes. The misrepresentation defense furthers this goal and is neither an arbitrary or unreasonably legislative action.

CONCLUSION

The Florida Chamber of Commerce respectfully contends that the amendments to §§440.015, 440.09, 440.15 and 440.26 contained in Chapter 90-201, Laws of Florida are constitutional based upon the authorities cited. The finding by the trial court that these provisions are constitutional should be affirmed.

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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 12th day of February, 1991.

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