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 CROSS-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

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PRELIMINARY STATEMENT

For purposes of this brief, the Plaintiffs/Appellees/Cross-Appellants will be referred to as Plaintiffs; Defendants/Appellants/Cross-Appellees will be referred to as Defendants; Intervenor/Appellant/Cross-Appellee Associated Industries of Florida will be referred to as AIF; Intervenor/Cross-Appellee Florida Chamber of Commerce will be referred to as the Chamber; Intervenors/Appellants/Cross-Appellees National Council on Compensation Insurance and Employers Insurance of Wausau shall be referred to collectively as NCCI; Intervenor/Cross-Appellee Tampa Bay Area NFL, Inc. (the Bucs) and South Florida Sports Corporation (the Dolphins) shall be referred to as the Bucs and Dolphins. The Employers Association of Florida, Florida Fruit and Vegetable Association, Harper Brothers, Inc. and Lee County Electrical Cooperative, and the Academy of Florida Trial Lawyers shall be referred to as Amici collectively or individually as Employers, Harper Brothers, and AFTL.

AIF adopt the brief and the positions of Defendants/Appellants/Cross-Appellees, the Chamber and Commissioner of Insurance, Tom Gallagher and the Buc and the Dolphins. Additionally, to avoid duplicity of some of the arguments; AIF adopts the brief of Amici Employers and Harper Brothers.

STATEMENT OF THE CASE AND FACTS

This brief is filed on behalf of Associated Industries of Florida ("AIF"). AIF is a business trade association representing over 6,000 Florida businesses who employ nearly 60 percent of Florida's private sector work force. AIF appeared in the trial below as Defendant/Intervenor and concurred int eh positions taken by the Defendants in support of Chapter 90-201, Laws of Florida. AIF actively participated in the enactment of Chapter 90-201, Laws of Florida, the trial of the case, and in the enactment of Senate Bill 8-B and House Bills 9-B and 11-B.

AIF adopts the Statement of the Case and Statement of Facts submitted by the Department of Legal Affairs, representing Tom Gallagher as Secretary of the Department of Insurance, Hugh Menedez as Secretary of the Florida Department of Labor, Bob Martinez (as Governor of Florida) and Gerald Lewis as Comptroller of Florida ("Defendants").

References to the Record on Appeal shall be noted as (R____). References to the Appellant's Joint Appendix shall be noted as (A-____). References to the Trial Transcript shall be noted as (Tr.____).

SUMMARY OF ARGUMENT

This cross appeal arises from the trial judge's ruling on the facial attack brought by the Plaintiffs to various sections of Section 90-201, Laws of Florida. The trial judge implicitly upheld the constitutionality of almost all of the sections being challenged by the Plaintiffs in their briefs in this cross appeal. This cross appeal, as well as the trial below, represents a facial challenge to a piece of legislation which is complex, comprehensive, and designed by the Florida legislature to address the problems in the workers' compensation system which were presented to it during the 1990 legislative session.

Chapter 440, Florida Statutes (Supp. 1990), is a reasonable litigation alternative as required under Article I, Section 21, Florida Constitution (1968). The amendments contained in Chapter 90-201, Laws of Florida, do not either separately or together violate the "access to courts" provision of Article I, Section 21, Florida Constitution (1968), as announced in **Kluger v. White**, 281 So.2d 1 (Fla. 1973) and subsequently construed by this court.

The Plaintiffs have not sustained their burden of proving the Act's provisions operate in a facially defective manner so that Chapter 440, as amended, no longer constitutes a reasonable litigation alternative. There is no record evidence that the "cumulative effect" of the various Act's provisions have operated or will operate to deprive injured employees of their ability to recover benefits from the workers' compensation system.

The Plaintiffs have not proven their challenges to various sections of the Act relating to compensability coverage in that they have not established those provisions in any way

violate the due process or equal protection rights of injured employees.

The amendments concerning the Special Disability Trust Fund contained in Chapter 90-201 do not violate due process provisions of the Florida Constitution of either employees or employers. The amendments are designed to encourage employers to hire previously injured employees and to seek recovery from the Special Disability Trust Fund. That is a proper exercise of the state's powers and furthers the purposes of Florida's workers' compensation system of getting injured employees back to work as soon as possible.

The mediation amendments contained in Chapter 90-201 do not violate the due process or equal protection provisions of the Florida Constitution. Rather, the amendments are designed to encourage the use of mediation to resolve disputes between employees and employers without the necessity of formal contested claims.

The establishment of an Industrial Relations Commission does not violate the separation of powers provision of the Florida Constitution.

The amendments adopted to section 440.15(1)(b), Fla. Stat. (Supp. 1990) are severable from the remainder of the Act. The trial judge was correct in his ruling that specific section could be severed if it is found to be unconstitutional by this court.

I

THE TRIAL JUDGE WAS CORRECT IN DETERMINING CHAPTER 90-201, LAWS OF FLORIDA, TO BE A REASONABLE ALTERNATIVE TO COMMON LAW.

The Plaintiffs have gone to great lengths in their briefs to argue that Chapter 90-201, Laws of Florida (the Act), is unconstitutional because it violates an employee's access to courts under Article I, Section 21, Florida Constitution (1968). They stand their arguments on two "legs" or theories, which simply distilled are:

a. the various amendments or additions to Chapter 440 violate the access to courts provision; or

b. the "cumulative effect" of the changes violates the access to courts provision.

The changes or revisions to Chapter 440, Fla. Stat. (1989), which were embodied in the Act come before this court with the presumption of constitutionality. **Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.**, 434 So.2d 879 (Fla. 1983). As such, all reasonable doubts are to be resolved in favor of its validity. **Belk James, Inc. v. Nuzum**, 358 So.2d 174, 177 (Fla. 1978) and **In re Estate of Caldwell**, 247 So.2d 1, 3 (Fla. 1971). That presumption must be overcome by proving the invalidity beyond a reasonable doubt. **Department of Business Regulation v. Smith**, 471 So.2d 138, 142 (Fla. 1st DCA 1985). It has been recognized that a legislative enactment should not be held to be facially

unconstitutional unless it cannot be constitutionally applied to any factual situation. **See** **Voce v. State**, 457 So.2d 541, 543 (Fla. 4th DCA 1984), rev. denied, 464 So.2d 556 (Fla. 1985).

The Plaintiffs had the burden of establishing on the record below that the Act was facially invalid because it denied access to courts as that provision had been previously construed by this court. Not only must such record evidence exist, but it must be of such a level that it overcomes the Act's presumed validity beyond a reasonable doubt. **See** **State v. Kinner**, 398 So.2d 1360 (Fla. 1981). That burden was not carried by the plaintiffs and for that reason alone, the Plaintiffs have failed to establish the Act is constitutionally invalid and this court should so hold.

Not only does the trial and evidentiary record below fail to sustain the Plaintiff's claims, it reflects evidence was presented by the Defendants that the various provisions under attack were facially constitutional and were designed to provide appropriate benefits to injured workers promptly without the necessity of litigation in the vast majority of cases. The trial record reflects the legislature had ample information upon which to conclude the amendments would provide benefits to injured workers as well as reduce the costs of workers' compensation insurance to Florida employers.

A. The Amendments Contained In Chapter 90-201, Laws Of Florida, Do Not Violate The Access To Courts Provision Of Article I, Section 21, Florida Constitution (1968).

This court is certainly aware that the seminal case in Florida concerning statutory abolition of an existing civil remedy is **Kluger v. White**, 281 So.2d 1 (Fla. 1973). In that case, this court established a standard for cases seeking to invalidate statutes upon that basis when

it stated that:

> [W]here a right of access to the courts of redress of 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 right has become 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 for redress of 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.

281 So.2d 4.

This court recognized in **Kluger** that the legislature could abolish a statutory or common law right of access to courts by enacting a statute that provides "a reasonable alternative to protect the rights of the people of the State for redress of injuries . . . ." In construing the challenged statute, this court specifically referred to the workers' compensation act, which itself had abolished tort actions against employers. This court noted that workers' compensation provided "adequate, sufficient, and even preferable safeguards" as an alternative to the right to sue. Id.

There have been numerous challenges to Florida's workers' compensation law in the past fifteen years. The workers' compensation system has been repeatedly upheld against multifaceted challenges to its constitutionality because the system performed its function as an alternate recovery system.

The preface to the Act establishes quite clearly that the legislature was concerned about the workers' compensation system and the overpowering public need for reform to

preserve the system, reduce the costs of the system, and protect the ability of employees to obtain benefits for job related injuries and preserve the ability of employers to purchase such insurance or coverage for employee benefits. (A-4, pp 4-6).

Many of the Act's changes to Chapter 440 were designed to eliminate or clarify areas of litigation or contention within the system as to the compensability of an injury or the amount of benefits an injured employee should receive. These changes were rationally related to the legitimate state interest of efficiency of payment of benefits by eliminating endless, costly debates over what benefits are due in a case. **See** **Carr v. Central Florida Aluminum**, 402 So.2d 565 (Fla. 1st DCA 1981), where the workers' compensation legislation was held to be rationally related to the legitimate state of interests of efficiency of payment of benefits by "eliminating endless debates...over exactly what percentage of use,...has been lost." **Id**. at 568.

The amendments in the Act relating to Chapter 440 were the legislature's effort to arrive at a comprehensive, cohesive reform of the workers' compensation system which kept the system efficient and effective, and balanced the interest of both employees and employers. The Defendants do not contend it is a perfect system, or that certain changes are not subject to legitimate debate. However, the Act is nevertheless constitutional and does not violate **Kluger v. White** by denying an employer's or employee's access to courts.

The amendments to the workers' compensation system were done in a comprehensive, thorough manner to minimize the impact upon injured employees as a whole and still effectuate the maximum amount of savings for employers within that system. The amendments were adopted by the legislature constitute a fair, rational, and comprehensive

solution to the crisis which was presented to the Legislature.

The evidence and testimony presented by the Defendants at trial showed the legislature had before it a massive amount of testimony, expert opinion, actuarial data, alternative proposals, and debate before adopting the amendments to Chapter 440 contained in the Act. Furthermore, the amendments adopted by the legislature were reasonable and constituted a rational balance between the need for employees to be assured a reasonable alternative to the tort system and the cost of the system to employers.

AIF respectfully contends the trial judge was absolutely correct in finding that the Plaintiffs' theory that the Act was violative of the access to courts provision of Florida's Constitution was not valid. Judge Hall apparently recognized that the Act did not completely alter the system that existed previously and that it would continue to constitute a reasonable litigation alternative as required under **Kluger**.

B. Florida's Workers' Compensation Law, As Amended By Chapter 90-201, Laws Of Florida, Continues To Be A Reasonable Litigation Alternative.

The real test under Article I, Section 21, is whether the amended remedy is still a reasonable alternative when viewed in its totality. As this court held in **Mahoney v. Sears Roebuck and Company** 440 So.2d 1285 (Fla. 1983), that while a particular change in the amount of benefit an injured employee would receive might be viewed as "inadequate or unfair," that did not violate that employee's rights to access to courts. In so holding, this court stated:

> Mahoney might have well received more compensation for the loss of his eye prior to the legislative amendments to the Workers'

> Compensation Law in 1979. Mahoney, however, received fully paid medical care and wage-loss benefits during his recovery from his on-the-job accident without having to suffer the delay and uncertainty of seeking a recovery in tort from his employer or third party. Workers' compensation, therefore, still stand as a reasonable litigation alternative.

440 So.2d 1286.

A case challenging the legislature's decision in 1979 to replace the permanent partial disability benefits system with the permanent impairment and wage-loss benefits system was decided by this court on the same day as **Mahoney**. That was **Acton v. Fort Lauderdale Hospital**, 440 So.2d 1282 (Fla. 1983). In rejecting the contention that the legislative changes to the workers' compensation law violated the access to courts provision of Article I, Section 21, Florida Constitution (1968), this court found:

> The Workers' Compensation Law remains a reasonable alternative to tort litigation. . . 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. . . .

440 So.2d 1284.

In **Sasso v. Ram Property Management**, 452 So.2d 932 (Fla. 1984), this court considered a challenge to another provision of Chapter 440, Fla. Stat. (1979), which denied wage-loss benefits to claimants after age sixty-five. The claimant argued he was denied any "reasonable alternative" to his right to sue in violation of Article I, Section 21 of the Florida Constitution (1968) because he could not sue his employer for lost wages and could not

recover wage-loss benefits under the workers' compensation law because of his age.

In upholding the statute against an access to courts challenge, this court stated:

> However, we find that Sasso has been provided with a reasonable alternative. His medical expenses were covered by workers' compensation benefits, and he received temporary total disability benefits during his convalescence. Permanent total disability benefits were available to him if he had qualified and any future medical expenses related to his injury are also covered. Sasso thus has received some of the compensation which a tort suit might have provided had he been forced to pay his own expenses and subsequently seek redress in court. Such partial remedy does not constitute an abolition of rights without reasonable alternative as contemplated in **Kluger v. White**. . . .

452 So.2d 933 and 934.

One year later, this court was faced with another challenge to the workers' compensation act in **Newton v. McCotter Motors, Inc.**, 475 So.2d 230 (Fla. 1985). That case involved a challenge by a deceased worker's widow to the statutory requirements necessary for her to recover compensation for her spouse's death. This court ruled the section under challenge did not violate access to courts and was a permissible provision within the act.

The proceeding cases underscore the principle that the workers' compensation system constitutes a reasonable alternative to the tort system and does not violate Article I, Section 21, Florida Constitution (1968). It is clear that the access to courts provision is not violated if the workers' compensation system provides an injured employee with some of the benefits which would be available to a plaintiff under the tort system if those benefits are provided without the need for proof of fault or the normal litigation required under the tort system.

What these cases also reflect is that an "access to court" challenge to a particular provision of Chapter 440 will not be upheld merely because that provision might provide a different amount of money or result for a specific claimant or is viewed by that claimant as inadequate or unfair. Rather, the claimant must prove unreasonable or arbitrary denial of access to the system or to any benefits before that claimant has been left with no alternative remedy under **Kluger**.

There was absolutely no evidence presented that the trial below that would establish this Act leaves a claimant with no alternative remedy. There was speculation by some of the Plaintiffs and witnesses and hypothetical examples offered up by Plaintiffs' counsels about how the various provisions of the law would work, but there was no evidence in the record as to **how** those provisions deprived a claimant of access to the workers' compensation system. In short, there was no record evidence as to how these particular Plaintiffs' challenges were any different than those plaintiffs in the **Acton, Mahoney, Newton** and **Sasso** cases. There was absolutely no proof or evidence presented to the trial court as to why a different result was compelled in this case as opposed to the result reached by this court in its prior rulings on "access to courts" challenges.

All the trial record below shows is that the Plaintiffs, their witnesses and counsel are unhappy or dissatisfied with the amendments contained in Chapter 90-201, Laws of Florida. That dissatisfaction might be sufficient to sustain the filing of a declaratory judgment action, but it certainly does not constitute a violation of the access to courts provision of the Florida Constitution as interpreted by this court in **Kluger v. White** and the various cases dealing with Florida's workers' compensation act. As such, AIF respectfully contends that the

Plaintiffs have utterly failed to sustain their burden of proving that the various amendments or additions to Chapter 440 violate Article I, Section 21, Florida Constitution (1968). Judge Hall was correct in his ruling that the various amendments contained in the Act were not unconstitutional and AIF respectfully requests this court uphold Judge Hall's decision and findings in that respect.

C. The Amendments contained In Chapter 90-201, Laws Of Florida, do not have the "cumulative effect" of violating Article I, Section 21, Florida Constitution (1968).

Finally, the Plaintiffs argue that even if the various amendments or additions to Chapter 440 do not separately or individually violate the "access to courts" provision, the "cumulative affect" of those changes somehow violates this provision of the Florida Constitution. That argument was presented in a portion of the initial brief filed on behalf of Cross-Appellants Florida AFL-CIO and IBEW, Local 606.

This lengthy discourse basically concludes that the Act's changes complained of by the Plaintiffs have the "cumulative affect" of converting the Act into something which is no longer a "reasonable litigation alternative." AIF will not respond to the alleged infirmities of all of the amendments adopted to the workers' compensation system and contested by the Plaintiffs. Many of the Plaintiffs' challenges are specifically addressed by the Defendants or Amici in their briefs filed in response to the cross-appeal. However, it appears to AIF that the Plaintiffs are making an argument to this court which is similar to that which was considered and disposed of by this court in a different context involving Florida's medical malpractice system.

In **Carter v. Sparkman**, 335 So.2d 802 (Fla. 1976), this court was presented with

several constitutional challenges to the facial validity of the Medical Malpractice Reform Act. This court resolved all doubts in favor of that legislation's validity and upheld the act as constitutional. In so doing, the court recognized the act was adopted because the legislature perceived an imminent threat to the availability of health care in Florida. **Id**. at 805 and 806.

Approximately four years later in **Aldana v. Holub**, 381 So.2d 231 (Fla. 1980), this court declared the Medical Malpractice Reform Act to be unconstitutional. This court said it would construe the statute to render it constitutional if there was any reasonable way to do so, but it could not because the operation of the statute proved to be arbitrary and capricious. In so ruling, this court stated:

> While we originally upheld the facial validity of the medical mediation act in **Carter v. Sparkman**, **supra**, we have authority to determine that the practical operation and effect of the statute has rendered it unconstitutional. [citations omitted]. It should be emphasized that today's decision is not premised on a reevaluation of the wisdom of the **Carter** decision. Rather, it is based on the unfortunate fact that the medical mediation statute has proven unworkable and inequitable in practical operation.

381 So.2d 237.

This case is in the exact posture as that challenge presented to this court in **Carter v. Sparkman**. There is no record evidence here that the Act is facially invalid in its "cumulative effect" upon Florida's workers' compensation law, or that the various amendments to Chapter 440 will unconstitutionally deprive injured employees of their rights under the access to courts provision of Florida's Constitution.

It is AIF's position that the Act's changes to Chapter 440 are not designed to alter

Florida's workers' compensation system so that it no longer constitutes a reasonable alternative to litigation. However, if the "cumulative effect" of the Act's amendments over the in fact operate in that fashion, this court will no doubt be given an opportunity to review such a challenge upon proper facts and evidence. That case (if it should ever exist) is not before this court today and this court should uphold the constitutionality of the Act.

II

THE CROSS-APPELLANTS HAVE NOT PROVEN THEIR CHALLENGES TO VARIOUS SECTIONS OF CHAPTER 90-201, LAWS OF FLORIDA CONCERNING COMPENSABILITY COVERAGE.

Cross-Appellant Scanlan and Professional Fire Fighters argue on page 21 of their initial brief that Section 9, on page 26, lines 26-31, and page 27, lines 1-5 of the Act legislatively overrules **Gator Freightways, Inc. v. Roberts**, 550 So.2d 1117 (Fla 1989). Appellee has totally misread the amendment and the **Gator Freightways** case, because the amendment actually codifies the **Gator Freightways** ruling. **Gator Freightways** held that the employee (Roberts) of the owner/operator truck driver (Reason) was the employee of the common carrier (Gator) and Gator was therefore the statutory employer. However, the employee of the owner/operator is covered under workers' compensation and if the owner/operator does not carry such coverage, the motor carrier is the statutory employer and must provide coverage to the employees of the owner/operator.

It is difficult to determine from Scanlan's complaint, trial memoranda and briefs who he wants covered and who he does not. He argues the requirement that all individuals in the construction industry be covered by the Act is unconstitutional and violates due process, equal protection, basic rights and access to courts. Scanlan cites the fact that under the original 1990 amendments, partners and sole proprietors actively engaged in the construction industry were considered employees and were covered (Complaint at page 20, paragraphs 67. and 68.). He further argued that to require all independent contractors in the construction industry to be included as employees and thereby become eligible to receive

workers' compensation benefits now provides a more limited definition of independent contractor "and therefore violates impairment of contracts, due process, equal protection, basic rights, access to courts and separate of power" (Complaint at page 20, paragraphs 69. and 70.).

Next, he argues that a requirement to prohibit officers of a corporation engaged in the construction industry from opting out of the workers' compensation system and thereby receiving workers' compensation benefits is unconstitutional in that such a requirement violates equal protection, due process, basic rights and access to courts (Complaint at pages 19 and 20, paragraphs 65. and 66.).

In paragraph 73 of the complaint, he argues two opposite concepts regarding coverage in that one paragraph. First, he challenges the fact that to increase the exemption for employers who do not have to carry workers' compensation if they employ three employees rather than two, is unconstitutional. He then argues that the language "enlarges coverage" to include volunteer fire fighters and this is also unconstitutional. Then, of course, the fact that owner/operators who are independent contractors and therefore exempt from coverage is also alleged to be unconstitutional.

A review of the complaint and briefs show that rather than taking a well reasoned, consistent approach to the constitutionality of the 1990 legislative amendments, Scanlan and the other Plaintiffs took a shot gun approach. In the complaint, Plaintiffs automatically challenged each amendment with an opposite stance, no matter what the amendment provided for. Obviously, this scattered approach was done in the hope that one or more of the Plaintiffs' pellets would hit something and that if it did not cause a serious wound, the

Act would die in the confusion.

Scanlan makes the statement that workers' compensation coverage was "enlarged" to include volunteer fire fighters overlooks the fact that if a volunteer fire fighter performs duties for the state or a county, city, or other governmental entity, that person is already defined as a covered employee under Section 440.02(13)(d) 3. Fla. Stat. (Supp. 1990). The challenged amendment that defines their volunteer activities to be employment did not change their status from what it was prior to the Act.

Scanlan's brief at page 21 regarding Section 15 of the Act is another example of the Plaintiffs not taking a reasoned approach in this lawsuit by attempting to baffle this court with its foot work. Scanlan states in his brief that a subcontractor who misrepresents the number of employees on the payroll in an effort to avoid coverage may be guilty of a felony. True. However, Scanlan goes on to argue that "this criminal statute does not apply to contractors." His argument, followed to its logical conclusion, would mean that Section 440.381, Fla. Stat. (Supp. 1990), which makes it a felony for an employer to file a false application would not apply if the contractor misstates the number of employees on his application for coverage. That is clearly not the case, and there is absolutely no basis to think or assume otherwise. Scanlan's argument also overlooks the fact that by virtue of Section 440.10 Fla. Stat. (Supp. 1990), if the subcontractor does not provide coverage, the contractor must. The contractor should be able to review a subcontractor's application and rely upon that application when utilizing that subcontractor on the job, to minimize the contractor's liability for workers' compensation insurance.

III

THE AMENDMENTS CONCERNING THE SPECIAL DISABILITY TRUST FUND DO NOT VIOLATE DUE PROCESS PROVISIONS OF FLORIDA'S CONSTITUTION.

Scanlan alleges at page 42 of his brief that Section 40, page 190, lines 1-6 of the Act which places additional procedures in the Act to allow employers to more easily recover from the Special Disability Trust Fund (SDTF) is unconstitutional in that it violates due process. The SDTF exists to encourage employers to hire and rehire employees with previous workers' compensation injuries. How does putting in yet another protection to allow such recovery harm an injured worker? How does it violate equal protection of the law? How does it violate due process of law? Scanlan does not say, only that it does.

Scanlon argues that the amendment "limits recovery to these circumstances in which the employer has a 'record'. . . that his knowledge and conduct would not be enough. . ." Nothing could be more incorrect. Scanlan obviously did not read the word "or" in the statute. There is no requirement that the employer must have a record to recover from the SDTF. The purpose of the amendment is to allow another avenue of proof that the employer knew of the previous injury and knew the injury could be a hindrance to employment and that compensation had been paid; but rehired the employee anyway. It certainly does not discourage recovery from the SDTF.

Scanlan's argument overlooks the fact that an employer can have an employee who had been injured ten years ago and now suffers a new injury. The SDTF requires the employer to on an affidavit from an individual who personally knew that the company hired that individual after the employer had reached an informed conclusion prior to the rehire

that the preexisting physical condition was permanent and was, or likely to be, a hindrance or obstacle to employment. <u>See</u> Section 440.49(2)(f) Fla. Stat. (Supp. 1990). The problem for some employers was that the supervisor who hired the employee and knew of the previous impairment may no longer be with the company 5, 10, or 15 years later after the initial injury. (Tr. p.799) The new language, in addition to the existing statutory language, allows the employer, through its records, to meet the two prong test for recovery from the SDTF and establish the required knowledge of the pre-existing physical condition and that such physical condition maybe a hindrance or obstacle to employment, i.e., they are likely to be reinjured.

AIF respectfully contends the Plaintiffs have apparently no knowledge of the operation of the SDTF and what was previously required of employers to recover from the SDTF. If they did, they would not have argued that language designed to encourage employers to rehire previously injured employees somehow violates the due process of rights of injured employees.

IV

THE AMENDMENTS CONCERNING MEDIATION DO NOT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION PROVISIONS OF FLORIDA'S CONSTITUTION.

Scanlan argues in his brief at page 14 that Section 23 of the Act which amends the prior mediation statute to authorize the employer to be represented by an attorney at the mediation conference if the employee is represented by counsel is unconstitutional in that it violates due process and equal protection. Scanlan does not state how it is unconstitutional - only that it is.

Scanlan also states that Section 23 provides that if an employee is not represented by an attorney the employer may not be represented by an attorney. He then proceeds to make a broad statement without any citation of any authority that ". . . the State of Florida, and its political subdivisions, including counties and cities, can only appear through counsel. The same is true of private corporations who can only appear through counsel."

AIF is at a loss to respond to this challenge, except that Scanlan apparently has confused mediation with litigation and is assuming there is no way that the State, its political subdivisions (including counties and cities) or private corporations can be at a mediation conference unless there is an attorney present on their behalf. Scanlan overlooks the fact that mediation is designed to bring disputes between the employee and the employer to a prompt conclusion without the need for formal litigation. Section 440.25(3)(b) 1. Fla. Stat. (Supp. 1990) specifically provides that a mediation conference shall be conducted informally and does not require the use of formal rules of evidence or procedures. Further, any

information obtained during and after the conference does not have to be disclosed and that conduct or statements made during a mediation conference or negotiations concerning the conference are inadmissable in any proceedings under Chapter 440.

How encouraging two parties to sit down and attempt to resolve their differences through mediation without the use of formal rules of evidence or procedure while protecting the employee and employer from being bound by and to any statements made during mediation to resolve their differences, is unconstitutional and denies due process of law or equal protection is absolutely unclear. Scanlan's brief certainly does not set forth any facts to make such statements and to support his conclusions - it appears as though Mr. Scanlan believes a mediation proceeding has to be conducted or is bound by the same rules of procedure and evidence as would apply during a formal hearing before a Judge of Compensation Claims.

In fact, the rules are not the same and mediation proceedings are conducted differently than in a normal contested case. Thus court's rules on mediation as set forth at Fla. R. Civ. P. 1.700-1.780. Those rules do not prohibit a party from having a representative present with the authority to discuss with the mediator that party's position regarding the dispute and enter into an agreement on behalf of that entity if mediation is successful. Rule 1.720(d), Fla. R. Civ. P., specifically states presence of counsel is not required for mediation to proceed.

AIF respectfully requests this court uphold Judge Hall's ruling that the mediation proceedings do not violate an employee's due process or equal protection rights.

V

THE ESTABLISHMENT OF AN INDUSTRIAL RELATIONS COMMISSION DOES NOT VIOLATE THE SEPARATION OF POWERS PROVISIONS OF FLORIDA'S CONSTITUTION.

The Legislature on January 22, 1991, repealed Section 20.171(5)(a)1.a. Fla. Stat. (Supp. 1990), during its recent Special Session and eliminated the enabling statute that created the Industrial Relations Commission (IRC). It left intact, however, the appropriation for the creation of the IRC, the appeals process from orders of the Judge of Compensation Claims to the IRC, and review of IRC orders to the First District Court of Appeal.

The Industrial Relations Commission was originally created by Governor Reuben Askew and adopted by the 1971 Legislature. **Alpert on Workers' Compensation** (1978). AIF contends Governor Chiles (with the appropriations and the legislative mandate of appeals to the IRC) can create the IRC without the existence of Section 20.171, much like Governor Askew originally did. A plain reading of the statute shows the legislative intent for review from orders of Judges of Compensation Claims to be first to the IRC then to the First District Court of Appeal.

Florida AFL-CIO argues that creation of the IRC means employers have no economic reason not to appeal. That argument ignores the statutory language that if the employee's award for benefits is reversed on appeal, no benefits are payable on review to the First District. Section 440.272 Fla. Stat. (Supp. 1990). It would be the employee who would then appeal to the First District, not the employer. Conversely, if the employee's

award is not reversed by the IRC and the employer appeals to the First District, the award of benefits must be paid to the injured worker pending the appeals.

Judge Hall ruled the reappointment of Industrial Relation Commissioners by the Judicial Nominating Commission as provided for under Chapter 90-201 was unconstitutional. Judge Hall stated that the recommendations for reappointment by the Judicial Nominating Commission was a judicial function in that the Judicial Nominating Commission is in the Judicial Branch and to allow it to dictate to the Executive Branch who shall remain appointed violated separation of powers. This ruling was premised on an incorrect assumption. The judicial nominating commissions are in fact Executive Branch entities. **In Re Advisory Opinion to Governor**, 276 So.2d 25, 29 (Fla. 1973). Therefore, there is no separation of powers violation by this provision.

As to the findings relating to the Judicial Qualifications Commission, that language was not challenged by the Plaintiffs' complaint and therefore, was not properly before the trial court.

This court has previously approved an Executive Branch entity performing judicial functions when in **Scholastic Systems v. LeLoup**, 307 So.2d 166 (Fla. 1974), it approved the rules of procedure for the IRC. In **LeLoup**, the Supreme Court held the IRC in such a high esteem it decided:

> IRC cases shall hereafter be reviewed by this Court upon traditional certiorari grounds based upon a departure from the essential requirements of law, rather than upon general appellate considerations. Appellate review shall be solely for the IRC, with review only in the Florida Supreme Court upon traditional certiorari grounds upon a failure to conform to the essential

requirements of law below.

307 So.2d 173.

This court recently referred to the old IRC as an example of a proper nonjudicial review mechanism upholding the citrus canker compensation system challenged in **Department of Agriculture and Consumer Services v. Bonanno,** ___ So.2d ___ (Fla. 1990), 15 F.L.W. (S) 485 (September 29, 1990).

VI

THE TRIAL JUDGE WAS CORRECT IN HIS RULING THAT THE SPECIFIC SECTIONS WHICH HE FOUND TO BE INVALID WERE SEVERABLE FROM THE REMAINDER OF CHAPTER 90-201, LAWS OF FLORIDA.

The initial brief of Plaintiffs Florida AFL-CIO and IBEW, Local 606 argues that the various provisions which the trial judge found to be invalid were not subject to being severed from the remainder of the Act. The Cross-Appellants make a specific reference to the amendment to Section 440.15(1)(b) Fla. Stat. (Supp. 1990) which requires an employee to establish they are unable to do light duty work within a 100 mile radius of the injured employee's residence. As stated in Point III of AIF's initial brief filed in the appeal of this matter, the addition of the 100 mile radius requirement was the only amendment to Section 440.15(1)(b). Section 440.15 has been in Florida's workers' compensation law essentially unchanged for the previous ten years.

The Plaintiffs contend this particular provision may not be severed from the existing statutory section and since it is not severable, it invalidates the entire Act.

As this court is keenly aware, the question of whether a section of a law which is held to be invalid may be severed from the statute resolves around the four tests which this court set forth in **Cramp v. Board of Public Instruction of Orange County**, 137 So.2d 828 (Fla. 1962):

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be

> accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

137 So.2d 830.

AIF contends that the application of **Cramp** clearly establishes this provision (if found to be invalid) is severable from the Act. First of all, the Legislature specifically provided that any provision of the Act found to be invalid should be severed from the remaining sections. To declare the entire Act unconstitutional on this one phrase alone, would undo all of the work already accomplished and return the workers' compensation system to the condition which the Legislature found unacceptable when it recognized and declared the existence of a crisis in the system. There is therefore no reason to answer question one in any manner other than in the affirmative.

AIF also contends that the answer to questions two and four should be the affirmative because the remaining portions of the Act which would nevertheless be viable and complete. There is no reason why the absence of the language in dispute here should prevent the remaining portions of the Act from having the ameliorative effects which the Legislature clearly sought to accomplish through the Act. As to question three, AIF does not believe anyone can conclude from an objective viewpoint, that there is anything but a strong likelihood that the Legislature would have passed the Act without the inclusion of this particular language. The Legislature was clearly faced with what it considered to be a crisis in the workers' compensation system. It is impossible for AIF to believe that anyone would

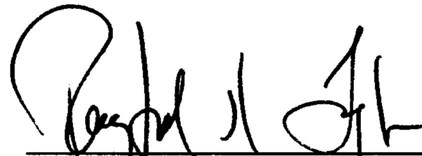
seriously argue that the linchpin of the revisions to the workers' compensation act contained in Chapter 90-201 was the inclusion of the "100 mile radius" language in Section 440.15 Fla. Stat. (1989).

AIF strongly believes the inclusion of this language is valid for the reasons stated in its initial brief. Nevertheless, if the section is found to be invalid, there is absolutely no reason why that language should not be severable from the remaining portions of the Act. **See** **Waldrup v. Dugger**, 562 So.2d 687 (Fla. 1990); **Smith v. Department of Insurance**, 507 So.2d 1080 (Fla. 1987); and **State v. Lee**, 356 So.2d 276 (Fla. 1978).

CONCLUSION

Based upon the foregoing, Associated Industries of Florida respectfully contends that Chapter 90-201, Laws of Florida (Comprehensive Economic Development Act of 1990) does not violate the "access to courts" provisions of Article I, Section 21 of the Florida Constitution (1968) in its entirety or in its several sections. Furthermore, the trial court's rulings regarding the validity of the various sections under challenge in this cross appeal should be upheld and the facial validity of this Act be affirmed by this court.

Respectfully submitted,



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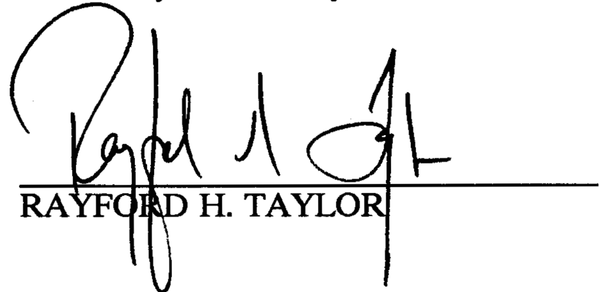
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Cross Appellee, Associated Industries of Florida, was furnished to all counsel on the attached list either by hand delivery or United States mail, this 12th day of February, 1991.



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