IN THE SUPREME COURT OF FLORIDA

Case No. 77,179

BOB MARTINEZ, et al.,

Appellants/Cross Appellees,

vs.

MARK SCANLAN, et al.,

Appellees/Cross Appellants.

ANSWER BRIEF OF APPELLEES, MARK SCANLAN and PROFESSIONAL FIRE FIGHTERS OF FLORIDA, INC.

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STATEMENT OF THE CASE

This is an appeal by the defendants from the order of Judge J. Lewis Hall, Jr. dated December 5, 1990, holding unconstitutional Chapter 90-201, Laws of Fla., in its entirety and holding §43 of Ch. 89-289, Laws of Fla., and its retroactive repeal unconstitutional and holding unconstitutional certain challenged individual provisions of Chapter 90-201, Laws of Fla., relating to: (1) "Super Doc"; (2) 100 mile work search for permanent total disability; and (3) burden of proof for 20% impairment.

The plaintiffs filed a cross appeal arguing that the Circuit Court also should have declared unconstitutional other challenged individual provisions of Ch. 90-201, Laws of Fla., and Ch. 89-289, Laws of Fla.

The defendant/intervener, NCCI/Employers Insurance of Wausau filed a cross claim below and a cross appeal arguing that if Ch. 90-201, Laws of Fla., is not invalid in its entirety but is invalid with respect to benefit reductions, then the mandated 25% premium reduction in §57, Ch. 90-201, Laws of Fla., should be declared invalid.

The case was certified to the Supreme Court under Art. V, §(3)(b) 5, Fla. Const. and the Court accepted jurisdiction.

STATEMENT OF THE FACTS

These Appellees re-adopt the Statement of the Facts contained in their Brief of Cross-Appellants together with the Statement of the Facts contained in the briefs of the Cross-Appellants and Appellees on the plaintiffs' side, specifically the Communication Workers of America, Florida AFL-CIO, IBEW, Local 606 and the Police Benevolent Association, as though fully set forth herein.

INTRODUCTION

"What Hath the Lobbyists Wrought?"

Legislatures exist so that a citizen (usually represented by a lobbyist) can petition the government to pass a law which advantages him over his friends and oppresses his enemies. Meanwhile his friends and enemies are trying to do the same to him. From this clash of forces comes legislation. The Legislature is the branch of government devoted to politics, not justice.

To the lobbyist and his clients, the three-branched form of government is one in which the legislature is supreme and the executive and the judiciary are secondary.

The founding fathers, however, created novus ordo seclorum,[1] a new order in the world, consisting of a three-branched form of government in which all branches were co-equal in order to balance and check one another. The people required that there be a Constitution, a written contract, a sacred compact, between the people and their government, that limited what the state government could do. They ordained that the judicial branch of the government should be the protector of that Constitution. Rhetorically we might ask who they thought would be its violator, and the answer is, of course, the legislature. Our ancestors had had more than enough experience with the mother of legislatures, the English Parliament, whose tyranny had caused them to revolt in the first place.

Workers' compensation laws predate World War I. They are social economic legislation by which the employer is given immunity from bankrupting lawsuits in exchange for the statutory obligation to provide

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[1] The motto on the Great Seal of the United States on the back of a dollar bill.

benefits which are certain, speedy of delivery and secured. See *New York Central R. R. Co. v. White,* 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917). *Halifax Paving Inc. v. Scott & Jobalia Construction Co., Inc.,* 565 So. 2d 1346 at 1347 (Fla. 1990). This represents a constitutional compromise by which a judicial function was transferred to the executive branch of the government. The decision of the government, whether the employer should be forced to convey some of his property to his employee on account of industrial injury by either paying for medical expenses or disability is judicial in nature. In the bulk of cases it is performed by the parties in a self-executing manner. *Florida Erection Services, Inc. v. McDonald,* 395 So. 2d 203 (Fla. 1st DCA 1981). However standing behind this process is the power of the government consisting of the Judge of Compensation Claims, an executive official exercising quasi-judicial powers, and behind him stands appellate review by the court system. The judiciary is the branch of government devoted to justice, not politics, in order to balance and check the legislative branch.

In *Kluger v. White,* 281 So. 2d 1 (Fla. 1973), this Court held that not only common law remedies, but also statutory remedies (like the Workers' Compensation Law), that existed prior to the 1968 Constitution could not be abolished without the Legislature providing a reasonable alternative.

While these arguments refer to access to courts and the reasonableness of the alternative system, it is also clear that the alternative system must be workable in practical operation. *Aldana v. Hollub,* 381 So. 2d 231 (Fla. 1980).

Furthermore, an alternative system such as the Workers' Compensation Law is subject to the constitutional limitations of due process

of law and equal protection of the laws. E. g., *De Ayala v. Florida Farm Bureau Casualty Co.,* 543 So. 2d 204 (Fla. 1989).[2]

The 1990 Workers' Compensation Law (in its various versions) reduces employee benefits wholesale in the area of procedure, compensability, medical benefits, and indemnity. This Court is now called upon (1) to act as the co-equal of the Legislature; (2) to perform its role as the administrator of justice and the protector of the Constitution; in order to (3) test this legislation against the state and federal Constitutions.

This brief deals with the correctness of Judge Hall's decision in regard to the invalidity of the Act and should be read in conjunction with the Plaintiffs', Scanlan and Professional Fire Fighters of Florida, brief on cross appeal, as well as in conjunction with the briefs of the other Appellees/Cross Appellants who were the Plaintiffs or the Plaintiff Intervener below. Their arguments are adopted as though fully contained herein.

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[2] In its Appellant's brief, page 21, Associated Industries of Florida relied on *Florida Farm Bureau v.* (sic) *Ayala,* 501 So. 2d 230 (Fla. 4th DCA 1985), which was reversed by this case.

SUMMARY OF ARGUMENT

The Circuit Court held Ch. 90-201, Laws of Florida, invalid in its entirety on two bases: (1) a violation of the single subject matter requirement of the Constitution and (2) multiple violations of the separation of powers requirement of the Constitution. The Circuit Court held individual provisions of Ch. 90-201, Laws of Florida, to be constitutionally invalid including the 100-mile radius work search requirement for permanent total disability, the "Super Doc" provision, and the burden of proof for wage loss excluding a consideration of economic conditions. The Circuit Court also invalidated the sunset of the Workers' Compensation Law by §43 of Ch. 89-289, Laws of Florida, and the retroactive appeal of the sunset by §56 of Ch. 90-201, Laws of Florida.

The Circuit Court was correct in all of these rulings.

The trial court was correct in invalidating the Ch. 90-201, Laws of Florida, in its entirety for violation of the single subject requirement of the Constitution.

The Circuit Court was correct in holding Ch. 90-201, Laws of Florida, invalid for multiple violations separation of powers. The creation of the review mechanism for decisions of the Judges of Compensation Claims by resurrecting the Industrial Relations Commission was invalid. The provision for the appointment and the re-appointment of the Industrial Relations Commissioners by the Supreme Court Judicial Nominating Commission was invalid. It was an attempt by the Legislature to confer powers and duties upon the Supreme Court Judicial Nominating Commission not authorized by Art. V, §12, and in violation of separation of powers. The provision making the Industrial Relations Commissioners subject to the discipline of the Judicial Qualifications Commission was also

an attempt by the Legislature to confer powers and duties upon the Judicial Qualifications Commission not authorized by Art. V, §12, by Art. V, §11, and in violation of separation of powers.

The creation of the Oversight Board which was located in the legislative branch within the Joint Legislative Management Committee, for which an appropriation was made to the Joint Legislative Management Committee "to administer the provisions of this act" violated separation of powers. The creation of the Legal Counsel, who is similarly located in the legislative branch, for the purpose of representing the people of the State of Florida in connection with rate making in regard to workers' compensation and other matters relating to workers' compensation violated separation of powers. The appointment process for the members of the Oversight Board violated separation of powers in that it combined appointments by the Governor and the President of the Senate and the Speaker of the House. If it was located in the legislative branch as the statute provided, the appointments by the Governor were impermissible. However, as it was given the duty to administer the provisions of this Act, if it would appear to have been properly located in the executive branch, and therefore, the appointments by the President of the Senate and the Speaker of the House were invalid as a violation of separation of powers. The only type of legislative participation in such appointments provided for in the Constitution is senate confirmation.

The Circuit Court was correct in holding that the requirement of the statute that a person claiming permanent total disability make a job search within a 100-mile radius of his residence was unconstitutional. It is violative of basic rights, access to courts, due process of law, and equal protection of the laws.

The Circuit Court was correct in holding that the "Super Doc" provision was constitutionally invalid. It is offensive to basic rights, access to courts, due process of law, and equal protection of the laws.

The Circuit Court was correct in holding that the burden of proof of an employee with a 20% impairment of the body or less claiming wage loss benefits to show that his wage loss was not due to unemployment or to economic conditions or to his own misconduct was constitutionally invalid. This violates basic rights, access to courts, due process of law and equal protection of the laws. Indeed, the First District Court of Appeal had previously indicated in *Regency Inn v. Johnson*, infra, and *City of Clermont v. Rumph*, infra, that such a burden was impermissible.

The Circuit Court was correct that the "sunset" provision of the 1989 Act was invalid. It was also correct that the provision in the 1990 Act which purported to retroactively repeal the 1989 "sunset" provision was invalid. The Legislature can not use its power to sunset regulatory agencies under §11.61, Fla. Stat. to sunset a general law such as Florida Workers' Compensation Act. This is particularly so in view of this Court's holding in *Kluger v. White,* supra, that the Legislature is powerless to repeal a statutory remedy like the Workers' Compensation Act which existed prior to the 1968 Constitution without providing a reasonable alternative. The sunsetting of the Workers' Compensation Law specifically violates the Constitution according to this Court's holding in *Kluger v. White,* supra. Sunsetting of general law is also an unconstitutional constraint upon the governor's veto power, as well as an unconstitutional "dead hand" statute.

The repeal of the "sunset" provision by §56 of Ch. 90-201, Laws of Fla., was made retroactively. This was an unconstitutional attempt by the Legislature to pass a law with a retroactive effective date.

These Appellees also adopt the companion briefs of the other Appellees on the Plaintiffs' side in regard to the issue of the retroactivity of House Bill 11-B and Senate Bill 8-B adopted in the January, 1991, Special Session. This retroactively is also impermissible and does not moot the issues before this Court either in whole or in part.

POINT I

THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THE CREATION OF THE INDUSTRIAL RELATIONS COMMISSION, THE OVERSIGHT BOARD, AND THE LEGAL COUNSEL, AND THE EMPOWERING OF THE JOINT LEGISLATIVE MANAGEMENT COMMITTEE TO ADMINISTER THE WORKERS' COMPENSATION LAW WERE CONSTITUTIONALLY INVALID.

Section 3 of Ch. 90-201, Laws of Florida, creates §20.171(5), Fla. Stat., to resurrect the Florida Industrial Relations Commission which had been abolished in 1979. Its function is the review of decisions of the Judges of Compensation Claims in workers' compensation cases.

The creation of this Commission is fatally flawed.

The Act provides on page 16, lines 28 through 30, that the Commissioners of the Industrial Relations Commission are subject to the Judicial Qualifications Commission.

The Judicial Qualifications Commission was created by the people of Florida in Art. V, §12 of the Florida Constitution for the purpose of providing for the discipline, removal, and retirement of Art. V Judges.

The Act provides on page 16, lines 1 and 2, that the commissioners may be removed by the governor for cause.

The commissioners are officials of the executive branch of the government and it is appropriate for the governor to have the power to remove them for cause. It is wholly inappropriate for the Art. V Judicial Qualifications Commission to have such power. The Legislature does not have constitutional authority to give the Judicial Qualifications Commission powers and duties not given to the Judicial Qualifications Commission by Art. V, §12, Fla. Const. It cannot exercise authority over

officials of the executive branch of the government. This violates separation of powers required by Art. II, §3, Fla. Const. It provides:

> "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

The Act provides on page 16 that the initial appointment process, retention process, and filling of vacancies of unexpired terms for commissioners of the Industrial Relations Commission shall be made by the Supreme Court Judicial Nominating Commission.

The Supreme Court Judicial Nominating Commission is created by Art. V, §11, Fla. Const. It has authority to nominate candidates to the governor for appointment to the Supreme Court of Florida. It has no other power. The Legislature of the State of Florida does not have power to give to the Supreme Court Judicial Nominating Commission powers and duties not given to the Judicial Nominating Commission by Art. V, §11, Fla. Const. It cannot have the power to nominate Commissioners of the Industrial Relations Commission who are officials of the executive branch of the government. This violates separation of powers required by Art. II, §3, Fla. Const. Furthermore, the Supreme Court Judicial Nominating Commission has no power with respect to the retention of any judge. The retention of Supreme Court judges is provided for in Art. V, §10 of the Florida Constitution by a vote of the public under a modified Missouri Plan. The Commission has no powers with respect to retention of anyone. Nonetheless, the Act provides on pages 16, lines 10 through 17, that prior to the expiration of the term of an Industrial Relations Commissioner, the Supreme Court Judicial Nominating Commission shall render a report to the governor as to his fitness to be retained, and upon such a favorable

report, the governor must reappoint the Commissioner. In the event of an unfavorable report, then the nominating process is repeated. When the Supreme Court Judicial Nominating Commission submits a favorable report, the Act provides that the governor must reappoint. Thus the reappointment power is in reality performed by the Supreme Court Judicial Nominating Commission. The governor is powerless to overrule them. The Supreme Court Judicial Nominating Commission, would, in reality, be making reappointments to the executive branch. This violates separation of powers under Art. II, §3, Fla. Const.

The Appellants view this only as a problem of "where is the JNC located?" This is not the point. The point is that the Legislature attempted to give to the JQC and the JNC powers and duties beyond those conferred by Art. V, §11 and 12, Fla. Const., by giving them authority over government officials who were not Art. V judges. That is the separation of powers violation.

The Appellants' reliance on *Commission on Ethics v. Sullivan,* 489 So. 2d 10 (Fla. 1986) is misplaced. This Court approved of the Florida Commission on Ethics' placement in the legislative branch because: "In short, the commission administers no programs; it enforces no law." *Id.* at 13. Here, the Oversight Board and the Legal Counsel's placement in the legislative branch was invalid because that was precisely their function "to administer the provisions of the act". In addition, the appointment process scrambled and blended the executive and the legislative branches.

§118, Ch. 90-201, Laws of Fla., specifically provided that the appropriation was for this administration.

The 1990 Oversight Board is created by section 38 of the Act beginning on page 167. It consists of 10 members appointed by the Governor, 5

members appointed by the President of the Senate, and 5 members appointed by the Speaker of the House, of various backgrounds stated in the Act.

The Act provides on page 173, lines 1 through 3, that the Oversight Board is assigned to the Joint Legislative Management Committee. The Act also provides on page 169, lines 17 through 23, that the Oversight Board shall consist of 6 non-voting members consisting of 2 members of the House of Representatives, 2 Senators, the Insurance Commissioner, and the Secretary of the Department of Labor and Employment Security.

The Act provides on page 167, lines 25 through 30, that the Legislature delegates to the governor the power to appointment his citizen designated members to this Board, which is however located in the legislative branch. The governor cannot make appointments to committees located in the legislative branch. §118 of Ch. 90-201, Laws of Florida directed that the appropriation was to administer the Act. If that were the case, the Oversight Board could not be in the legislative branch and the Speaker and the President could not make appointments to the executive branch.

This Board violates separation of powers required by Art. II, §3, Fla. Const. The Oversight Board created by the 1989 Act did also. Section 22, Chapter 89-289, Laws of Florida, created §440.44(10), Fla. Stat., to provide for the creation of the Oversight Board which consisted of citizens of various stated backgrounds and legislators who were appointed by the governor. This Board was an agency located within the Division of Workers' Compensation of the Florida Department of Labor and Employment Security. In other words, it was an agency of the executive branch of the government which had among its members legislators appointed by the

governor. This clearly violates separation of powers as required by Art. II, §3, Fla. Const. The governor cannot appoint legislators to an executive agency. The 1989 Board was abolished by §37 of the 1990 Act. However, the invalidity of the 1990 Act in its entirety has the effect of reviving it.

The 1990 Act also created the office of legal counsel. In section 38, page 173, he is assigned to the Joint Legislative Management Committee. Section 38 of the Act goes on to provide on page 173, beginning on line 8, that the Joint Legislative Auditing Committee shall appoint a legal counsel who shall represent the people of Florida in any proceeding before the Department of Insurance with regard to rate making, etc., in regard to workers' compensation. He is given similar duties with regard to other workers' compensation matters.

Section 54 of the Act does not amend the Florida Statutes, but amends section 38 of Chapter 89-289, Laws of Florida. On page 208 of the Act, the legal counsel created by §440.4415, Fla. Stat., is authorized by the Legislature to participate in any legal action on behalf of the Florida Legislature which challenges the constitutionality of Chapter 89-289, Laws of Florida, or this act (Ch. 90-201, Laws of Fla.). The Florida Legislature enacts laws in conjunction with the governor. It does not enforce them. It does not implement them. It does not appear in court to defend their validity. That function belongs to the executive branch of the government and specifically to the Attorney General under Art. IV, §4(c), Fla. Const.

The Florida Legislature is without power to create its own legal department for the purpose of enforcing and defending the laws of Florida before the executive branch of the government and the judicial branch of the government.

The Circuit Court was correct in holding §3, §38, and §118 of Ch. 90-201 invalid.

The Circuit Court was correct in holding that these constitutional violations invalidate Ch. 90-201 in its entirety. The invalidity of these provisions gutted the Act of the mechanism whereby decisions of the Judge of Compensation Claims would be reviewable by the judicial branch. It also gutted the Act of the oversight of rate making and the administration of the Act. The Circuit Court was correct that these constitutionally invalid sections were of such importance that the Act was invalid in its entirety. They were not severable because taken together they completely abolished the governmental reforms provided for in the Act by eliminating the Industrial Relations Commission, the Oversight Board, and the Legal Counsel.

The Appellants' side argues that the 1991 legislation described as Senate Bill 8-B and House Bill 11-B resolve these constitutional defects in that §6 of House Bill 11-B repeals the creation of the Industrial Relations Commission, the Oversight Board and the Legal Counsel and the appropriation to the Joint Legislative Management Committee, notwithstanding their re-adoption in 1991 by Senate Bill 8-B. This, however, is incorrect since House Bill 11-B has a January, 1991, effective date and Senate Bill 8-B also passed in January of 1991, has a retroactive effective date to July 1, 1990. §54, Senate Bill 8-B (January, 1991, Special Session). The invalidity of this retroactive effective date is treated elsewhere in a companion brief of Appellees. However, under the 1991 Acts, if Senate Bill 8-B is retroactive, then the provisions regarding the Industrial Relations Commission, Oversight Board, Legal Counsel, and the appropriation to the Joint Legislative Management Committee which are the same in Ch. 90-

201, Laws of Florida, as they are in Senate Bill 8-B (January, 1991, Special Session). They were in force between July of 1990 and January of 1991. That being the case, such issues are unresolved for that period of time. More importantly, however, House Bill 11-B (January, 1991, Special Session) did not amend or repeal §23 or §25 or §26 of Senate Bill 8-B (January, 1991, Special Session). Instead, §440.25, Fla. Stat. was amended and §440.271, Fla. Stat. was amended by Senate Bill 8-B to read exactly the same as they were amended by Ch. 90-201, Laws of Florida. Regardless of whether the 1991 laws are retroactive or not, the provisions are the same. These sections of the Florida Statutes now provide that appeals from orders of Judges of Compensation Claims must be taken to the Industrial Relations Commission [which, however, does not exist] and the orders of the Industrial Relations Commission must be appealed to the First District Court of Appeal under the same circumstances as provided in §28, of Ch. 90-201, Laws of Florida.

If House Bill 11-B was the "fix bill"; it became the "glitch bill". In House Bill 11-B, the Legislature amended the Government Reorganization Act to abolish the Industrial Relations Commission but neglected to amend the Workers' Compensation Law to delete the references to the Industrial Relations Commission. §10 of House Bill 11-B does direct Statutory Revision to prepare a bill to be passed as some future date to conform the law to this change. However, in the meantime, the Workers' Compensation Law provides for a review procedure which does not exist. More importantly, even disregarding this impossibility, both the 1990 and the 1991 Acts provide for a fundamental change in the First District Court of Appeal's review, a change which is not constitutionally possible.

The Circuit Judge's decision invalidating the Act in its entirety for the creation of the Industrial Relations Commission in the manner provided for in Ch. 90-201, cured this defect. However, the Legislature's 1991 enactment did not. It made matters worse.

Section 27 of Chapter 90-201 [§25 of Senate Bill 8-B (January, 1991, Special Session)] provides that an appeal from an order of a Judge of Compensation Claims shall be made to the Industrial Relations Commission. Section 28 of Chapter 90-201 provides that the review of the orders of the Industrial Relations Commission shall be subject to review by appeal to the First District Court of Appeal. The Act provides on page 125, line 31, and page 126, line 1, that "the division shall have the right to intervene in any such review".

This language replaces the language formerly contained in §440.271, Fla. Stat., making the Division "a party respondent in every such proceeding" when such proceeding was an appeal to the First District Court of Appeal.

In *Rollins v. Southern Bell Telephone & Telegraph Co.,* 384 So. 2d 650, (Fla. 1980), the Supreme Court was confronted with the problem presented by the 1979 amendment to the Workers' Compensation Law which provided for appeal from the orders of the workers' compensation Deputy Commissioners to the First District Court of Appeal, notwithstanding that the claim arose outside of the district and that the parties, particularly the appellant, resided outside of the district. The Court held that this was permissible because the (former) statute did provide that the Division, which was located in Tallahassee, "be made a party respondent in every such proceeding".

The 1990 amendment (the 1991 amendment is the same) repeals the language relied on by the Supreme Court in *Rollins* to sustain the constitutional validity of the assignment of cases from outside the first district to the First District Court of Appeal. Eighty per cent of the population and most of the cases arise outside of the first district. Furthermore, only the people residing in the first district can vote for retention of the judges of that court. The rest of the people in Florida can not. There must be some constitutional justification for assigning these cases to the First District Court of Appeal. However, in the current amendment, the Legislature repealed the language that was the justification for the *Rollins* decision and substituted for it the language that the Division has the right to intervene in any such review. First of all, there is no provision in the Florida Appellate Rules to "intervene". See Fla. R. App. P. 9.360. That is a procedural device at the trial level under the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.230. More importantly, the statement that the Division has the right to intervene clearly indicates that the Division is not a party, otherwise there would be no need for it to intervene. Therefore, although the statute provides that the appeals must be taken to the First District Court of Appeal, the statute no longer contains a constitutional basis for such assignment.

The order of the Circuit Court holding that the creation of the Industrial Relations Commission, the Oversight Board and the Legal Counsel and the empowering of the Joint Legislative Management Committee to administer the Workers' Compensation Law were constitutionally invalid should be affirmed for violations of separation of powers. The Circuit Court's holding that these violations were of such magnitude as to invalidate the Act in its entirety should also be affirmed.

POINT II

THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THE 100 MILE RADIUS WORK SEARCH REQUIREMENT FOR PERMANENT TOTAL DISABILITY IS CONSTITUTIONALLY INVALID.

Section 20 provides, on page 84, lines 3 and 4, of the Act that there is a burden upon the employee in order to be entitled to permanent total disability: he must show that he is not able, uninterruptedly to do even light work available within a 100-mile radius of the injured employee's residence due to physical limitation.

Such a requirement replaces the reasonable man test of the existing law whereby the employee was required, in order to be entitled to permanent total disability, to demonstrate that he had made a reasonable effort to find suitable work commensurate with his physical limitations, or that his physical limitations were so great that such a job search effort was unreasonable or futile. *Chicken 'N' Things v. Murray,* 329 So. 2d 302 (Fla. 1976) and its progeny. Instead, the reasonable man test and the reasonable conduct test have been replaced by a mechanical standard which is arbitrary and capricious. Actually, it is a little bit silly in view of the fact that Florida is a state which has a substantial coastline so that for those people who live on the coast, much of the 100 mile radius required by the statute would consist of either the Atlantic Ocean or the Gulf of Mexico. In Southeast Florida, this would involve two foreign countries: the Bahamas and Cuba. This mechanical standard has no regard to the availability of public transportation or the employee's own transportation opportunities as well as his physical limitations and his ability to travel. Neither does it consider that in the more populous areas a 100-mile radius would involve

thousands of jobs. In Miami, this requirement would be staggering. In the more rural areas of the state, the number of available jobs would be considerably less, but the transportation opportunities would be extremely limited. In point of fact, requiring any permanently impaired employee to go to up to 100 miles to work and 100 miles back is excessive. E.g. *Drummond v. Plumbing Corp. of America,* 428 So. 2d 741 (Fla. 1st DCA 1983).

This requirement is unfair and unreasonable. The Circuit Court was correct in holding it invalid.

POINT III

THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THE "SUPER DOC" PROVISION IS CONSTITUTIONALLY INVALID.

From a constitutional standpoint, "Super Doc" is fatally flawed for multiple reasons. It violates substantive due process of law because it transfers the real decision-making from the Judge of Compensation Claims, the government official, to the expert witness-physician called "Super Doc". The statute makes the Judge a spectator in his own courtroom; the real decision is made by "Super Doc". The "Super Doc" provision violates procedural due process because the due process hearing before the Judge of Compensation Claims would be a mockery. The opinions of the treating physicians and others, even direct evidence would be meaningless. It is the opinion of "Super Doc" that counts. Furthermore, the execution of this concept in the 1990 Workers' Compensation Law is replete with due process and equal protection violations.

Section 18, page 67, lines 4-30 and page 68, lines 1-14 of the Act provide for what is known as "Super Doc". It provides for three conditions precedent: (1) a "disagreement in the opinions of the health care providers"; or (2) two health care providers have determined that there is no medical evidence to support the claimant's complaints or the need for additional medical treatment; or (3) two health care providers agree that the employee is able to return to work. The first condition precedent only requires that there be a disagreement in the opinions of health care providers. The disagreement may be trivial. The health care providers involved may be of different specialties or even different disciplines. This condition precedent is all encompassing and could be used in almost any case because doctors

disagree about everything. See *Andrews vs. C.B.S. Division Maule Industries,* 118 So. 2d 206 (Fla. 1960).

The second condition precedent is inartfully drawn because it describes a circumstance in which two physicians have determined that there is no medical evidence. In the due process sense, it is not the witnesses who determine that there is no medical evidence, but rather the judge deciding the case.

The third condition precedent is also inartfully drawn because it describes a circumstance in which two physicians agree that the employee is able to return to work. The statute goes on to provide that upon the happening of any one of these three conditions precedent, either the injured employee, the employer, or the carrier may make a written request to the Judge of Compensation Claims for the appointment of "Super Doc". The statute provides that 15 days after receipt of the written request the Judge of Compensation Claims shall order the injured employee to be evaluated by an appropriate health care provider from a list provided by the Division. The statute contains no provision for a hearing and the time limitation stated is too short to conduct one. The drafter of the statute seems to have assumed that the files of all injured employees were in the hands of the Judge of Compensation Claims. This is not the case. The statute described a written request being made to the Judge of Compensation Claims. However, if no application for hearing upon a formal claim had been previously filed, the case file would not be assigned to a Judge of Compensation Claims nor actually physically transferred to him. The Judge of Compensation Claims would have to wait until the file was assigned to him and actually physically transferred to him. When this provision is read in conjunction with section 25 on page 120, lines 19-28, of

the Act, it is seen that the Judge of Compensation Claims must give at least 15 days advance notice of a hearing by mail, and he must also conduct a pretrial and give the parties at least 90 days to conduct discovery. Plainly, the 15 days between request and order in the "Super Doc" provision does not provide for, or allow, notice or hearing. Since "Super Doc" is not a naked request, there must be a hearing in order to determine whether the conditions precedent were met or not met in order to trigger the invoking of the "Super Doc" provision. Surely an affected party ought to be entitled to a hearing to contest whether the conditions precedent for the appointment of "Super Doc" were met.. The "Super Doc" provision directs the Division to prepare a list of appropriate health care providers for this purpose, but it fails to provide any criteria by which this power is delegated to the Division. Although no list is presently available, the draft rule of the Division provides that all licensed medical practitioners are on the list. (R. 205, Exhibits Nos. 15 and 21). The statute next provides:

> "The opinion of the health care provider shall be presumed correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims."

"Super Doc" should be read in conjunction with Section 8, page 22, lines 21-31, and page 23, lines 1-8 of the Act, a declaration of legislative intent, which has been described as the "open field" provision.

Section 8 of the Act provides that the facts in a workers' compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and 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 the employer on the other hand. The Legislature may have adopted this

statement of legislative intent, but the actual procedure is the "Super Doc" provision, which is exactly the opposite. The field is not open; it is closed by "Super Doc".

The provision that the opinion of "Super Doc" "shall be presumed correct unless there is clear and convincing evidence to the contrary" is totally abhorrent to due process of law and equal protection of the laws.

First of all, the opinion of "Super Doc" is not limited to the opinion of the physicians which were the condition precedent for invoking "Super Doc". There is no requirement that there be a nexus between the condition precedent which gave rise to the appointment of "Super Doc" in the first place and the opinion of "Super Doc" which is presumed to be correct. It could be in disagreement with any of the opinions in the condition precedent, support one and not the other, or be something completely different. However, without knowing what this opinion is, the Legislature has provided that this opinion is presumed to be correct. The statute makes one expert witness' opinion testimony on a point better than that of any other expert witness as a matter of law. In reality it makes "Super Doc" the judge because his opinion would be the decision. This the Legislature cannot do. There is no basis to give "Super Doc" such powers.

Furthermore, the requirement that such expert opinion testimony can only be overcome by clear and convincing evidence is an unreasonable mismatch because it is only an opinion in the first place. How can a contrasting opinion ever rise to the level of clear and convincing evidence? It cannot. The clear and convincing evidence test is more than a preponderance of the evidence. Such a heavy burden has no place in workers' compensation. In such a case, the right to notice and hearing

would be a total mockery. This is true whether the burden is upon the employee or upon the employer/carrier.

It really does not matter whether the burden to overcome "Super Doc's" opinion by clear and convincing evidence is upon the employee or the employer/carrier in any given case. Due process is missing in either event. However, as a practical matter, notwithstanding the statement of legislative intent of an open field, if the "Super Doc" provision is read in conjunction with the independent medical examination provision, it will be seen that one party has an enormous and unfair advantage over the other. Section 18, page 61, lines 3-17, of the Act authorizes an "independent medical examination" by a physician selected by the employer/carrier. Aside from the misnomer, the statute provides:

> "The employer or carrier has the right to schedule an independent medical examination with a health care provider <u>of its choice</u>, at a reasonable time to assist in determining this status." (emphasis added).

This should also be read in conjunction with section 18 of the Act, page 58, lines 26-28 of the Act, which defines an independent medical examination to mean an objective medical or chiropractic evaluation. The use of the adjective "objective" transforms the examination out of subjectivity. The statute decrees that if it was an IME, it was objective as a matter of law.

This provision does not limit the examination as to place, but only as to time. Under the former statute, the employer/carrier had a right to request a medical examination to which the employee could either agree or disagree. If he disagreed, the matter could come before the Judge of Compensation Claims after a due process hearing and the Judge could decide either to require the medical examination or not, and if so by a

physician of the claimant's choice, the employer/carrier's choice, or the Judge's choice. Under this provision, the Judge's power to appoint a physician for the independent medical examination has been abolished. The statute now provides that the employer/carrier "has the right to schedule an independent medical examination with a health care provider of its choice". Under the statute, in the event of a dispute, the Judge of Compensation Claims must accept the choice of the employer/carrier. A hearing on the issue would be useless. Again, there is no due process of law in this and it is unreasonable. The judicial function is to resolve disputes. The statute takes that function away from the judge and provides that the employer/carrier has the absolute right to select the physician for its independent medical examination. It should be borne in mind that the employee did not have a free choice of physician in the first place since the employer/carrier is only required to pay those physicians whom it authorized or whom the Judge ordered it to pay. As a practical matter, in all but controverted compensability cases, the employee would be under treatment by an authorized treating physician selected by the employer/carrier. Yet the employer/carrier is entitled to an "independent medical examination" by another physician of its own choice. Thus the employer/carrier has within its means the ability to create the disagreement, however trivial, which is one of the conditions precedent for invoking "Super Doc". The result of this is to cast upon one side or the other, and most likely upon the employee, an outrageously difficult and totally unreasonable burden of proof: "clear and convincing evidence".

The statute goes on to provide that "Super Doc" shall have free and complete access to the medical records of the employee and that compensation shall terminate during any period in which the employee

fails to report or cooperate with such evaluation [there is no provision for reasonable excuse]. The statute provides no limitation in terms of time upon the opinion of "Super Doc". Under the terms of the statute, it could be stated at any hearing into the indefinite future, and would always be presumed correct. The statute ends with the requirement that "Super Doc" submit a copy of his report within 30 days after the Judge's order appointing "Super Doc" (apparently without regard to when the examination took place or whether this is possible). A copy of "Super Doc's" report shall be furnished to the employer or carrier. However, there is no requirement that it be sent to the employee. Finally the statute provides that "Super Doc" is immune from suit. This is the highest privilege that the Legislature can confer; it is better than a tax break. However, in this situation there is no quid pro quo, which makes such unwarranted gift unconstitutional. See *Sunspan Engineering and Construction Co. v. Spring-Lock Scaffolding Co.,* 310 So. 2d 4 (Fla. 1975).

For these reasons Judge Hall was correct that the "Super Doc" provision was constitutionally invalid.

POINT IV

THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THE BURDEN OF PROOF FOR WAGE LOSS WHICH EXCLUDED CONSIDERATION OF ECONOMIC CONDITIONS IS CONSTITUTIONALLY INVALID.

Section 20, page 94, lines 30 to 31, and page 94, lines 1-9 of the Act provides: When an employee has a permanent impairment of at least 1%, but not more than 20% of the body as a whole, the burden is on the employee to demonstrate that his "post injury earning capacity" is less than his pre-injury average weekly wage and is not the result of economic conditions or the unavailability of employment or his own misconduct. It further provides that in the case of an employee whose permanent impairment is 21% or more of the body as a whole, the burden is on the employer to demonstrate that the employee's post injury earning capacity is the same or more than his pre-injury wage.

This statute is inartfully drawn since it uses the phrase "earning capacity" The statute does not provide for any payment for loss of earning capacity. However, these words should be read in pari materia with the existing provision in §440.15(3)(b)2, Fla. Stat. (1990) which provides that the amount which the employee is able to earn after reaching the date of maximum medical improvement shall in no case be less than the sum actually being earned. Nonetheless it is plain that this amendment places upon the employee who has an impairment of 20% of the body or less the burden of showing that his wage loss is not the result of economic conditions or the unavailability of employment or his own misconduct. As a practical matter, an impairment rating of 20% of the body would include most of the common injuries resulting in permanent impairment for

which wage loss benefits are payable. (R. 245-247). More importantly, the statute places upon the employee the burden of proving that his wage loss exists in an unreal world, in a world in which economic conditions or the unavailability of employment do not exist. Such a burden is impossible to sustain because it does not relate to the real world. Therefore this provision fails constitutional muster.

This provision legislatively overrules the decisions of the First District Court of Appeal in *Regency Inn v. Johnson,* 422 So. 2d 870 (Fla. 1st DCA 1982); petition for review denied, 431 So. 2d 989 (Fla. 1983) and *City of Clermont v. Rumph,* 450 So. 2d 573 (Fla. 1st DCA 1984); petition for review denied, 458 So. 2d 271 (Fla. 1984).

To understand *Regency Inn,* it is helpful to understand the difference between loss of earning capacity as determined under the 1978 Workers' Compensation Law and all of its predecessors, and wage loss under the 1979 Law and all of its successors. Under the 1978 statute, an employee who suffered a permanent impairment due to injury to the trunk of his body or the trunk and an extremity or two or more extremities, was entitled to compensation for a percentage of a number of weeks allowed for permanent injury to the body. This could be on two bases, either the degree of permanent physical impairment expressed in percentages of the body as rated by a physician; or the loss of earning capacity also expressed in percentages, whichever of the two was the greater. §440.15(3), Fla. Stat. (1978). Loss of earning capacity was determined by taking into account the employee's permanent physical impairment in conjunction with his age, education, industrial background, average weekly wage, post recovery earnings, motivation, as well as the availability of work which the employee

could perform insofar as affected by his injury. *Walker v. Electronic Products & Engineering,* 248 So. 2d 161 (Fla. 1971).

A rather simple example of this is the employee who suffered an injury leaving him with a 15% permanent impairment of the body who had had a job consisting of heavy work which paid him $500.00 per week which he could no longer perform; and he was now employed at lighter work which paid $250.00 per week. Under *Walker,* post recovery earnings were a factor to be given great weight. While it is an oversimplification, it could be said that such an employee had a 15% impairment of the body on a physical basis, or a 50% loss of earning capacity. He would be entitled to the greater of the two. This was a determination which would be made by the employer/carrier in a self-administering way at the time of maximum medical improvement. If the employee were dissatisfied with the degree of permanency either for impairment or loss of earning capacity which had been accepted by the employer/carrier, he could apply for a hearing before the Judge of Compensation Claims. The Judge would then conduct a hearing, consider all relevant evidence, and make <u>one determination only once in the employee's life time</u> of what was the degree of permanent physical impairment and what was the loss of earning capacity and make an award accordingly. Such determination would be subject to modification, but modifications were difficult to obtain. E. g. *Hall v. Seaboard Maritime Corp.,* 104 So. 2d 384 (Fla. 1st DCA 1958)

As a practical matter, loss of earning capacity was something that was determined only once and this should have been immediately following maximum medical improvement. See *Nuce v. City of Miami Beach,* 140 So. 2d 303 (Fla. 1962).

The 1979 statute, which is a wage loss system, provides no payment for permanent impairment for injuries to the trunk of the body. §440.15(3)(a), Fla. Stat. (1979). Common permanent injuries to the knees, or to the spine, or to the shoulder, neck, do not result in any payment for permanent injury. Ibid. The statute provides certain payments for amputation of extremities as an impairment benefit only. Ibid. The amount payable for these was increased in 1982, but the list of qualifying injuries is very limited. §440.15(3)(a), Fla. Stat. (1982). The entitlement of an employee, who has a permanent impairment, to any benefit, is determined by a comparison between his average weekly wage and his actual earnings, if any, during a fixed period of time and this calculation is repeated over and over again for each period of time involved. §440.15 (3)(b)1, Fla. Stat. Under the original 1979 Act, wage loss for permanent injury was calculated monthly for up to 350 weeks. §440.15 (3)(b)3, Fla. Stat. The statute later read that the calculation was to be made bi-weekly for up to 525 weeks. Ibid. Under the 1990 amendment the available weeks are substantially reduced, but the bi-weekly calculation remains. §20, Ch. 90-201, Laws of Fla. What this means is that in each bi-weekly period following maximum medical improvement, the employee's entitlement to wage loss benefits is calculated according to the statutory formula based on the difference between his average weekly wage earned before his injury and his actual earnings during each two-week period. In such a system, what was earned or not earned in any previous two-week period is essentially irrelevant. *Shelfer v. Dairymen, Inc.,* 543 So. 2d 246 (Fla. 1st DCA 1989). Each two-week period is considered by itself, apart from the threshold issue whether the employee had a permanent physical

impairment. *Wellcraft Marine Corp. v. Turner,* 435 So. 2d 864 (Fla. 1st DCA 1983); *Shelfer v. Dairymen, Inc.,* supra.

The wage loss system was first enacted in Florida in 1979 and it required interpretations by the judicial branch of the government as to how this statutory scheme would work in actual practice.

One of the most immediate and obvious problems occurred when, following maximum medical improvement, the employee had no earnings at all in the applicable monthly period used to make the calculation [or later the applicable bi-weekly period].

The 1979 statute provided that the employee who voluntarily limited his income was entitled to have his wage loss benefit calculated in any given period according to his loss of earning capacity. §440.15(3)(b)2, Fla. Stat. (1979). It provided:

> "The amount determined to be the salary, wages, and other remunerations the employee is able to earn after reaching the date of maximum medical improvement shall in no case be less than the sum actually being earned by the employee, including earnings from sheltered employment. In the event the employee voluntarily limits his or her income, or fails to accept employment commensurate with his or her abilities, the salary, wages, and other remuneration the employee is able to earn after the date of maximum medical improvement shall be deemed to be the amount which would have been earned if the employee did not limit his or her income or accepted appropriate employment. Whenever a wage-loss benefit as set forth in subparagraph 1. may be payable, the burden shall be on the employee to establish that any wage-loss claimed is the result of the compensable injury."

Going back to the 1978 law and its predecessors, this Court had already adopted the view that the employee who had a permanent physical impairment but who had voluntarily limited his income by refusing to seek suitable employment was not entitled to loss of earning capacity in the one

time only determination. *Exxon Co. v. Alexis,* 370 So. 2d 1128 (Fla. 1978). This "good faith work search" requirement was fully explained by the First District Court of Appeal in *Flesche v. Interstate Warehouse,* 411 So. 2d 919, at 924-26 (Fla. 1st DCA 1982).

In interpreting the 1979 law, the First District Court of Appeal applied the "work search test" for loss of earning capacity under the 1978 law as the test for whether the employee had voluntarily limited his income. This, however, did produce a conundrum. Under the 1977 [1978 type] statute an employee who did not make a good-faith work search was not entitled to an award for loss of earning capacity. *University of West Fla. v. Nall,* 404 So. 2d 381 (Fla. 1st DCA 1981). However, the 1979 statute specifically provided that an employee who voluntarily limited his income was not entitled to an award based on actual wage loss but was entitled to an award for loss of earning capacity. Originally the First District Court of Appeal addressed this problem by concluding that the employee who had voluntarily limited his income was entitled to nothing during any given period for the calculation of wage loss. E. g. *B. P. Construction, Inc. v. Garcia,* 440 So. 2d 76 (Fla. 1st DCA 1983). However, obviously, if the employee subsequently did not limit his income, he would be entitled to compensation during subsequent periods of time. Ibid.

The statutory language specifically provided that the employee who voluntarily limited his income was entitled to a benefit based on a determination of his loss of earning capacity. §440.15(3)(b)2, Fla. Stat. (1979). This accounts for the "deemed earnings" concept which was particularly applicable in those cases in which the employee had limited his income for a limited and specific period of time, but either had employment or was actively seeking employment in subsequent periods of

time. *Sigma Co. Commercial Division v. Calhoun,* 475 So. 2d 733 (Fla. 1st DCA 1985); *Anderson v. S & S Diversified, Inc.,* 477 So. 2d 591 (Fla. 1st DCA 1985); petition for review denied, 486 So. 2d 597 (Fla. 1986).

There are three different reasons which could account for an employee voluntarily limiting his income in a specific period of time: (1) good reasons like quitting a job to take care of a sick relative; *Lykes Bros., Inc. v. Jackson,* 461 So. 2d 247 (Fla. 1984), *Spartan Electronics v. Russell,* 513 So. 2d 153 (Fla. 1986); or losing a job due to subsequent injury; *McNeil v. Progressive Driver Services,* 513 So. 2d 195 (Fla. 1st DCA 1987); (2) neutral reasons like being laid off, which might entitled the employee to unemployment compensation which would be a credit against workers' compensation owed; §440.15(10), Fla. Stat.; but in some instances the employee would not be entitled to unemployment compensation; *STC/Documation v. Burns,* 521 So. 2d 197 (Fla. 1st DCA 1988) or (3) bad reasons like the employee's misconduct. *Williams Roofing, Inc. v. Moore,* 447 So. 2d 968 (Fla. 1st DCA 1984).

Since the wage loss system calculated each benefit for each applicable period of time, the issue whether the employee had limited his income for good, neutral or bad reasons in some other period of time is essentially irrelevant. *Shelfer v. Dairymen, Inc.,* supra. Therefore, the employee who has lost his job for good, neutral, or bad reasons would still be entitled to compensation based on a wage loss in a subsequent period of time upon obtaining employment if he still sustained a wage loss. *Baggett v. Mulberry Construction Co.,* 549 So. 2d 1386 (Fla. 1st DCA 1989).

A different question, however, concerned the employee who in a given wage loss period, instead of having a job which paid less money, had no job at all. In such case a determination would have to be made as to

whether (1) the employee was limiting his income by not looking for work at all; or (2) he had not limited his income and therefore was entitled to wage loss benefits based on the statutory formula. The employee would be entitled to benefits based on a good-faith work search during the applicable period of time. If the employer/carrier was satisfied that the employee had made a good-faith work search during the applicable period of time, the employee would be paid benefits. If the employer/carrier did not pay benefits because they believed that he had not made a good-faith work search, then the employee either accepted that and made claim for subsequent periods of time, if applicable, or he presented his claim to the Judge of Compensation Claims for a determination of the question whether he had made a good-faith work search or not. A good-faith work search means that the employee had looked for work in the applicable period of time in sufficient numbers and in an appropriate way considering his injuries, his age, his work experience, the geographical area in which he sought employment, and so on. *Regency Inn v. Johnson,* supra. It may be that there was not employment available to him during the applicable period of time, even though we would all agree that he had made a good-faith effort to find such employment. The question confronted by the First District Court of Appeal en banc in *Regency Inn v. Johnson,* supra, was whether a good-faith work search was to be evaluated in a vacuum without regard to whether suitable jobs were, in fact, available, or whether it was to be evaluated with regard to the real world in which economic conditions, unemployment and even prejudice against the physically handicapped exist.

The employer/carrier in *Regency* argued that the entitlement to wage loss based upon a good-faith work search in a given period of time had to be

done in a vacuum, considering only the employee's physical impairment and nothing else. The court concluded that this could not be so on a constitutional basis because this would cast upon the employee a burden of proof which was impossible to sustain. As a practical matter, prospective employers would be unlikely to admit that they had refused to hire the employee because he was physically handicapped. As a practical matter, in many places, it would be disruptive of the economy for the Judge of Compensation Claims to have subpoenaed before him the employers of the community to be paraded, each to explain why they had not hired the employee when he applied for work. More importantly, the court recognized that wage loss did have to be determined with reference to the real world, and that a good-faith work search had to be evaluated in terms of the availability of employment in the applicable period of time within a reasonable area, under reasonable circumstances, in terms of a reasonable effort to find suitable employment. The court clearly stated that it simply had to be this way or the wage loss system would not and could not work. For it to be otherwise would imperil the wage loss system as an alternative remedy. For it to be otherwise would be unconstitutional. The next session of the Legislature amended into statute the contention of the employer/carrier in the *Regency* case. In *City of Clermont v. Rumph,* supra, the First District Court of Appeal clearly stated that this language must be considered to be ineffective, for otherwise it was constitutionally impermissible.

The 1990 statute was a blatant attempt by the Legislature to legislatively overrule *Regency* and *Rumph*. It even more specifically placed this constitutionally impermissible and impossible burden upon the employee.

The Circuit Judge held this language establishing a burden of proof upon the employee who had a 20% impairment of the body to prove that his wage loss was not due to economic conditions or unemployment or his own misconduct to be constitutionally invalid.

The Appellants and the Interveners and Amicus Curiae on their side, place before this Court the proposition that *Regency Inn v. Johnson*, supra, and *City of Clermont v. Rumph*, supra, should be overruled. They argue that this Court should defer to the Legislature even though this would place upon the employee a burden of proof which is impossible to sustain.

The First District Court of Appeal's en banc decision in *Regency Inn v. Johnson,* 422 So. 2d 870 (Fla. 1st DCA 1982); petition for review denied, 431 So. 2d 989 (Fla. 1983) is correct. The court was confronted with language in the original, that is the 1979, wage loss statute, requiring that the burden be on the employee to establish that any wage loss claimed is the result of the compensable injury. In that case the employer/carrier argued that the unavailability of jobs due to economic conditions precluded recovery of wage loss benefits. For a number of reasons the court rejected this contention. One of the reasons was that such a requirement would amount to depriving workers' compensation claimants "...of a remedy for work-related injuries, and seriously affecting, in our judgment, the rational balancing of the rights and interests of both employers and employees which is necessary to give validity to the wage loss concept." [citing among other cases, *Kluger v. White,* 281 So. 2d 1 (Fla. 1973)] *Regency Inn v. Johnson,* supra at 879. (emphasis added) The en banc court held:

> "We hold that the unavailability of jobs due to economic conditions does not preclude recovery of wage loss

> benefits and, accordingly, it is not necessary for a wage loss claimant to present evidence that his refusal for employment was not due to unavailability of jobs resulting from economic conditions. Any other decision on this issue would convert wage loss hearings under the act into seminars on economics, requiring the gathering and presentation of complex information beyond the ken of all but the most schooled in the field of economics, and certainly beyond the resources and ability of the average worker to present or defend against. The sheer impracticability of burdening wage loss claim procedure with such evidence is obvious." *Regency Inn v. Johnson,* supra at 879.

The next session (1983), the Legislature amended the statute to provide that the burden was on the employee to show that his inability to obtain employment or to earn as much as he earned at the time of the industrial accident is due to physical limitation related to his accident and "not because of economic conditions or the unavailability of employment". §440.15(3)(b)2, Fla. Stat. (1983).

The matter went back to the First District Court of Appeal and the court held that the 1983 amendment could not have changed *Regency Inn.* The court concluded that if it did, this "...would seriously imperil the constitutional validity of the Workers' Compensation Law." *City of Clermont v. Rumph,* 450 So. 2d 573 (Fla. 1st DCA 1984); petition for review denied, 458 So. 2d 271 (Fla. 1984). (emphasis added).

> "To whatever extent the 1983 amendment applies in this case, we conclude that claimant has satisfied the evidentiary burden which the amendment imposes. The contested provision was enacted at the next legislative session after this court's en banc decision in *Regency Inn v. Johnson,* 422 So. 2d 870 (Fla. 1st DCA 1982), which expressly held that:
>
> > . . . the unavailability of jobs due to economic conditions does not preclude recovery of wage loss benefits, and, accordingly, it is not necessary for a wage loss claimant to present evidence that his

> refusal for employment was not due to unavailability of jobs resulting from economic conditions . . . .

Employer/carrier argue that the 1983 amendment has effectively overruled *Regency Inn,* and precludes an award of wage loss benefits unless a claimant establishes that economic conditions do not affect his employability. In *Regency Inn* the employer/carrier suggested a similar construction of § 440.15(3)(b), as then enacted. In rejecting this argument the en banc court noted that:

> . . . the employer/carrier's view is fundamentally flawed by its failure to take into account the aspect of 'certainty' of recovery which is said to contribute to the constitutional validity of the workers' compensation system. *Acton v. Ft. Lauderdale Hospital,* 418 So. 2d 1099 (Fla. 1st DCA 1982) . . . .

The court further observed that such an approach would have the effect of withholding wage loss benefits in times of economic depression, thereby

> . . . depriving those workers' compensation claimants of a remedy for work-related injuries, and seriously affecting, in our judgment, the rational balancing of the rights and interests of both employers and employees which is necessary to give validity to the wage loss concept. *Acton v. Ft. Lauderdale Hospital* . . . .

As *Regency Inn* thus indicates, in the present case employer/carrier's suggested construction of the 1983 amendment to § 440.15(3)(b) would seriously imperil the constitutional validity of the workers' compensation law." *City of Clermont v. Rumph,* 450 So. 2d 573 at 575, 576. (emphasis added)

The provision of §20, Chapter 90-201, Laws of Florida providing that the burden is on the employee who has a 20% impairment or less of the body to show that his wage loss is not due to economic conditions or the unavailability of employment is clearly unconstitutional.

In *Regency Inn* the court held that a good faith work search established a causal relationship between the employee's impairment and his wage loss, and that once that was established, the burden shifted to the employer/carrier:

> "Once this evidence has been presented by the employee, the burden of proving that the employee has refused work or voluntarily limited his or her income is on the employer. [citing authority] *Regency Inn v. Johnson,* supra, at 876.

The "open field" amendment would violate this part of *Regency Inn* as well. See *Florida Mining and Minerals v. Brantley,* 418 So. 2d 352 (Fla. 1st DCA 1982).

This same burden of proof rule applies when the employee has employment with earnings which are less than the average weekly wage. *Rios v. Teitelbaum Construction,* 522 So. 2d 1015 (Fla. 1st DCA 1988).

Plainly "open field" in conjunction with the "20% burden" creates a burden of proof in wage loss cases which the employee can never sustain, because the real world has unemployment. It has economic conditions. The handicapped worker is competing for jobs against non-handicapped workers. He is the last to be hired and the first to be fired.

The Circuit Court was correct that the provisions of §20, Chapter 90-201, Laws of Fla., requiring an employee with a permanent impairment of 20% of the body or less to show that his wage loss was not due to economic conditions, the unavailability of employment, or of his own misconduct is constitutionally invalid.

POINT V

THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THE "SUNSET" OF THE WORKERS' COMPENSATION LAW IN THE 1989 ACT AND ITS RETROACTIVE REPEAL IN THE 1990 ACT ARE CONSTITUTIONALLY INVALID.

Section 43 of Chapter 89-289, Laws of Florida, provides:

> "Chapter 440, Florida Statutes, is repealed on October 1, 1991, and shall be reviewed by the Legislature pursuant to s. 11.61, Florida Statutes."

The Circuit Court declared the 1990 amendment to the Florida Workers' Compensation Law be declared invalid. This had the legal effect of reviving the Workers' Compensation Law as it read in 1989. The Circuit Court's invalidating the 1990 Workers' Compensation Law included §56 of Chapter 90-201 which repealed section 43 of Chapter 89-289. In other words, the invalidity of the 1990 amendment to the Workers' Compensation Law revived §43 of Chapter 89-289, the sunset provision of the 1989 Act. The Circuit Court also declared this invalid on the ground that the Legislature could not use its power to sunset regulatory agencies under §11.61, Fla. Stat. to sunset general law.

The problem may be viewed on three levels: (1) the Legislature does not have the ability to sunset general law; (2) the Legislature does not have the ability to sunset general remedial law; and (3) the Legislature does not have the ability to sunset the Workers' Compensation Law.

Laws of Florida, Chapter 89-289, §43 provides that the sunset was invoked under the Legislature's powers pursuant to §11.61, Florida Statutes. This relates to the sunset of regulatory agencies. It is inappropriate for the Legislature to use its statutory power to sunset regulatory agencies in order to sunset the general law of the state and most

especially a part of the remedial law of the state, in this instance, the Workers' Compensation Law. Under *Kluger v. White,* supra, the Legislature is without power to abolish the Florida Workers' Compensation Law without providing a reasonable alternative because the Florida Workers' Compensation Law existed prior to the enactment of the 1968 Constitution. Section 43, Laws of Florida, Chapter 89-289 is a repeal of the Florida Workers' Compensation Law without the providing for reasonable alternative. Therefore, "sunset" violates *Kluger v. White,* supra.

The sunsetting of general law is offensive to separation of powers and the governor's veto power.

Art. III, §8(a), Fla. Const., provides for the sharing of the power to enact legislation by the Legislature together with the governor. This provides that the governor may veto an act of the Legislature or not. If he does veto an act of the Legislature, then the status quo is maintained. The sunsetting of the Workers' Compensation Law in this instance, however, is designed to place a constraint upon a future governor's power to veto. The governor would be considering an act of the Legislature which, if he vetoed it, would not maintain the status quo, but would have the effect of repealing the existing statute. His choice is thus constrained to accept what they have more recently enacted knowing that his veto is a repeal of the existing law. This legislative device is designed to give greater power to the Legislature against the governor's veto power. It forces him into a subservient position with respect to the sharing of the power to enact legislation into law. This is contrary to the Constitution.

Such a sunset provision is also a "dead hand" statute because it binds a subsequent session of the Legislature to act on a particular subject in a certain way even though those members of the Legislature have not yet even

been elected. Under the Constitution, each session of the Legislature should be free to either amend the statutes or create laws, or not. It should not be enslaved by a previous session of the Legislature. The sunsetting of general law, the sunsetting of general remedial law, the sunsetting of the Florida Workers' Compensation Law is abhorrent to a constitutional form of government. Given the doctrine of judicial economy, it would be possible for this Court to decide this question by merely holding that the Legislature does not have the power to sunset the Workers' Compensation Law since it did exist prior to the 1968 Constitution, *Kluger v. White,* supra. On the other hand, this Court may wish to go on to the real question, which is whether the Legislature may sunset general law at all, since it is a handicap to future governors in the exercise of their veto power.

The trial court held "sunset" invalid on the narrow ground that the Legislature could not use its power to sunset regulatory agencies to repeal the Workers' Compensation Law. This decision was correct on that narrow basis on any of the other broader bases.

The Circuit Court also held that §56 of 90-201 was invalid. This section provided for the retroactive repeal of the sunset. It was not a simple repeal. It was a retroactive repeal, as though the "sunset" had never been enacted. It was an ex post facto law forbidden by both the state and federal constitutions. The Legislature may not change history. For the reasons stated in the companion briefs of the other Appellees dealing with retroactivity, this was impermissible as well.

CONCLUSION

In its 1990 publication "55th Anniversary Workers' Compensation Act" on page 3, the State of Florida, Department of Labor and Employment Security, stated:

> "Under workers' compensation, the worker sacrifices the right to receive fair, just, and adequate treatment."
>
> Exhibit No. 44-Deposition Exhibit No. 5.

The Constitutions of the United States and of the State of Florida do not allow workers to sacrifice the right to receive fair, just and adequate treatment under a state statute.

The Circuit Court was correct in holding Ch. 90-201, Laws of Fla., invalid in its entirety. The Circuit Court was correct in invalidating §43 of Ch. 89-289, Laws of Fla.

The Circuit Court was correct in holding certain individual provisions of Ch. 90-201, Laws of Fla., to be constitutionally invalid.

The order of the Circuit Court should be affirmed, although it should also be modified with respect to the arguments made by the Appellees/Cross Appellants as to the invalidity of other provisions of Ch. 89-289, Laws of Fla., and Ch. 90-201, Laws of Fla.

Respectfully submitted,

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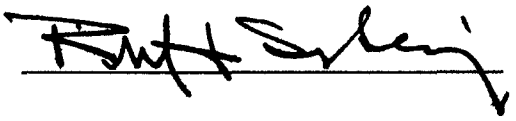

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed on the 12th day of day of February, 1991, to:

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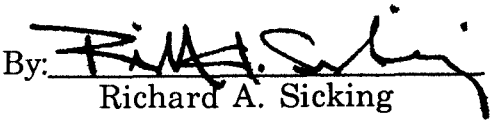
By: 
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