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.

BRIEF OF CROSS APPELLANTS, MARK SCANLAN and PROFESSIONAL FIRE FIGHTERS OF FLORIDA

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STATEMENT OF THE CASE

This is a cross appeal by the plaintiffs from the order of Judge J. Lewis Hall, Jr. dated December 5, 1990, holding constitutional those individual portions of Chapter 90-201, Laws of Fla., and certain challenged portions of Chapter 89-289, Laws of Florida, other than those which he declared unconstitutional: (1) "Super Doc"; (2) 100 mile work search for permanent total disability; (3) burden of proof for 20% impairment; (4) Industrial Relations Commission; (5) Joint Legislative Management Committee - appropriation and powers; and (6) "Sunset" of the Workers' Compensation Law.

STATEMENT OF THE FACTS

The provisions of Ch. 90-201, Laws of Florida, involved in this lawsuit are briefly described as follows:

Section 1	Title
2	Division of Insurance Fraud (creation - powers)
3	Industrial Relations Commission (creation - powers)
5, 6, 7	Division of Safety (creation - powers - appropriation)
8	"Open Field" Provision
9	Definitions
10	Numerical Exemptions
11, 12, 13	Drugs and Drug Testing
14	Special Requirements for Compensability
15	Contractor and Sub Contractor Provisions
16	"Fellow Employee"
17	Waiting Period - 21 days
18	Medical Benefits
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29	Attorney's Fees
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34	Insolvency of Individual Self Insureds
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46	Rule Making Power
47, 48	Construction and Electrical Contractors - Licensing
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50	Insurance Adjusters - Continuing Education
51-53	Insurance - Drug Free Workplace, Premium Volume and Installment Payment
54	Joint Select Committee - Legal Counsel
55	Employer - Self Insurance
56	Repeal of Sunset
57	Legislative Finding: 30% Reduction in the Cost of Benefits - 25% Rate Reduction Mandated
58	Oversight Board - "Sunset"
59	Economic Development and International Affairs
60	Governor - Principal International Affairs Officer
61	Florida International Affairs Commission - Not in Executive Department; not an Agency
62 - 114	International Affairs
115	Appropriation to Dept. of Labor and Employment Security
116	Appropriation to Department of Insurance
117	Appropriation to Department of Professional Regulation
118	Appropriation to Joint Legislative Management Committee
119	Appropriation to Department of Insurance
120	Severability
121	Effective Date

The provisions of Ch. 89-289, Laws of Florida, involved in this lawsuit are briefly described as follows:

Section 6	Professional Athletes - Special Offset for Contract Payments
17	Mediation - No Lawyers Allowed
19	Attorney's Fees
22	1989 Oversight Board - (creation - powers)
38	Appropriation to Joint Select Committee
43	"Sunset" of Workers' Compensation Law, October 1, 1991

These provisions are described in detail in the Second Amended Complaint (R. 1638-1707).

SUMMARY OF ARGUMENT

The constitutional validity of workers' compensation acts as a substitute for the common law is pitched upon the theory that the employer is given immunity from suit for common law damages in exchange for providing statutory benefits which are certain, which are speedily delivered, and which are secured. See *New York Central R. R. Co. v. White,* 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917). The Florida Workers' Compensation Law must meet due process of law standards (is it fair?) and equal protection of the law standards (is it reasonable?). E.g. *De Ayala v. Florida Farm Bureau Casualty Co.,* 543 So. 2d 204 (Fla. 1989).

In addition to federal constitutional guarantees of due process of law and equal protection of the laws provided by Art XIV, §1, U. S. Const., and similar state constitutional guarantees under Art. I, §2 and §9, Fla. Const., the Florida Constitution contains two special provisions. Art. I, §2, Fla. Const. guarantees the right to be rewarded for industry. It further provides:

> "No person shall be deprived of any right because of race, religion or physical handicap."

The "rewarded for industry" provision does protect the adequacy and certainty of workers' compensation benefits. *De Ayala,* supra, at 206. The physically handicapped are added to the list of suspect class (race and religion). This subjects acts of the Legislature which adversely affect the physically handicapped to strict scrutiny, or at least to intermediate scrutiny.

A statutory scheme which is a substitute for the common law must work in practical operation in order to comply with due process of law. See *Aldana v. Hollub,* 381 So. 2d 231 (Fla. 1980).

In order to work the Florida Workers' Compensation Law is self-executing. *Florida Erection Services, Inc. v. McDonald,* 395 So. 2d 203 (Fla. 1st DCA 1981).

Numerous individual provisions of the 1990 Workers' Compensation Law violate these constitutional guarantees. The Act is replete with the abolishment or the reduction of the certainty, the speediness, and the security of benefits for employees and the immunity from suit for employers. The provisions relating to the procedures for obtaining benefits, the compensability of injuries, the amount of indemnity benefits, and the medical care available are individually violative of due process and equal protection requirements.

While the trial court did invalidate some of these individual provisions, it did not invalidate them all. That task is now before the Supreme Court to consider. Furthermore, the cumulative effect of these invalid individual provisions is such that the entire Act is invalid.

These Cross Appellants also adopt by reference the arguments of the other Plaintiffs.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING SPECIFIC PROVISIONS OF CH. 90-201 AND CH. 89-289, LAWS OF FLORIDA, CONSTITUTIONAL WHEN

A. THEY VIOLATED DUE PROCESS OF LAW

B. THEY VIOLATED EQUAL PROTECTION OF THE LAW

Procedure

Section 8, on page 22, lines 23-31, and page 23, lines 1 though 8, of the Act is the "open field" provision, which is a statement of legislative intent that the facts in workers' compensation cases are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. This provision overrules the logical cause rule announced by the Supreme Court and followed without exception for many decades. The logical cause rule may be stated as follows: When the claimant has conclusively shown a serious injury and

presented proof indicating a logical cause between such injury and an industrial accident, the burden shifts to the employer/carrier in order to defeat recovery to show by positive evidence another cause of the injury which is more logical and consonant with reason; negative evidence attacking the claimant's theory of causation is insufficient and every doubt should be resolved in favor of the claimant. *Crawford v. Benrus Market,* 40 So. 2d 889 (Fla. 1949); *Sanford v. A. P. Clark Motors, Inc.,* 45 So. 2d 185 (Fla. 1950); *Johnson v. Dicks,* 76 So. 2d 657 (Fla. 1954); *Lyng v. Rao,* 72 So. 2d 53 (Fla. 1954); and *Wilhelm v. Westminster Presbyterian Church,* 235 So. 2d 726 (Fla. 1970).

The determination of the burden of a proof is essentially a function of the judicial process. This is explained in *Johnson v. Dicks,* supra, that the employee in a workers' compensation case could not have the burden of proving his case by a preponderance of the evidence, otherwise a workers' compensation act would not work. The claimant need only show that there is a reasonable relationship between industrial accident and the injury.

In *Johnson v. Dicks,* the Supreme Court held:

> "If this were not the rule, the case of the death of an employee to which there were no eyewitnesses would be most difficult to prove and could well result in manifest injustices. This is particularly true in workmen's compensation cases where the claimant is not bound by the preponderance of evidence rules or the rule which requires proof to the exclusion of a reasonable doubt as in criminal cases. We have repeatedly held that while a claimant in compensation cases may not recover on mere speculation or conjecture, if the proof furnishes a reasonable basis for an inference that death or injury resulted from an accident arising out of and in the course of his employment, that is sufficient. This rule was applied by us recently in American Air Motive Corp. v. Moore, Fla. 1952, 62 So.2d 37, and there we referred to the many cases which support this thesis. In Sanford v. A. P. Clark Motors, Inc., Fla. 1950, 45 So.2d 185, 187, we said:
>
> > 'This court is committed to the doctrine that when a serious injury is conclusively shown and a

> logical cause for it is proven, he who seeks to defeat recovery for the injury has the burden of overcoming the established proof and showing that another cause of the injury is more logical and consonant with reason.'
>
> See also Crawford v. Benrus Market, Fla. 1949, 40 So.2d 889.
>
> In the instant case we are impelled to the conclusion that the combination of circumstances in this case justify the inference that the death of claimants' decedent was caused by electrocution. Compare Lyng v. Rao, Fla. 1954, 72 So.2d 53, 56, which involved an injury by virtue of an alleged electric shock caused by lightning. We were dealing with the elusive force of electricity. While there was no visible injury to the claimant, we also held that 'The combination of the many events occurring so suddenly and the injury of the claimant following so closely can lead to no other conclusion' than that the claimant was actually injured from the lighting. Moreover, we emphasized in that case what we had said before, that under such circumstances where a logical cause was shown for the injury, it became the responsibility of the carrier or employer to overcome such proof by showing that another cause was more logical and consonant with reason. We further said there that 'Even if the cause was doubtful it would be our duty under the law and the basic philosophy of Workmen's Compensation Acts to resolve such doubt in favor of the claimant.' " *Johnson v. Dicks*, supra, at 661-662. (emphasis added).

The logical cause rule has not been used a great deal, but its most frequent use is in death cases. E. g. *Melbourne Airways Air College, Inc. v. Thompson,* 190 So. 2d 304 (Fla. 1966). [the employee flew an airplane toward the Atlantic Ocean and disappeared.]

This new provision should be read in conjunction with section 26 of the Act which abolishes the employee presumptions, by repealing §440.26, Fla. Stat. It contained the statutory presumptions which had been in the Law since its inception in 1935. [actually there is a title defect on page 3, lines 10 and 11 of the Act which state "amending s. 440.26, F. S.; providing a presumption; since the Act does not amend §440.26 or provide a presumption; it repeals them.] The drafter of the "open field" provision apparently failed to note §440.185(1)(b), Fla.

Stat. (1990) which still provides that a Judge of Compensation Claims may excuse the failure to give statutory notice of injury but in such case "every presumption shall be against the validity of the claim". The statement of legislative intent was that it was an "open field". The presumptions in favor of employees contained in §440.26 were abolished, but the presumption in favor of employers was not abolished. It remains on the books, making the open field less than open.

The abolishment of the logical cause rule and the burden of proof rule which the Supreme Court held was the Court's duty under the law and the basic philosophy of workers' compensation acts, destroys due process of law in workers' compensation proceedings. Quite plainly, the average injured worker would be lost in the "open field".

Section 20, page 91, lines 14-26 of the Act, provides that wage loss forms and job search reports are to be mailed to the employer/carrier within 14 days after the time benefits are due. The failure of the employee to request benefits timely shall result in benefits not being payable. Failure of the employee to file the appropriate job search forms showing that he looked for a minimum of five jobs in each bi-weekly period shall result in benefits not being payable. The statute provides that these two requirements are not triggered until after the employee has knowledge that a job search is required, whether he was so advised by the employer, the carrier, the servicing agent, or his attorney. The statute provides for breaching the attorney-client privilege, but oddly, the employee receiving the information from any other source such as the government, a fellow worker, or relative does not count. The only excuse provided in the statute is that the employee need not show that he looked for a minimum of five jobs in each bi-weekly period, if a Judge of Compensation Claims determines that fewer job searches are justified due to the availability of suitable employment. The statute appears to be inartfully drawn in this regard because in a self-administering act such as the Workers'

Compensation Law, the employer/carrier ought to be able to accept that fewer job searches were justified, but under the terms of this statute, their acceptance is insufficient. The Judge of Compensation Claims must determine that.

The former work search requirement was a reasonable man test, i.e., did the employee make a reasonable effort to look for suitable work under the circumstances. See *Regency Inn v. Johnson,* 422 So. 2d 870 (Fla. 1st DCA 1982). This statute replaces the reasonable man test with a mechanical standard of five job searches in each bi-weekly period, which are mandated and for which there is but one excuse, i.e. "fewer job searches are justified due to the (sic) availability of suitable employment". Apparently the drafter of this statute forgot that there are two kinds of people who are entitled to wage loss benefits. The first is the employee who has an impairment, but no job, and he is looking for suitable work. The second is an employee who has an impairment, who has already found light work commensurate with his impairment. This work however pays less than his average weekly wage, such that under the wage loss formula he is entitled to benefits. It is absurd to require this employee to make five job searches in each bi-weekly period in order to obtain benefits. He already has a job. However, already having a job is not an excuse under the statute. Such a requirement is unrealistic and would certainly interfere with the performance of the job he already has. Most absurdly, this requirement, that he look for five jobs etc., would still apply even if he were now working at less money for his employer at the time of the injury.

The requirement that the employee file his papers every 14 days or else he loses his benefits is capricious. This appears to be a 14 day statute of limitation or a 14 day non-claim statute which obliterates entitlement every two weeks if no form is filed, regardless of the excuse, other than the unavailability of suitable

employment. The employee's lack of English, lack of education, any other illness, family catastrophe, or even the fault of the U. S. mails is not an excuse.

Section 23, page 111, lines 15-18 of the Act amends the statute of limitation to provide that "remedial treatment or attention" for the purposes of the statute of limitation means the providing of skilled services provided by a physician or any recognized health care provider as defined in §440.13, Fla. Stat. Since the Florida Workers' Compensation Law follows the maxim, expressio unius est exclusio alterius, *Dobbs v. Sea Isle Hotel,* 56 So. 2d 341 (Fla. 1952), this amendment would mean that non-professional custodial care described in section 18, page 64, lines 28-31 and page 65, lines 1-9 of the Act is excluded. Apart from this plain meaning, the amendment would otherwise serve no other purpose. Under the statutory scheme of §440.19, Fla. Stat., there is a separate statute of limitation for claims for indemnity and for claims for medical care. Both of them are "tolled" by the providing of benefits, so that a claim for compensation or a claim for medical benefits may be made within two years of the accident or the date of the last payment of compensation or the date of the last remedial treatment or attention furnished by the employer/carrier. This amendment has the effect in the statute of limitation for indemnity of excluding for tolling purposes the providing of non-professional custodial or attendant care. Thus, if indemnity payments had ceased, only professional medical care would toll the statute. Under this provision, if the employee went two years thereafter without receiving professional medical care, but was still receiving non-professional custodial or attendant care, the employer/carrier could raise the statute of limitation even though they had furnished custodial or non-professional care in the previous week. This is senseless. It is worse, because the statute of limitation for medical benefits contains the phrase remedial attention in two places. One is at the back end for tolling, just the same as the statute of limitation for claims for indemnity.

The other is at the front end to describe what can be claimed. This is the existing §440.19(1)(b), Fla. Stat. which is shown to be unchanged on page 110, lines 11-12:

> "All rights for remedial attention under this section shall be barred unless a claim . . . is filed with the division within two years . . ." (emphasis added)

The amendment uses four words: "remedial treatment or attention". These four words in that sequence do not appear in the existing section. The words "remedial treatment" are used in the statute of limitation for tolling. The section in regard to medical benefits uses the words "remedial attention" both to describe the medical benefits that can be claimed and the tolling. The unreasonable affect of abolishing the tolling is also present with respect to claims for medical benefits. The exclusion of non-professional custodial or attendant care from the words "remedial attention" would now be plugged into, not only the words of tolling, but also, the words describing what medical benefits can be claimed. The statute of limitation for medical benefits now reads that "all rights for remedial attention shall be barred unless a claim . . . is filed with the Division within two years . . .", but the words "remedial attention" do not include non-professional custodial or attendant care. The legal effect of this is to abolish the statute of limitation for claims for non-professional custodial or attendant care. The statute is most inartfully drawn. While it may have been intended to abolish the tolling, however unreasonable that might be, the drafter apparently overlooked the fact that the words describing the tolling also describe what could be claimed. By interpretation, it could be concluded that although the Legislature wrote the statute this way, it must not have intended to have done so, and therefore, claims for non-professional custodial and attendant care still have a two year statute of limitation. The fault of this latter approach is that the statute

is replete with provisions that if they mean what they plainly say, they are absurd and unreasonable. The Court should not rewrite the statute.

Section 23, page 113, lines 16-19 of the Act amends the language which under the former practice permitted a claim for both past benefits and continuing benefits in any benefit category. The amending language now provides that a claim for continuing benefits "is limited to those in default and ripe, due and owing on the date the claim is filed". This provision is self conflicting. The statute now provides that claims for past and future benefits can be made, but claims for future benefits are limited to those which are already due. The amendatory language limits claims for continuing benefits to those which are "ripe, due and owing on the date the claim is filed". Such benefits are therefore not continuing, nor due in the future. However, the nature of the workers' compensation remedy is one of continuing benefits. It is constructed, as an alternative remedy to common law rights, to be a system of continuing benefits. This amendatory language which would limit claims for continuing benefits to those which are "ripe, due, and owing on the date the claim is filed" would abolish the right of the employee to claim continuing benefits. This is reinforced by the amendatory language in Section 23, page 113, lines 10 and 11 of the Act referring to the specificity required of claims and describing claims for penalties, attorney's fees or any other benefit or allowance "deemed due at the time of filing of the claim but not being furnished". (emphasis added)

Section 23, pages 112-114 of the Act, requires that claims shall contain the specific details of the benefits alleged to be due and the basis for those benefits. The statute then goes on to provide in an extensive manner what details shall be included in each claim. For example, on page 112, lines 21-23, a claim for past-due medical expenses must include the name and address of the medical provider and the amounts due and the specific dates of treatment. On page 113, lines 3-8,

any claim for wage loss benefits must contain a "detailed description of the percentage of permanent impairment and corresponding entitlement to increased wage loss benefits in excess of that which is or has been voluntarily paid by the employer or carrier together with the medical provider who has diagnosed any increased impairment".

The statute provides on page 113, lines 26-31, and page 114, line 1, that if the claim or any portion of it is not in compliance with these specificity requirements, it shall be dismissed if the claimant is represented by a lawyer. The statute provides that if the claimant is not represented by a lawyer, it shall not be dismissed. This provides an unequal standard. If the employee chooses to be represented by a lawyer, his claim may be subject to dismissal. If he chooses not to be represented by a lawyer, it cannot be dismissed.

Since this provision is procedural and not substantive, it would apply not only to accidents which occurred after July 1, 1990, but to all accidents and all claims. *Sullivan v. Mayo,* 121 So. 2d 424 (Fla. 1960).

The practical effect of this statute is to place upon the employee the burden of conducting discovery before he files his claim. Indeed, the statement of legislative intent within this amendment contained on page 113, lines 20-25, is that it is the intent of the Legislature that a claim apprise the employer/carrier with "sufficient detailed information to facilitate a timely and informed decision with respect to a claim for benefits". How this is to be accomplished by the thousands of working people who are injured and who have claims is unanswerable. Many of them don't speak English, many of them are illiterate or nearly so. In most instances they simply do not have the knowledge or access to the information which this degree of specificity requires. The constitutional validity of workers' compensation acts is pitched on the speediness of the delivery of the benefits. This provision is an impermissible hurdle. It provides that the

employee cannot file a valid claim until he is able to provide vast information. At its worst, if he is never able to provide such detailed information, he cannot file a claim at all. At best, he must delay filing his claim until he is able to gather all of the specific information beforehand. The judicial branch of the government has had some experience in making judicial decisions. Its practice is that claims should be made first to notify the parties and the government that a claim is being made, and then discovery comes after the claim. That works. This does not. The Division of Workers' Compensation is supposed to assist workers to file claims but it does not have offices in every Florida city, only in some, and not even all of the major ones.

Section 23 provides on page 115, lines 3-31, of the Act that the Division shall, upon the receipt of a claim for benefits or any other notice of disputed issues, investigate the claim or dispute to determine whether it can be resolved without a hearing. Upon determining that a disputed issue can be resolved without a hearing, the Division shall make an investigation which shall include a dispute resolution report which shall be furnished to the parties. It provides that this decision is advisory. It goes on to provide that should the Division determine that benefits are payable, then the Division shall assist the requesting party in securing payment:

> "Upon a finding by the division that benefits, services, or treatment are due and owing, it shall be the responsibility of the division to assist the requesting party in securing payment or provision of the same."

Under §440.021, Fla. Stat., the investigations of the Division are exempt from the APA. Assisting the requesting party in securing payment or the providing of benefits is not "investigation". Therefore, that action would not be exempt from the APA. The Legislature has created a dual adjudicatory process for the resolution of claims: the decision by the Judge of Compensation Claims

and the determination by the Division which should it be favorable to the applicant, requires more than investigation. It is final agency action to assist the claimant in the securing payment or providing of the benefits claimed. In those cases in which the Division made such a determination, if the employer/carrier failed to contest the agency's action, it would become final and binding under the APA, notwithstanding that the case was pending before the Judge of Compensation Claims. The statute is a mismatch in terms. It says the decision of the Division is advisory. Yet if the decision is favorable to the claimant it is binding, because the Division is to assist the claimant to obtain the benefits claimed.

Section 23 amends the provision in regard to mediation on page 120, lines 6-8, of the Act to repeal the former, obviously, unconstitutional language that neither party could be represented by an attorney. §17, Ch. 89-289, Laws of Fla. It substitutes the current language that the employer may be represented by an attorney at the mediation conference if the employee is represented by an attorney at the mediation conference. Therefore, under the statute, if the employee is not represented by an attorney, the employer may not be represented by an attorney. However, 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.

Medical Benefits

Section 18 of the Act provides on page 60, lines 27-30, and page 61, lines 1-2, that no health care provider may refer the employee to another health care provider, diagnostic facility, pain program, work hardening program, therapy center, or other facility without prior authorization from the carrier, or from the employer if the employer is self insured, except in cases where emergency care is required.

Under this provision, a physician may not refer the employee for any consultation, or for a diagnostic procedure, or for any other medical care without the specific prior approval of the insurance carrier where the employer has insurance. The authorization of the employer will not suffice. Since the definition of carrier includes self-insured servicing agents, the authorization of the employer even though self-insured would be insufficient as well. As a practical matter, this is unworkable. The offices of the carrier will only be open from 9:00 to 4:30 or 9:00 to 5:00. The medical needs of the employee do not keep office hours, although they may not be of an emergency nature. The carrier may be difficult to reach in order to get prior authorization, but more importantly, it is an interference in the physician-patient relationship since each referral or consultation would require prior approval by, in essence, an insurance adjuster or clerk. The supposed safety valve in the statute is the existence of an emergency. However, an emergency is not defined and who is to say what is an emergency and what is not, and how can it be determined beforehand. The validity of workers' compensation acts is pitched in part upon the obligation of the employer to furnish medical care as needed. This provision destroys that. Modern day medicine is performed in a world of specialists and consultants. (R. 68-69) Requiring prior approval for even the simplest of these is an impermissible impediment upon the employee receiving medical benefits as needed.

Section 18 of the Act provides, beginning on page 70, a schedule of medical fees. The current medical fee schedule is the 1988 Reimbursement Manual which is based on 1985-1986 data and is set at the 44th percentile. (R. 40-41, 57, 84) What this means is that an array of all charges for all coded procedures was made during 1985-1986 for all injured workers. (R. 44-45) For a given coded procedure, the 50th percentile represented the most frequently reported charge. (R. 55) After having conducted an APA hearing in 1987, the Three Member Panel approved

that data base and adopted the 44th percentile. (R. 48-50) (Plaintiff's Exhibit 40) The 1990 Act mandates the Three Member Panel to adopt a new fee schedule by January 1, 1991, which shall not exceed 95% of the 50th percentile used to establish the 1988 fee schedule. It further provides that this schedule shall not be changed for at least two years. It further provides that thereafter subsequent schedules shall not exceed 95% of the 50th percentile. This constitutes fact finding by the Legislature without a lawful basis. It fixes the price of physicians' charges and limits payment to 95% of the 50th percentile forever. The "APA hearing" before the Three Member Panel would be a mockery because their decision is mandated by the Legislature.

As to hospital charges, the Legislature mandated that the Division collect and submit to the Three Member Panel arrays for hospital charges no later than October 1, 1990, which shall then review the arrays within 30 days, approve a schedule of maximum charges for hospitals amounting to 80% of the 50th percentile effective January 1, 1991. Any item not in the schedule shall be reimbursed at 70% of the usual and customary charge. There were similar provisions for ambulatory surgical centers, pain programs, work-hardening centers, etc.

Section 18 provides on page 75, lines 1-4 of the Act, that the maximum reimbursement for prescription medication shall be "the average wholesale price x 1.2 + $4.18 for the dispensing fee." Aside from the question whether the Florida Legislature can fix prices for prescription drugs in interstate commence in the United States (obviously they can not given the interstate commerce clause of the federal Constitution), the statute fails constitutional validity for failure to define the "average wholesale price". Is that to be determined nationally, statewide, or locally? As it is written, it is not even to be determined by the government. It is a delegation of law making to private industry and the free market. Again, this is

unworkable and impossible of performance. It is interesting that the operative word is "reimbursement" since it would appear that if the employee paid more than that amount because that's what it cost to get the medication, then he would have to bear the loss himself. This should be read in conjunction with section 18 of the Act on page 59, lines 11-16, which provides that medicine means only generic drugs unless an authorized health care provider writes or states that the brand name drug is medically necessary. Thus, if the employee unknowingly bought the brand name drug, or that was all that was available, or it was prescribed by an unauthorized health care provider, then he would not get paid at all [authorized is not defined in the statute, but by custom it means those medical providers that the employer/carrier is willing to pay as contrasted with those whom it was ordered to pay by the Judge of Compensation Claims].

Section 18 on page 80, lines 9-23 of the Act, provides the penalties for failure to comply with the Medical Fee Schedule. The statute contains four penalties. However, the first is applicable to employers and carriers but the second, third and fourth are applicable to employers only. Consequently, the penalty provision is discriminatory in an arbitrary and capricious manner and is unworkable. It provides that the Division shall audit employers, carriers and self insurers to determine if medical bills are paid in accordance with the statute and Division rules. First of all, the inclusion of the term "self insurers" is evidently redundant. It then provides the first penalty. Any employer, carrier, or self insurer found by the Division not to be within 90% compliance as to the payment of medical bills shall be assessed a fine of $50.00 per incorrect bill. This first penalty is vague and unworkable because it does not say 90% of what. Is it 90% per 100 bills, or per 10,000 bills handled, or is it per case, or per week, or per year? It does make a difference.

It goes on to provide that within 60 days of the first audit, the Division shall conduct a second audit. But the statute only authorizes a second audit of employers found not to be in compliance. It does not authorize a second audit of carriers (whether insurance companies or servicing agents or self insurance groups) found not to be in compliance. The statute provides if the employer on the second audit is not within 90% of compliance, the Division shall assess the employer $100.00 per incorrect bill. Again, it does not state 90% of what and provides that only employers can be fined the second time. A carrier cannot be fined a second time. It continues that an employer found not to be in compliance on the second audit shall be required to implement a medical bill review program approved by the Division. This is not required of carriers. Finally comes the fourth penalty that any employer found not in compliance by the second audit shall be subject to appropriate licensing review. However, the statute does not authorize a license review for carriers. This is a penalty statute. A penalty statute cannot be construed to include the imposition of the penalty upon persons not named in the statute. Under this statute, insurance carriers and servicing agents and self insurance funds are subject only to the first penalty, but not subject to the second, third, or fourth. This is the penalty provision of the statute which is supposed to implement the Medical Fee Schedule upon physicians, hospitals, pharmacists, and other professional medical providers. Since the penalties are unworkable and arbitrary and capricious, the entire system of the fee schedules and the penalties for violation of the fee schedules is unworkable.

Justice Redefined as Politics

Section 9 of the Act, on page 26 redefines independent contractors. The former statute provided that the word "employee" does not include an independent contractor. This language has been changed to include an inoperable term, two negatives and an exception so that the statute is incomprehensible. In *Cantor v.*

Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the tests contained in the Restatement of the Law of Agency of the difference between "employee" and "independent contractor". There are a number of indicia but the primary tests are whether the principal has the right to hire and fire or whether the principal has the right to exercise the manner and means of the performance of the work regardless of whether such right is actually exercised or not. This statute effectively overrules *Cantor v. Cochran* and substitutes only one of the tests of independent contractor, thereby excluding the others. The statute now provides:

> " 'employee' does not include an independent contractor, who is not subject to the control and direction of the employer as to his actual conduct, except those independent contractors engaged in the construction industry, including..."

The definition now contains a mismatch of terms since an "independent contractor" who is subject to the control and direction of the employer as to his actual conduct, is not an independent contractor, but an employee. *Cantor v. Cochran,* supra. Furthermore, the exception for independent contractors engaged in the construction industry is an arbitrary and capricious discrimination. Independent contractors have always been excluded from workers' compensation acts for a number of reasons. First of all, the test of compensability is whether the employee suffered personal injury arising out of and in the course of employment.[1] §440.09, Fla. Stat. (1990). Since an independent contractor by definition is not subject to the time and place limitations of "course of employment", and since he is not actually in any employment, how can the test of arising out of and in the course of the employment apply? By definition, any injury to him would never meet the definition of a compensable injury. He would become a covered person entitled to

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[1]a term which has been described as "deceptively simple and litigiously prolific". *Cardillo v. Liberty Mutual Ins. Co.,* 330 U. S. 469, at 479; 67 S. Ct. 801, at 807 (1947).

no benefits or his coverage would be so broad as to be unworkable. Furthermore, the definition of disability by which all indemnity is calculated is the inability to earn equivalent wages. §440.02(11), Fla. Stat. (1990). An independent contractor, however, is paid not wages for his labor. He is paid for his contract, which includes his costs and overhead such as materials, tools, insurance, energy, as well as his profit. Yet under the Workers' Compensation Law, his indemnity is to be calculated only for lost wages, which is something he does not receive. He would become a covered employee with no ability to recover indemnity since he has received no wages or his coverage would be so broad as to be unworkable. Independent contractors in the construction industry just do not fit into the Workers' Compensation Law. Since premiums are based on payroll, the premium for an independent contractor would be prohibitively expensive.

The inclusion of independent contractors in the construction industry in the Workers' Compensation Law is consistent with the provision in section 9, page 24, lines 7-10 of the Act providing that the definition of "employee" includes partners or sole proprietors actively engaged in the construction industry. This is also consistent with the provision in section 9, page 27, line 30 and page 28, lines 1 and 2, that corporate officers in the construction industry cannot opt out of the Workers' Compensation Law, although corporate officers in any other industry can. This is also consistent with section 9, page 28, line 15 which provides that employment includes all private employments in which four or more employees are employed; however, with respect to the construction industry, it includes all private employments in which one or more employees are employed. The inclusion of partners and sole proprietors in the construction industry in the Workers' Compensation Law is wholly inappropriate since it is a substitute remedy for the common law rights of the employee to sue the employer. It is social economic legislation for the benefit of the working class, not employers.

Under the 1990 Workers' Compensation Law, the Legislature plainly stated that it was reducing benefits to employees. A reduction in benefits to employees in the construction industry in order to provide coverage to employers in the construction industry is arbitrary and capricious in its own right and is devoid of due process of law. Worse yet, however, employees outside of the construction industry are forced to take a reduction in benefits under the 1990 Act in order to provide coverage to employers in the construction industry.

These provisions should be read in pari materia with §440.10, Fla. Stat. (1990) which provides that no permits for construction can be obtained without proof of coverage and sections 47 and 48 of the Act, which provide that those who hold construction industry licenses under DPR are subject to revocation with respect to the maintenance of workers' compensation insurance coverage, although other license holders under DPR are not.

Section 15 of the Act which provides that subcontractors who misrepresent the number of their employees or their payroll in order to avoid coverage are guilty of a felony. However, this criminal statute does not provide that it is a felony for contractors to perform this same act. For them it is not a crime. The obvious arbitrary and capricious discriminations in regard to the construction industry are overwhelming.

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). Under the former law, a truck driver (owner-operator) hired by a motor carrier was an employee if he met the tests of employment. This amendment provides that an employee does not include such a truck driver hired by a motor carrier so long as there is a written contract which evidences a relationship between the motor carrier and the driver by which he "assumes the responsibility of an employer for the performance of the contract". This is absurd. Under this

provision an actual employee is declared not to be an employee under the law if he signed a written piece of paper which states that he is an employer, even if he is not.

Section 9, page 31, lines 5-8 of the Act provides that wages "includes only the wages earned on the job where he is injured and does not include wages from outside or concurrent employment except in the case of a volunteer fire fighter..." This provision legislatively overrules *Trainer v. American Uniform and Rental Service,* 262 So. 2d 193 (Fla. 1972).

The former statute did not distinguish between concurrent or consecutive, similar or dissimilar employment. However, in *J. J. Murphy & Son, Inc. v. Gibbs,* 137 So. 2d 553 (Fla. 1962), the Supreme Court adopted what became known as the concurrent dissimilar employment rule: when the employee has worked for more than one employer during the 13 weeks prior to the industrial accident, the only wages which may be included in the calculation of average weekly wage are those earned in concurrent similar employment. Wages which were earned in a dissimilar employment could not be included. It was not clear from the decision whether dissimilar meant (a) the nature of the employer's business or (b) the kind of work that the employee performed or (c) both. The rationale was founded in the theory of workers' compensation that the industry which produced the injury should bear the risk of the loss.

The rule was not long enunciated before it became apparent that it spawned more problems than it solved. The first of these was dominant v. non-dominant employment. §440.14, Fla. Stat. provided that the employee's earnings during 90% of the 13 weeks before the industrial accident should be used to calculate the average weekly wage. The statute went on to provide that if the employee had not worked 90% of the 13 weeks, then the earnings of a similar employee who had worked 90% would be used. It further provided that if there were no similar

employee, then a full-time weekly wage would be used. When the employee "moonlighted" and one of the jobs was dominant and the other non-dominant, if he were injured in the non-dominant job, it would produce an unreasonably low average weekly wage with respect to his real earnings. If he were injured in the dominant job, the average weekly wage would be higher, but still not equal to the actual earnings of the two combined.

The claimant was injured in the non-dominant job in *Wolf v. City of Altamonte Springs,* 148 So. 2d 13 (Fla. 1962). Mr. Justice Drew dissented, arguing that had the employee had the non-dominant employment only, he would have been entitled to the earnings of a similar employee in the non-dominant employment who had worked 90% of the 13 weeks. He saw no reasonable justification to give an employee who worked at two jobs less an average weekly wage than an employee who had worked at only one.

In *Jones Shutter Products, Inc. v. Jackson,* 185 So. 2d 476 (Fla. 1966), Mr. Justice Drew wrote an opinion for the court which adopted his dissent in *Wolf v. City of Altamonte Springs,* supra, without saying so. Jones had a regular job but worked for the shutter company only one day and was injured. The Deputy Commissioner determined that his average weekly wage was his one day's salary with the shutter company and he awarded him the minimum compensation rate. The Supreme Court reversed and remanded holding that Jones was entitled to an average weekly wage of a similar employee of the shutter company who had worked 90% of the 13 weeks prior to his accident, or if there were no similar employee, he was entitled to a full-time weekly wage which would have been his daily wage times the number of weeks in a work week of the shutter company.

Finally, in *Trainer v. American Uniform and Rental Service,* supra, the Supreme Court receded from *Gibbs,* holding that there was no authority for the announcement of the rule in the first place. Plainly, it did not work.

In *Trainer,* this Court recognized that all workers' compensation was required to be secured. As a consequence, the cost of injury was borne by all industries covered by the workers' compensation system. Therefore, earnings in any covered employment received during the 13 weeks prior to the industrial accident should be included in the average weekly wage without regard to whether they were current, consecutive, similar or dissimilar.

The amended definition of "wages" to include only those earned on the job where the employee was injured is unworkable because it does not fit into the formula for the calculation of average weekly wage contained in §440.14, Fla. Stat. That section describes a 1-2-3 step method by which the average weekly wage is calculated. The average weekly wage is the basis by which all indemnity payments are calculated and is, therefore, of considerable importance. Under step 1 in §440.14, Fla. Stat., when the employee has worked substantially the whole (90%) of the 13 weeks before the injury, his own earnings are added up and divided by 13. Under this new definition of wages, that would only be possible if the employee worked at the same job, for the same employer, at the same wages, in that 13-week period. If he got a promotion, a change in wages, a change in duties, even in job sites his earnings cannot be used in step 1. The new definition uses the word "where", thereby limiting the definition of "wages" to the job site where the employee is injured. If there were any change during the 13 weeks, then the preferred method, the employee's own earnings cannot be used.

Step 2 provides for use of a similar employee who did work substantially the whole of the previous 13 weeks. However, the new definition of "wages" would preclude the use of the similar-employee method, except in the rare circumstance in which an employee could be found who had received no raises and no change in job responsibilities or job location in the applicable 13-week period. Thus, step 3 would come into play by which the statute requires the use of a full-time weekly

wage which may be by the actual wages or the contract for hire. *Penuel v. Central Crane Service,* 232 So. 2d 739 (Fla. 1970). Plainly the new definition virtually eliminates step 1 and step 2.

Employees who work in seasonal employment have the option of electing a 52-week basis. §440.14(1)(c), Fla. Stat. (1990). It is virtually impossible to plug the new statutory definition into that calculation because by definition the employee is entitled to use not the wages he was earnings on the job where he was injured, as the definition requires, but his total earnings for the 52-weeks before he was injured.

The statute was plainly intended to discriminate against those who moonlight or who find it necessary to work at two jobs in order to sustain themselves or their families. It also discriminates against those who work in employments in which they frequently change jobs, or employers, or the nature of the work they perform. Since the statutory formula for calculating average weekly wage is based on the 13 weeks before the injury in the case of ordinary employment and 52 weeks in the case of seasonal employment, the new definition of "wages" to mean only those earnings which were earned at the time the accident occurred is totally unworkable. The one does not fit into the other. The definition does not fit into the calculation.

Finally the discrimination in favor of volunteer firefighters is unreasonable, arbitrary and capricious. §440.02(13)(d) 3, Fla. Stat. (1990) provides that volunteers who are employees of the government (such as volunteer auxiliary law enforcement officers) are included in the definition of employee. Under this definition, they are covered by the Act and therefore cannot sue the employer. However, under the 1990 amendment they cannot collect compensation because they have no wages; concurrent wages are excluded.

Section 11, on page 35 of the Act provides that no compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee, which is existing law. However, the statute is amended to provide that if the employee has a positive confirmation of a drug as defined in this Act, it shall be presumed that the injury was occasioned primarily by the intoxication of, or the influence of, the drug upon the employee. The language that such presumption should be applied in the absence of substantial evidence to the contrary has been repealed. In its place is the language that in the absence of a drug-free workplace, this presumption may be rebutted by clear and convincing evidence that the intoxication or influence of the drug did not contribute to the injury. What this means is: (1) where there is a drug-free workplace, the presumption may not be rebutted at all and (2) where there is no drug-free workplace program, the presumption may only be rebutted by clear and convincing evidence. The clear and convincing evidence test is more than that required by civil litigation. It is more than a preponderance of the evidence. Either circumstance violates due process and equal protection: no ability to rebut or an impossible burden. Furthermore the statute lacks due process of law for it requires no causal relationship between intoxication and causation of the injury. For example, under this statute the intoxicated passengers of an automobile could not recover workers' compensation for an injury at the hands of a sober driver, although the sober driver could recover workers' compensation, even if the accident were his fault. Due process requires that there be some causal relationship between the activity sought to be prohibited, intoxication by alcohol or drugs, and the accident. This statute does not require such causal relationship.

Section 13, page 40, lines 30-31 of the Act provides that the happening of an accident "caused or contributed to" by the employee is reasonable suspicion that the employee was intoxicated and, therefore, justifies the employer's application

of drug test procedures. Such a provision invades the employee's privacy protected by Art. I, §23, Fla. Const. and is unjustified. The mere happening of an accident which is the employee's fault is not a circumstance for the statute to presume intoxication so as to allow the employer to require drug testing procedures.

Section 14 of the Act describes special circumstances for compensability. All of these provisions are examples of legislative overruling which challenge the judicial branch of the government in its ability to perform its judicial function. The courts had defined justice under reasonable standards, particularly the reasonable man test. The question may be viewed: Whether the Legislature may redefine justice in terms of politics. The Legislature may not redefine justice in terms of politics. That is not due process of law and it is an intrusion into the judicial function. Certainly the choices made by the Legislature in overruling the judicial branch must meet due process of law standards and equal protection standards. The choices made by the Legislature in this Act do not.

Section 14, on page 55, lines 1-6, provides that subsequent intervening accidents arising from an outside agency which are direct and natural consequence of the injury are not compensable unless suffered while the employee was travelling to and from a health care provider for the purpose of receiving medical treatment for the compensable injury. This provision legislatively overrules the Supreme Court's decision in *Johnnie's Produce Company v. Benedict & Jordan,* 120 So. 2d 12 (Fla. 1960) and its progeny. In that case the Supreme Court adopted Professor Larson's natural, probable consequences rule, which is: where a primary injury is shown to be compensable, every natural and probable consequence of such injury is also compensable, absent the chain of causation being broken by an act of the employee's own contributory negligence. While contributory negligence was subsequently abolished in this state, the

natural probable consequence rule has not been further developed in that regard. The amended statute would cover, for example, a consequential injury incurred by the employee while travelling from the job site by ambulance to the hospital if the ambulance were involved in an accident. However, any mishap at the hospital would not be. This statute abolishes any responsibility by the employer/carrier for the malpractice of the medical provider. Even short of malpractice, the amendment would relieve the employer/carrier of any responsibility for any mishap such as the side effects of medication, the complications of injury, including such examples as the employee who is given braces to wear because of his injury and is encouraged to walk, and in so doing topples over and suffers further injury. By some anachronism, death due to surgery for a hernia "as required in s. 440.15(6)" is still compensable under §440.09(1), Fla. Stat. (1990). In fact, "s. 440.15(6)" does not refer to hernia surgery and has not for many years.

This provision and others like it render certain injuries or circumstances no longer compensable. The statute fails to advise that by so doing, the employer is made liable for damages at common law for such occurrence and is at the risk of bankrupting lawsuits.

Mr. Justice Kogen speaking for a unanimous Florida Supreme Court, pointed out as recently as July 26, 1990 [which was after the enactment of Ch.90-201, Laws of Fla.]:

> "Indeed, the central policies of workers' compensation are to provide employees with a swift and adequate means of compensation for injury, and to insulate employers from potentially bankrupting tort liability for work-place accidents. *Halifax Paving Inc. v. Scott & Jobalia Construction Co., Inc.*, 565 So. 2d 1346 at 1347 (Fla. 1990).

For many years there has been a provision in the Florida Workers' Compensation Law known as the "fright statute", which provides that a claim for

disability due to mental illness caused by fright or excitement only is not compensable. §440.02(1), Fla. Stat. (1990). This is the workers' compensation equivalent of the common law "impact rule".

In the case of *Williams v. Hillsborough County School Board,* 389 So. 2d 1218 (Fla. 1st DCA 1980), the court was confronted with a workers' compensation claim that had been denied on account of the "fright statute." The court held that the case was not covered by the Workers' Compensation Law but pointed out that the employee did have a remedy at common law.

> "While the alleged injuries are not encompassed within the Florida Workers' Compensation Act, those injuries under such circumstances or other similar situations not covered by the act, are free to pursue common law remedies. *Grice v. Suwannee Lumber Manufacturing Company,* 113 So. 2d 742 (Fla. 1st DCA 1959). *Williams v. Hillsborough County School Board,* supra at 219.

This holding was reinforced by *Davis v. Sun Banks of Orlando,* 412 So. 2d 937 (Fla. 1st DCA 1982). In holding that the case was not covered by the Workers' Compensation Law, the court held that the claim was actionable at common law:

> "Emotional injuries due to fright or excitement unassociated with physical injury are excluded from the Workers' Compensation Act section 440.02(18), Florida Statutes (1981). Injuries of this nature are the proper subject of a civil action." *Williams v. Hillsborough County School Board,* 389 So. 2d 1218 (Fla. 1st DCA 1980).

This line of decisions was followed by the Supreme Court of Florida in what is known as the "sexual harassment" case. *Byrd v. Richardson-Greenshields Securities, Inc.,* 552 So. 2d 1099 (Fla. 1989). In this case the Supreme Court had a certified question which was:

> "Whether the workers' compensation statute provides the exclusive remedy for a claim based on sexual harassment in the work place."

The Supreme Court of Florida answered the question in the negative. In this case the Supreme Court held that sexual harassment was not covered by the Florida Workers' Compensation Law and consequently such claims were covered by the common law which provided damages for civil actions.

Based on these decisions we would have to offer the maxim "there is no free lunch". Either the employee's injury is covered by the Florida Workers' Compensation Law or in those circumstances in which the employee's injury is specifically excluded from the Workers' Compensation Law, the employee may sue the employer for damages at common law. Section 14 of the Act provides numerous instances of various types of injuries which are no longer covered by the Florida Workers' Compensation Law. It exposes employers to suits for common law damages, notwithstanding that one of the purposes of the Workers' Compensation Law was to immunize the employer from such lawsuits.

The 1990 amendment to the Florida Workers' Compensation Law, without giving notice of such fact, places every employer in Florida at risk of bankrupting lawsuits by excluding many types of injuries from coverage under the Workers' Compensation Law. The employer's immunity from suit is balanced by the alternative remedy of the Workers' Compensation Law. The exclusion of various types of injuries suffered by employees which were formerly compensable destroys that balance. It creates a dual system of common law liability and workers' compensation liability. This is unreasonable and unworkable. The abolishment of consequential injuries for medical mistake now renders the employer and the insurance carrier even liable for an action at common law with respect to the negligent selection of the physician because malpractice of the physician would no longer be covered by the Workers' Compensation Law. Ironically, under §440.39, Fla. Stat., the employer/carrier enjoy 100% subrogation against any medical malpractice recovery. However, under the amended statute, it is unwarranted to

place upon the employee the risk of loss of such event. Furthermore, as a practical matter, whether it be malpractice or mishap, the employee has no guarantee that he will ever recover damages for medical malpractice for such cases are difficult at best. Beyond that how can he pay for the medical care in the meantime? He can not.

Section 14 of the Act provides that an employee who is injured while deviating from the course of his employment, including leaving the employer's premises, is not eligible for benefits unless such deviation is expressly approved by the employer or unless such deviation or act is in response to an emergency and designed to save life or property.

First of all, there is an inherent draftsmanship error in using the word "expressly" since by the maxim expressio unius est exclusio alterius this excludes the possibility of "impliedly" approved by the employer. A requirement that there must be express approval is arbitrary and capricious by excluding implied approval.

This provision is intended to legislatively overrule what is known as the "personal comfort rule", first announced by the Supreme Court of Florida about 50 years ago in *Bituminous Casualty Co. v. Richardson,* 4 So. 2d 378 (Fla. 1941). In that case, the employee was riding in the company truck when his hat blew off; the driver stopped so that he might go back and retrieve his hat, which he did and he was struck by another vehicle. The court recognized compensability. Neutral or essentially harmless deviations from the master's business such as going to the bathroom, having lunch, taking a coffee break, etc., do not remove the employee from the protection of the Florida Workers' Compensation Law as to his entitlement to benefits, and similarly, do not remove the employee from the Workers' Compensation Law with respect to the employer's protection from immunity from suits. See Davis, Vol. 6, *Florida Practice, Workers'*

Compensation, §249 (1982). It would be contrary to common sense to expect that the employee is always about his master's business during the time of his employment. The real issue in such cases is what is a reasonable activity or harmless or neutral deviation compared to outright horseplay, but even the disobedient servant is entitled to workers' compensation because it is a system of no fault liability. The Supreme Court, in following the decisions of other courts that went back several decades, was wise enough to understand that. While this might provide benefits to employees who were engaged in a personal comfort activity and the like, it also protected the employer from those lawsuits in which the injury was the employer's fault, but at the moment of the accident the employee was engaged in a personal comfort activity or neutral deviation. Under the amended statute, an employee who was engaged in a personal comfort activity, would be permitted to sue the employer for damages at common law. The employee who happened to be smoking a cigarette or turning to go to the bathroom at the moment that the ceiling collapsed would find himself in a most favored position by which he could sue the employer for common law damages.

Such a rule is unworkable and absurd. It destroys the very immunity which employers were supposedly guaranteed under the Workers' Compensation Law.

Section 14 of the Act provides that an injury suffered while going to or coming from work is not an injury arising out of or in the course of the employment, notwithstanding that the employer provided transportation to the employee when such transportation was also available for personal use by the employee unless the employee was engaged in a special errand or mission for the employer.

This provision legislatively overrules the Supreme Court's decisions in *Blount v. State Road Department,* 87 So. 2d 507 (Fla. 1956), *Swartzer v. Food Fair*

Stores, Inc. 175 So. 2d 36 (Fla. 1965), *Huddock v. Grant Motor Co.,* 288 So. 2d 898 (Fla. 1969) and other cases. The Supreme Court of Florida long recognized as an exception to the going and coming rule the employment in which the employer provided transportation, such as the furnishing of a company car, to the employee as a specific condition of the contract of employment. This exception follows general workers' compensation law throughout the United States. The reason is founded on two-fold principles. The first is, having furnished the employee with an automobile pursuant to the contract of employment, the employer is certainly liable to the general public, so he should be also liable to the employee. The second reason is: since the employer has provided the automobile, he is responsible for its selection, condition, maintenance and reliability and all of the other obligations that go with providing a dangerous instrumentality. Under the terms of this amended statute, this exception to the going and coming rule is no longer compensable. Consequently, if the injury occurred while going and coming and was in any way due to the negligence of the employer with respect to the providing, or the working, or the maintenance of the motor vehicle, then the employee could sue the employer for negligence and collect damages at common law, notwithstanding that the providing of the vehicle was a contractual condition of his employment. The statute does not reveal to employers this expanded common law liability. This amendment is designed to defeat the purpose of workers' compensation laws with respect to the immunity from suit of employers.

Section 14 provides that recreational and social activities are not compensable unless such recreational and social activities are "<u>expressly</u> required incident of employment <u>and</u> produce a substantial direct benefit to the employer beyond improvement in employee health and morale that is common to all kinds of recreation and social life". This provision is intended to legislatively overrule the First District Court of Appeal's decisions in *Brockman v. City of*

Dania, 428 So. 2d 745 (Fla. 1st DCA 1983), *City of Tampa v. Jones,* 448 So. 2d 1150 (Fla. 1st DCA 1984) and other cases. In those cases the court adopted Professor Larson's three-part test of compensability for recreational and social activities. This statutory amendment abolishes that test and substitutes a two-part test which requires that the activity: (1) was expressly required by the employer and (2) produced a substantial direct benefit to the employer.

It should be obvious that the use of the phrase "expressly required" is inherently defective since by statutory construction it excludes the possibility of "impliedly required". It should be obvious that the court's interpretation under the former law was that it be expressly or impliedly required or produce a substantial direct benefit to the employer. The statutory amendment requires that it be both, which would simply permit the employer to exclude from coverage all of those activities which he impliedly approved or which he disavowed that it produced a substantial direct benefit to him, when it caused an injury. Again, this provision, like the others in Section 14 interferes with the judicial branch of the government in its performance of its judicial function in interpreting what was a reasonable set of circumstances for compensability. The Legislature has substituted a mechanical test which does not cover all of the reasonable circumstances. It leaves open a suit for negligence for damages at common law by the employee against the employer for those recreational and social activities which the employer impliedly authorized or which only produced a substantial indirect benefit to the employer, since these circumstances are excluded from the statute.

Section 14 of the Act provides that injuries to travelling employees are only compensable while the employee is in travel status, and then only if the injury arises out of and in the course of his employment while he is actively engaged in the duties of his employment, which shall include travel necessary to and from

the place where such duties are to be performed and other activities reasonably required by travel status. This statutory provision is intended to legislatively overrule *Gray v. Eastern Airlines,* 475 So. 2d 1288, (Fla. 1st DCA 1985) and *Garver v. Eastern Airlines,* 553 So. 2d 263 (Fla. 1st DCA 1989). Again, the statute limits compensability to limited circumstances leaving open those circumstances not covered by the statute for which the employee could then bring an action at common law for damages against the employer.

Section 20, page 84, lines 30 and 31, and page 85, lines 1 and 2, provide that the supplemental benefits for permanent total disability shall cease at age 62 if the employee is eligible for Social Security benefits under §42 U.S.C. §402 and 423, whether or not the employee has applied for such benefits. First of all, the statute is badly written since it is legally impossible under the Federal Social Security Act to be eligible for benefits as the statute says "under 42 U.S.C. ss 402 and 423". §402 provides for old age retirement and §423 provides for disability retirement, and under the Social Security Act it is not possible to receive both of them, only one or the other. If this statute were read in plain English as it reads, it is impossible of performance. Plainly, however, it is intended to diminish benefits to the most seriously injured, those who are permanently totally disabled, which is impossible to justify on a due process or equal protection basis. Under the Social Security Act, an employee could be entitled to disability under §423 who was also entitled to permanent total disability. However, under the Social Security Act, the entitlement to such disability benefit ceases at age 65. The reference to age 62 appears to be directed towards those persons who, although receiving permanent total disability under workers' compensation, would be eligible to receive an early retirement (reduced benefits) under Social Security at age 62. Under this provision they would not be permitted to wait to age 65 to receive the full benefit. Rather under this amendment, they are compelled by the Florida Legislature to

elect the lesser benefit at age 62. It has the effect of forcing them to take a lesser Social Security benefit than they would otherwise be entitled to receive because the statute provides that their supplemental benefit will cease merely on the eligibility for the lesser benefit under Social Security. The most obvious constitutional defect in this is that it bears no rational relationship to the amount of money that is to be received from the Social Security Administration. It could be less than that required to be paid for the supplemental benefit. In point of fact, that could easily be the case since the supplemental benefit is calculated at 5% of the compensation rate for every year since the accident, the current compensation rate being $382.00 per week. It is arbitrary and capricious to force an employee to lose his supplemental benefit under the Florida Workers' Compensation Law, merely because he is eligible to receive the lesser, but not the full, benefit for old age retirement under the Social Security Act. Furthermore a Social Security disability benefit is already capped at 80% of average current earnings including workers' compensation after age 62. This is a double offset because the supplemental benefit is already subject to the 80% cap. *State of Fla., Div. of W. C. v. Hooks,* 515 So. 2d 294 (Fla. 1st DCA 1987).

Section 20 of the Act, page 86, provides for the catastrophic loss benefit payable to those persons who have suffered the amputation of an arm or a hand or a leg or a foot or who have been rendered paralyzed or totally blind. Under this provision such a seriously injured employee is entitled to 80% of his average weekly wage up to $700.00 per week for up to six months. This roughly corresponds to the waiting period for Social Security total disability. Under the former statute, this was payable for up to six months from the injury. In the case of *Bordo Citrus Products v. Tedder,* 518 So. 2d 367 (Fla. 1st DCA, 1987), the court held that the six months period began to run from the date of the qualifying injury, [such as an amputation done surgically] and not from the date of accident.

The amended statute repeals the word "injury" and substitutes the word "accident" so that in the case of amputation, for example, if the doctors tried to save the employee's leg and the amputation took place more than six months from the date of accident, he would not be entitled to this benefit, and for every day that they delayed subsequent to the accident, the amount of the benefit would be reduced by every day short of six months.

This amendment is absurd because the rationale for the benefit is the suffering of the qualifying injury, blindness, total amputation, or paralysis, which has nothing to do with the date of accident. It makes no sense to provide this benefit to those persons who suffer these horrible injuries in the moment of the accident and not provide it to those persons who suffer such injury subsequent to the accident, usually as a consequence of the medical treatment involved.

Section 20, on page 93, lines 19-29, and page 94, lines 1-29, of the Act provides that the former availability of 525 weeks for wage loss is reduced to a number of weeks which is proportionate to the seriousness of the permanent physical impairment involved. However, the statute begins by providing that for injuries after June 30, 1990, the employee's eligibility for wage loss benefits shall be determined according to the following schedule:

> "Twenty-six weeks of eligibility for permanent impairment ratings up to and including 3 per cent."

The schedule continues in this manner; however, as a practical matter, it ranges up to 150 weeks of eligibility for permanent impairment ratings up to and including 15%. Higher ratings would usually result in permanent total disability. The so-called availability of these weeks for wage loss benefits is largely illusory. The principal fault from a standpoint of due process and also equal protection with respect to this schedule is that it is vague and indefinite and impossible if not impractical and unworkable. It provides an availability of a number of weeks for

impairment ratings of up to and including 3% etc. without saying 3% of what. There can be impairment ratings of 3% of the body and also 3% of the little finger, or the hand, or arm, or any part of the body. The Workers' Compensation Law follows the maxim of statutory construction called the "most favorable remedy rule" which is if the statute is ambiguous or capable of more than one interpretation, then the court must choose that interpretation which gives the employee the greatest benefit. *Kerce v. Coca Cola Co. Foods Division,* 389 So. 2d 1177 (Fla. 1980). That being the case we would have to conclude that the number of available weeks is the same for a rating of 3% of the little finger as it is for 3% of the body. Such a result is, however, patently absurd. When this provision is read in conjunction with the language contained on page 94, lines 30-31, and page 95, lines 1-9, which refer to the burden of proof applied to permanent impairment ratings of 1% but not more than 20% of the body as a whole, it should be apparent that the Legislature understood the difference. Yet it chose to write the availability of wage loss in terms of the "per cent" without regard to "per cent" of what.

Section 20 does provide that for injuries after July 1, 1990, pending the adoption by the Division of a rule of a uniform disability rating guide, that the Minnesota Department of Labor and Industry Disability Schedule shall be temporarily used, unless that schedule does not address an injury and then it goes on to provide on page 88, lines 27-31, and page 89, lines 1-2, that if the injury is not in the Minnesota Guide then the Guides to the Evaluation of Permanent Impairment by the American Medical Association shall be used.

Taking that provision in reverse order it should be noted that there are three editions of the Guides to the Evaluation of Permanent Impairment and there are substantial differences among them. The statute only makes reference to the use of the Guides and does not say which edition. Unworkable.

The Minnesota Guide is not widely available and it is confusing. (R. 382-83) Indeed the 1990 Law states that there are injuries which are not covered by that schedule. Given that the constitutional validity of workers' compensation laws is pitched upon the theory that they are certain and speedy as to their benefits, it is wholly inappropriate to incorporate by reference an obscure guide from Minnesota. Furthermore, the Minnesota Guide was adopted in 1984 (R. 374) (Exhibit No. 55) and is already obsolete in Minnesota. (R. 379-80) More importantly, this incorporation by reference to another state's law, which is not readily available, is somewhat akin to a traffic sign that says "Speed Limit, see section 23-10 of the Minnesota Traffic Code". Unworkable.

Section 20 provides on page 95, lines 13 and 14, of the Act that notwithstanding sub-paragraph 4, (which is all of the other many limitations on the right to recover wage loss benefits) the right to wage loss shall terminate if within any two-year period there are three occurrences of any one of the following incidents which include: "the employee voluntarily terminates his income for reasons unrelated to his compensable injury".

Section 20 of the Act on page 90 repeals the former provision with respect to what was known as "deemed earnings" by which the courts recognize that there were circumstances which were either good, neutral, or bad in which an employee voluntarily terminated his employment for reasons unrelated to his compensable injury. Such reasons, however, did not cure him of his physical injury and should not relieve the employer of responsibility. A good example would be a circumstance in which the employee quit work to take care of a sick mother or spouse or child. It could also include that he quit one job to take another job which he thought would be better, either as to wages, working conditions, or opportunity, or any of these. A neutral reason would be that the employee terminated his employment because he suffered a subsequent injury. A

bad reason, of course, would include employee misconduct, such as unexcused absenteeism or even theft.

The difficulty with this amendment is that it does not distinguish between the three and it provides no excuse or safety valve. Note for example, if the employee who was on wage loss quit a job in order to take what he thought was a better one and subsequently discovered that it was not, and quit that job to return to his former job, he would immediately have two strikes against him. He would be restrained as a practical matter within any two-year period from making any other job change for fear that his benefits would, as the amendment provides, be terminated permanently. This is arbitrary and capricious and totally absurd.

Section 20 provides, on page 95, lines 25-31, and on page 96, lines 1-3, of the Act that the right to wage loss benefits shall terminate if the employee is convicted of conduct punishable under a particular statute. This statute, however, incorporates by reference even traffic violations. Far worse yet, the amendment defines convicted to include "a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation". Again the statute does not deal merely with a suspension or a diminishment or a deeming, but states that benefits shall terminate. This violates equal protection requirements. See *Walker v. City of Tampa,* 520 So. 2d 66 (Fla. 1st DCA 1988).

Section 20, on page 99, lines 18-23, of the Act provides that no benefits shall be payable if the employee, at the time of entering into the employment of the employer by whom the benefits would otherwise be payable, falsely represents himself in writing as not having previously been disabled or compensated because of such previous disability impairment, anomaly or disease. This provision legislatively overrules the Supreme Court's decision in *Martin Company v. Carpenter,* 132 So. 2d 400 (Fla. 1961). In that case the court held that when the employee misrepresented his physical condition (but this does not apply to any

other representation) at the time of his employment, and the employer relied on such misrepresentation, and subsequently the employee was injured, and either the condition which was misrepresented caused the injury or added to the disability, then such injury was not compensable. Basically it is estoppel. The amended statute eliminates the requirement of reliance by the employer upon the misrepresentation and more importantly eliminates the need for a causal relationship between the misrepresentation and either the accident or the resulting disability. The statutory amendment violates due process of law and equal protection of the law because it is totally unreasonable to provide that the employee's misrepresentation is a bar to any recovery even if there is no causal relationship whatsoever between that misrepresentation and either the accident or the injury. Indeed, the accident or the injury could be due to a completely outside force, including the employer's fault. Furthermore, this particular statutory provision impairs the obligations of contracts because it makes reference to the contract of hire that may have been entered into many years ago. It is quite plainly an ex post facto law with respect to any contract of hire entered into prior to the 1990 effective date.

Section 20, on page 100, lines 16 -20 and 28-31, and page 101, line 1, of the Act provides with respect to those employees who are on wage loss and suffer a subsequent injury, that their average weekly wage is not what they were actually earning at the time that they suffered the subsequent injury, but "shall be deemed to be the salary wages or remuneration the employee is able to earn". Such a provision is unworkable since it is a departure from true fact. The statute in every other respect provides that the average weekly wage is what the employee was earning at the time of his injury. This amendment provides that the employee's average weekly wage is not what he was earning at the time that he was injured, but is some subjective standard which is difficult if not impossible to determine.

Section 40, page 190, lines 1-6 of the Act establish another mechanical standard providing that no reimbursement shall be allowed to an employer under the Special Disability Fund in the circumstance in which the employer has re-employed an employee who suffers and injury which results in a permanent physical impairment, "and the records of the employer establish that the employee had a preexisting permanent physical impairment and such records were in the employer's possession prior to the subsequent accident." First of all, records are not defined, but more importantly, it limits recovery to those circumstances in which the employer has a "record" that establishes that the employee had a preexisting permanent physical impairment. Under this statute his knowledge and conduct would not be enough. He must have a "record". That is not the way the real world operates. The statute is designed to prohibit or limit recovery by employers against the Special Disability Fund, even in those cases in which they would in every other way be entitled to recover.

Section 24 on page 117, lines 2-26, of the Act provides that when the claimant has reached maximum medical improvement and has been assigned a permanent impairment rating from 1 through 5 per cent [again the statute does not say of the what] and has not received any medical treatment for at least three months, he shall be allowed a lump-sum settlement which shall be equal to the amount determined by multiplying the claimant's weekly compensation rate by a factor of three, then multiplying that product by the number of permanent impairment rating points assigned and this lump-sum settlement shall be a settlement not only of indemnity but of his right to future medical care as well. This provision is a violation of due process of law, the right of the parties to contract, of equal protection of the law, and is an absolute fraud on the public. It should be seen by comparing this section with the schedule of available weeks for wage loss that this calculation is limited to a settlement under any mathematical

circumstance which is only about 25% of the benefit to which the employee is otherwise entitled.

Section 29 of the Act, in regard to attorney's fees, provides that in determining the value of future medical benefits secured by the attorney's services, these shall not include those benefits provided on any day more than five years after the date the claim is filed. This language repeals §19, Ch. 89-289 Laws of Fla. which provided that it shall not be more than five years after the hearing is held.

This provision is a conclusive presumption that medical benefits received by the employee more than five years after the claim is filed are not due to the claimant's attorney's efforts. While the 1989 statute was also a conclusive presumption which would be similarly invalid for the same reason, the 1990 statute is far worse because the former statute was a restriction on the consideration of future medical benefits at the time that the attorney's fee was determined. Under the amended statute, it is a mismatch of terms for it states that benefits secured does not include "future medical benefits" to be provided on any date more than five years after the date the claim is filed. Obviously by definition, on the date that the hearing is held, some of the medical benefits will have been in the past. Yet the statute defines them as being future medical benefits simply because they were provided after the claim was filed. Indeed, if the hearing on attorney's fees were more than five years after the claim was filed, the statute prohibits the presentation of any evidence of the value of medical benefits received more than five years after the claim was filed, even if they all had been in the past and can be determined with absolute certainty. Under the amended statute at least part of the benefits will always have been in the past and this has no relationship to future benefits. The five-year cutoff is a conclusive presumption. This amendment is plainly an attempt to reduce the amount of

attorney's fees in an arbitrary and capricious manner in those cases when medical bills were in dispute, in order to prohibit actual proofs of the real amount in controversy.

These amendments, however, are of recent origin, notwithstanding that the First District Court of Appeal held in *Aramburo v. Cargo Development, Inc.* 455 So. 2d 567 (Fla. 1st DCA 1984) and *Dale v. Landrum Temporary Services,* 458 So. 2d 32 (Fla. 1st DCA 1984) that the attorney's fee statute in the Florida Workers' Compensation Law was already too restrictive and imperiled the rights of employees to the procedures necessary to assert their rights.

The attorney's fee statute in the Florida Workers' Compensation Law is the most highly regulated and restrictive in Florida. However, it is a statute that is only applicable to claimant's attorneys. There is no restriction of any kind with respect to the employer/carrier's attorney's fees. The statute lacks reciprocity. From a constitutional standpoint it is impossible to justify restrictions on claimant's attorney's fees on the basis of reducing costs [the excuse offered by the Legislature] when there is no restriction on employer/carrier's attorney's fees. As the First District Court of Appeal indicated in *Aramburo* and *Dale*, the restrictions on claimant's attorney's fees become directed toward restricting the availability of employees to assert their rights.

Insecurity of Benefits

Section 31 of the Act provides the various methods by which the employer may secure the payment of benefits. A new method is described on pages 133 and 134 of the Act to the effect that an employer may satisfy the requirement of the law that he secure the payment of compensation by contracting for a 24-hour health insurance policy which may provide for medical treatment by an HMO or a PPO, which shall be paid for by the employer. However, the statute goes on to provide that the 24-hour health insurance policy may utilize deductibles and co-insurance

provisions that require the employee to pay a portion of the actual medical care received by the employee.

Under this provision the employer receives immunity from suit in exchange for purchasing a medical insurance policy with an HMO or PPO. He is free to negotiate with the HMO or the PPO what the deductible shall be, for example, $500.00, or $1,000.00, or $1,500.00, and those deductibles are payable by the employee, not by him. This is a complete departure from the theory of workers' compensation and is not a suitable alternative remedy since it is unreasonable, if not outrageous, to give the employer immunity from suit in exchange for providing a workers' compensation benefits which the employee pays for himself.

Quite plainly, this provision by which the employee pays a deductible for his medical benefits does not satisfy the requirements that a workers' compensation law be certain, speedy and secure. If the employee cannot pay the deductible, he cannot get the medical benefits. Given this deductible for medical care and the waiting period for compensation, §440.12(1), Fla. Stat. (1990), an employee could, under this amendment, receive nothing from the employer and the employee would have to pay for his own medical expenses. Yet the employer would be immune from suit.

Section 33 of the Act relates to the Florida Self-Insurers Guaranty Association, Incorporated. On page 142, it provides that the insolvency fund under the Guaranty Association "is obligated for payment of compensation under this chapter" to the employees of insolvent members for incidents and injuries occurring prior to the insolvency and for 30 days thereafter. The statute limits the obligation to the payment of compensation. It does not provide for the payment of medical expenses or any other obligation under the Florida Workers' Compensation Law, and to that extent it is inadequate. Page 142, line 18 and also

line 25. Far worse, however, is the amendment that even this payment is not to be made unless "...the employee makes timely claim for such payments according to procedures set forth by a court of competent jurisdiction over the delinquency or bankruptcy proceedings of the insolvent member". This means that in the event of the insolvency of a self insured employer, the Guaranty Fund would not be responsible for the payment of benefits to the employee nor would the Judge of Compensation Claims have jurisdiction over a claim for benefits between the employee and the Guaranty Association. Rather, under this amendment, the employee would have to make his claim to the bankruptcy referee or such other court which had jurisdiction over the bankruptcy of the employer. This is unequal treatment with respect to those employees who work for employers who have workers' compensation insurance for whom the bankruptcy of the employer or the carrier does not affect either his entitlement to benefits or the procedures that he may invoke to obtain them. Furthermore, this provision eliminates the speediness in the delivery of benefits by throwing the employee into the procedure of the bankruptcy court which defeats the purpose of having a Guaranty Fund in the first place.

Section 43, page 198, lines 22-31, and page 199, lines 1-2, of the Act provides that a self insurer having a net worth of $250 million or more "may assume by contract the liabilities under this chapter of contractors and subcontractors, or each of them, employed by or on behalf of such individual self-insurer when performing work on or adjacent to property owned or used by the individual self-insurer by the division." It goes on to provide that in determining the assets, the corporate veil may be pierced with respect to the assets of the self-insurer's parent and its subsidiaries or sister companies or affiliated companies, or related entities located within the state.

This provision is imaginative. It would be a flight of fancy equal to "Peter Pan's Flight" to suggest to whom it applies. What is wrong with it, first of all, is that although it provides that the corporate veil may be pierced to find the $250 million for qualification, there is no provision permitting the employee to pierce the corporate veil in order to collect. This is significant because there is no requirement that the corporation which assumes by contract the liabilities of other employers have any assets at all. For the purpose of qualifying, that corporation can use the assets of other corporations. For the purpose of claims, the corporate veil cannot be pierced. This amendment allows the mega-corporation to say to those with whom it contracts that it will bear their responsibility for workers' compensation coverage; those contractors may say to those with whom they contract that the mega-corporation will also provide them with coverage. The work to be done does not have to be construction. It does not even have to be on the property of the mega-corporation. It can be work on, or even just adjacent to its property or property that is used by it. There is no way for the Division of Workers' Compensation to tell which of these contractors and which of these subcontractors are "insured" by this mega corporation. There is no way for the employees of the contractors of the mega-corporation, or the employees of those with whom the contractors subcontract, to know that mega-corporation is responsible for workers' compensation. What this provision does is: it allows an ordinary business to operate as an insurance company without the regulations placed upon insurance companies to be placed upon it. There is no security for benefits to employees to this wild scheme and where the immunity from suit is, is difficult to determine.

Section 57 of the Act, beginning on page 208, mandates a 25% reduction in rates as of September 1, 1990. It shall remain in effect until January 1, 1992. The Legislature stated:

> "The 25 per cent rate reduction reflects the estimated 30 per cent reduction in the cost to benefits that will result from the enactment of this bill and the increase in medical costs that has occurred since January 1, 1990. There shall be no exceptions to the requirements of this provision..." [unless the carrier's insolvency is jeopardized.]

The section goes on to provide that new or renewal workers' compensation insurance policies entered into after September 1, 1990, shall reflect this 25% reduction in the rates for required coverage under this Act and the Department and the Division are to adopt rules for proration from September 1, 1990. The section also abolishes all deviations or discounts previously offered by any carrier with regard to all insureds. The section concludes by providing:

> "No insurer, commercial self-insurance fund, or group self-insurer shall make written application to the Department of Insurance or the Department of Labor and Employment Security for permission to file a uniform percentage decrease below the revised rates effective as of September 1, 1990."

Taking these provisions in reverse order, the last sentence plainly violates due process of law because it provides that no carrier shall even ask. It makes even a request unlawful.

The mandated 25% relates to the "average premium increase approved effective January 1, 1990."

This provision is deceptive because those employers who already had discounts from the approved rates lost those discounts. (R. 741-42, 759-60) Those carriers who already offered deviations from the standard rate lost those deviations as did the employer involved. (R. 741-42, 759-60) Of course, individual self-insurers paid no rate at all. (R. 754) They paid only for their own experience. (R. 755)

Therefore, the mandated 25% reduction is not accurately stated. Furthermore, it is an example of fact finding by the Legislature without any basis

in fact and without due process. Finally, it should be obvious that if any of the provisions in the Act relating to the reduction of employee benefits are invalidated, then the 25% mandated reduction in premiums is invalidated. The Legislature made it a tandem bicycle or a daisy chain. The Legislature provided that the 25% reduction in premiums was connected to the reduction in benefits to employees contained in the Act.

CONCLUSION

The individual provisions of Ch. 90-201 and the challenged portions of Ch. 89-289, Laws of Florida, violate due process of law and equal protection of the laws. The cumulative effect of the individual violations of Ch. 90-201 invalidate the entire Act. This Court should so decide.

Respectfully submitted,

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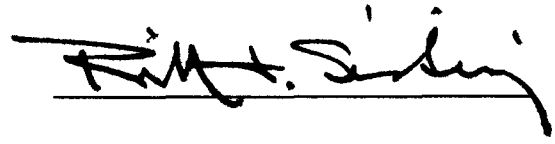

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