OIA 3-4-91

IN THE SUPREME COURT OF FLORIDA

BOB MARTINEZ, et al.,

Appellants/Cross Appellees,

vs. CASE NO. 77,179

MARK SCANLAN, et al.,

Appellees/Cross Appellants.
_____/

DEFENDANTS' BRIEF IN RESPONSE TO THE AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND FACTS

Defendants Martinez, Gallagher, Menendez and Lewis adopt the Statement of Case and Facts contained in the other answer briefs filed by Defendants and the amicus brief filed on behalf of Defendants.

While the Trial Lawyer's brief is styled as an "answer" brief, it is in fact an initial cross appeal brief submitted on behalf of the Plaintiffs. As this brief was not filed until February 11, 1991, (14 days after all initial briefs were required to be filed) the Defendants did not have sufficient time to review the brief and draft a response to it by February 12, 1991, the date by which all answer briefs were required to be filed. Therefore on February 13, 1991 the Defendants filed a motion for leave to file a response to the Trial Lawyer's brief. This Court granted that motion on February 15, 1991.

SUMMARY OF THE ARGUMENT

As indicated by the record in this case, the Plaintiffs failed to present testimony or evidence below to support their claims that Chapter 90-201, Laws of Florida, was facially invalid.

A recurring theme of the Plaintiffs' which is echoed by the Trial Lawyers in their brief is that the Legislature erred in amending the workers' compensation act. They argue, without either legal or factual support, that the changes made to the workers' compensation act constitute a denial of access to courts.

What they are really saying is that "You can't do this to me." They are challenging the wisdom of the Legislature on a facial basis rather than waiting for the act to "shake down" to determine its viability. There is no evidence to support the Plaintiffs' and Trial Lawyers' allegations that the individual amendments violate constitutional principals. These allegations are based solely on a series of hypothetical analogies unsupported by the record. Having set up a series of worse case hypotheticals, the Trial Lawyers now ask this court to perform a "super legislature role" and find, without a foundation and without the Plaintiff's having proved their case beyond a reasonable doubt, that these hypotheticals, taken in their worst case scenario, constitute a cumulative denial of access to court. This is a bed of hot coals upon which this Court should not walk.

The Court should exercise extreme judicial restraint before accepting the invitation of the Trial Lawyers and the Plaintiffs to perform a legislative function and write or rewrite a workers' compensation law which will be acceptable to these Plaintiffs.

As Defendants and Amici point out in the initial and answer briefs, this suit was brought as a declaratory suit seeking to have this Court declare the workers' compensation law unconstitutional. Stripped down to its unsupported foundation, Plaintiffs seek to have this Court issue an advisory opinion regarding the potential effect of Chapter 90-201, Laws of Florida. The trial court was right for the right reasons in holding that the majority of the provisions of Chapter 90-201, Laws of Florida, do not violate Article I, Section 21 of the Florida Constitution.

I. The Trial Court Was Right For The Right Reasons When It Held That Chapter 90-201, Laws of Florida Did Not Facially Violate Article I, Section 21 of The Florida Constitution.

A. THE LEGAL FRAMEWORK

An extensive analysis of whether Chapter 90-201, Laws of Florida, constitutes a reasonable alternative to the tort litigation system in light of Kluger v. White, 281 So.2d 1 (Fla. 1973), and its progeny has been made in the answer briefs of Associated Industries of Florida (pp. 5-15) and Defendant Gallagher (pp. 28-39). The argument contained in those briefs establishes that Chapter 90-201, Laws of Florida, maintains and effectuates a workers' compensation system which provides employees with a reasonable alternative to the tort litigation system because it continues to ensure that employees will receive fully paid medical care and wage loss benefits for on-the-job accidents without having to endure the uncertainty and delay of personal injury litigation. See Kluger, supra, Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983); and Mahoney v. Sears Roebuck & Co., 440 So.2d 1285 (Fla. 1983). The Trial Lawyers have not, because they cannot, cited any case where this Court has struck a workers' compensation statute because it denied access to court provisions of Florida's Constitution. Many of the non-workers compensation cases cited by the Trial Lawyers are distinguishable because in those cases this Court found that the Legislature had provided no alternative remedy to

the common law right being statutorily abrogated. See, e.g. Overland Constr. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979); and Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987). In contrast to these cases, in the other cases challenging the workers' compensation system as denying access to courts, this Court has consistently affirmed that the workers' compensation law provides a reasonable alternative remedy to the tort litigation system.

B. THE WORKERS' COMPENSATION DECISIONS

As this Court is aware, there have been numerous challenges to Florida's workers' compensation law in the past fifteen years. The validity of the workers' compensation system as a reasonable alternative to the right to sue has been upheld time and time again against multifaceted challenges to its constitutionality. See Newton v. McCotter Motors, Inc., 475 So.2d 230 (Fla. 1985) (provision requiring that death must occur within one year of accident, or must follow continuous disability and must result from the accident within five years of the accident in order for death to be compensable under the worker's compensation statute did not deny access to courts); Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984) (provision limiting wage loss benefits when injured employee reaches age 65 did not deny access to courts); Mahoney v. Sears Roebuck & Co., supra, (provision reducing the amount of recovery for loss of vision in one eye, even if recovery appeared inadequate and

unfair, did not deny access to the courts); Acton v. Ft. Lauderdale Hospital, supra (provisions eliminating "scheduled injury" benefits did not deny access to courts); Iglesia v. Floran, 394 So.2d 994 (Fla. 1981) (provision repealing right to bring a lawsuit against a co-employee for death or injuries negligently inflicted except in cases of gross negligence, did not deny access to courts.); Scholastic Systems, Inc. v. LeLoup, 307 So.2d 166 (Fla. 1974) (provision creating the Industrial Relations Commission did not deny access to courts); and Wood v. Harry Harmon Insulation, 511 So.2d 690 (Fla. 1st DCA 1987) (provision establishing additional evidentiary requirements necessary for spouse to receive death benefits compensation did not deny access to courts).

C. CHAPTER 90-201, LAWS OF FLORIDA DOES NOT VIOLATE THE RIGHT OF ACCESS TO COURTS.

The Trial Lawyers fail to demonstrate that the cumulative effect of the amendments to Chapter 90-201, Laws of Florida, "radically" reduces the benefits employees enjoyed under the previous workers' compensation act without providing employees with other benefits to compensate (for the loss of benefits taken away). The Trial Lawyers also fail to prove that the pre-existing balance between employers and employees has been impermissibly altered, thus rendering Chapter 90-201, Laws of Florida, unconstitutional.

The Trial Lawyer's argument flies in the face of the reasoning set forth in Kluger, supra, and its progeny. None of

these cases even remotely suggests that, when a court reviews a worker's compensation statute against the reasonable alternative standard, the reviewing court is to conduct a balancing test regarding whether an employee still enjoys an equivalent level of benefits under the new workers' compensation law as compared to the level of benefits he or she enjoyed under the previous workers' compensation law.

When analyzing whether a workers' compensation act constitutes a reasonable alternative for an employee's right to sue, the relevant consideration is whether the new workers' compensation law "continues to provide substantial advantages to injured workers, including full medical care and wage-loss payments for total disability without their having to endure the delay and uncertainty of tort litigation" Acton v. Ft. Lauderdale Hospital, supra.

Further, as the numerous cases upholding the constitutionality of various amendments to the workers compensation law attest, there is no requirement that once a reasonable alternative has been provided, it must remain forever immune from amendment or modification. Cases such as Acton, and Mahoney, establish that the Legislature has the authority to make sweeping amendments to the workers' compensation law and as long as these changes continue to ensure that injured workers receive medical care and attention and wage replacement until they are able to return to work. Thereafter wage replacement is paid based on wages actually lost due to the injury. Balanced against

the assurance of those payments is the requirement that the system be affordable to the employer. There simply is no quid pro quo requirement that the legislature has to provide another benefit in place of one reduced.

The Legislature in the "whereas" clauses of Chapter 90-201, Laws of Florida, found that: "the reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a worker's compensation system which provides adequate coverage to injured employees at a cost that is affordable to employers". (Emphasis added).

The evidence in the record clearly demonstrates that the Legislature's objective of stabilizing the workers' compensation system in Florida was well founded. The cumulative overall rate increase for workers' compensation in Florida from 1982 to January 1, 1990 was over 200 percent (T 873), with even higher increases for some classes. For example, since 1982 an employer of carpenters for construction of detached residences, a highly significant class in Florida, has experienced a rate increase from $7.48 per $100 of payroll to $28.18 per $100 of payroll, a 276 percent increase (T 881). Yet, despite these increases, insurers have not earned a profit on workers compensation in Florida, even including investment income, for any year from 1984 to 1990 (T 418). This escalation of workers' compensation rates had shown no signs of subsiding at the time Chapter 90-201 was enacted. Mr. Frederick Kist, an actuary testifying on behalf of the Defendants stated that an additional 30 to 40 percent rate

increase would have been needed on January 1, 1991, absent enactment of Chapter 90-201 (T 893). Thus, enactment of Chapter 90-201, with the 25 percent rate rollback in section 57 and the rate freeze until January 1, 1992, prevented a 30 to 40 rate increase, plus it rolled back rates another 25 percent below their January 1, 1990, level. Using the $28.18 rate for carpenters to illustrate, the rolled back rate should be $21.35, while the rate if this law were not in existence would be between $36.63 and $39.45 per $100 payroll.

It should be noted that in identifying this legislation as "the only alternative available" the Legislature recognized and took steps to preserve the essential balance between adequate coverage for employees and affordable cost to employers noted by the Trial Lawyers in their brief. To illustrate this balance, Dr. David Appel cited the report of the National Commission on State Workers' Compensation Laws, which the U.S. Department of Labor uses on a semi-annual basis to review compliance by the various states (T 428). This report has five broad objectives for workers' compensation programs and 19 essential recommendations (T 428). Dr. Appel concluded that the provisions of the 1990 law were responsive to all five objectives and was particularly strong in comparison to other states with respect to both encouragement of safety and the provision for an effective delivery system (T 430). With regard to compliance with the 19 essential recommendations of the Commission, Florida's level of compliance rate is 12 out of 19 recommendations (T 431). The

average state compliance rate is 12.5 out of 19 recommendation and the highest level of compliance is 15 out of 19 recommendations (T 431). The balance contained in this legislation is further supported by Mr. Kist's testimony that in addition to the benefit reductions which could be presently costed, there were other elements of the 1990 law which should provide additional protection to employees in the workplace and have potential costs savings. (T-948).

The Trial Lawyers argue that each new amendment of a statute should not be judged in a vacuum but should be judged based on the effect it has on the overall scheme (See, Trial Lawyer's Brief, FN7) In partial support of this statement, the Trial Lawyers cite to Carter v. Sparkman, 335 So.2d 802 (Fla. 1976) and Aldana v. Holub, 381 So.2d 231 (Fla. 1980). Defendants agree that these cases provide relevant guidance to this Court regarding the instant case.

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

Approximately four years later in Aldana v. Holub, supra, this Court declared the Medical Malpractice Reform Act to be unconstitutional. This Court said it would construe the statute

to render it constitutional if there was any reasonable way to do so, but it could not because the operation of the statute proved to be arbitrary and capricious. In so ruling, this court stated:

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

Id. at 237.

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

The majority of the specific provisions of Chapter 90-201, Laws of Florida, discussed by the Trial Lawyers in their brief are addressed in detail in the answer briefs of Defendants and Amici. A number of the provisions challenged by the Trial Lawyers in their cross appeal are inappropriately raised because they were issues that the Plaintiffs prevailed on in the trial below. The following portion of Defendants' brief addresses, in an abbreviated fashion, each specific provision of Chapter 90-

201, Laws of Florida, challenged by the Trial Lawyers and then references where a detailed analysis and response to the challenged provision can be found in the other briefs of Defendants and Amici.

1. Procedural Changes

The Trial Lawyers argue that amendments contained in Sections 11, 17-18, 20 and 26 of Chapter 90-201, Laws of Florida, effectuate radical changes to the procedures for administering workers' compensation claims in a manner which significantly undermines a workers' pre-existing benefits. While Defendants agree that at least some of these provisions effectuate procedural changes, these changes are not radical in nature and were adopted by the Legislature in an effort to preserve the worker's compensation system as a reasonable alternative to tort litigation for both employees and employers. The Legislature's intent regarding the provisions challenged by the Trial Lawyers is specifically set out in Chapter 90-201, Laws of Florida, as follows:

> Section 440.015 Legislative intent.--It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits. The workers' compensation system in Florida is based on a mutual renunciation of common law rights and defenses by employers and employees alike. In addition, it is the intent of the Legislature that the facts in a workers' compensation case are not to be

> interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Additionally, the Legislature hereby declares that disputes concerning the facts in workers' compensation cases are not to be given a broad liberal construction in favor of the employee on the one hand or of the employer on the other hand.

The Trial Lawyers also allege that these "pre-existing" presumptions and procedures were a fundamental aspect of the benefits given to employees in exchange for their right to pursue claims against their employer in the tort litigation system. However, as is pointed out below and more fully in the other briefs of the Defendants and Amici, the majority of these presumptions did not exist at the initial codification of the workers' compensation law in this state and were judicially rather than legislatively created. The amendments to Chapter 90-201, Laws of Florida, regarding the procedures and presumptions challenged by the Trial Lawyers are a legislative effort to correct the imbalance in the workers compensation system that had resulted from these presumptions.

The Trial Lawyers contend that Section 440.015, F.S., overrules the "logical cause" doctrine; alters the judicially created burden of proof, and changes the basic philosophy of the workers' compensation law, thereby denying a claimant access to courts. They assert that the change in the burden of proof and repeal of Section 440.26, F.S., is a violation of Kluger v. White, supra, in that the remedy provided by the workers' compensation law was changed and reduced by Chapter 90-201, Laws

of Florida, to such an extent that it is no longer a viable alternative to common law remedies. However, it is axiomatic that remedial statutes are to be liberally construed to effectuate their beneficent purposes. E.g., Cook v. Georgia Grocery, Inc., 125 So.2d 837 (Fla. 1960). The repeal of presumptions and creation of Section 440.015, F.S., in no way alters the requirement that the workers' compensation statute be liberally construed. Section 440.015, F.S., simply requires that the facts of the case not be liberally construed or interpreted in favor of either party.

The liberal construction of the law did not alter the fact that the claimant had to prove the elements of his claim such as causal connection between the employment and injury. See Glasser v. Youth Shop, 54 So. 2d 686, 687 (Fla. 1951) ("While there is a presumption that the claim comes within the Act, the claimant is not relieved of burden of proving that the injury arose out of and in the course of employment") and City Ice & Fuel Div. v. Smith, 56 So.2d 329 (Fla. 1952) (no presumption will be indulged as to injury resulting from an accident, but both injury and its relation to employment must be proved).

The changes in the 1990 Act abolishing the presumption in Section 440.26, F.S., do no more than require the claimant to prove that his injury is job related by a preponderance of the evidence. He is not required to prove fault of the employer in causing the injury. This is hardly an onerous burden. This requirement is not an unusual burden under workers' compensation

statutes in other jurisdictions, all of which have been held to constitute an alternative remedy to the common law right to sue.

The doctrine of liberal construction is cited as the basis for the so-called "logical cause doctrine." The logical cause doctrine holds that when a serious injury is conclusively shown and the evidence presents a sufficiently logical explanation of a causal relationship between the accident and the subsequent injury, the burden of proof shifts to the employer to show a more logical cause for injury. E.g., Sanford v. A.P. Clark Motors, 45 So.2d 185 (Fla. 1950).

This Court is not called upon to assess the wisdom of the logical cause doctrine or the impact of the amendments on the logical cause doctrine. What this Court must decide is whether the change amounts to a constitutional violation. Again, there was no evidence presented as to how this alleged change will affect injured employees, or if any employees will actually be affected. With the exception of cases where the logical cause doctrine has been applied, the burden of proof is already on the claimant to establish the elements of his claim. Stone-Brady, Inc. v. Heim, 12 So.2d 888 (Fla. 1943).

Kluger, supra, is inapplicable since no remedy is being significantly impaired, much less abolished. No violation of the access to courts provision of the Florida Constitution occurs when the burden of proof is altered with the result that recovery under a cause of action may become more difficult. Alterman Transport Lines v. State, 405 So.2d 456, 459 (Fla. 1st DCA 1981);

Jetton v. Jacksonville Elec. Auth., 399 So.2d 396 (Fla. 1st DCA 1981). The Florida Workers' Compensation Law has been recognized as a viable alternative to common law suit. A complete analysis of this issue is set out on pages 8-16 of the Chamber's answer brief and is readopted here.

The argument of the Trial Lawyers that, if an employee is injured in a drug free work place program, there is a conclusive presumption that his injury was caused by drug or alcohol is an inaccurate statement. Arguing that in a drug free work place, an employee can rebut this evidence only by clear and convincing evidence is likewise misleading. One only has to look at the Florida Evidence Code (Chapter 90, F. S.) to obtain the response to this concern. The language in the Section 90.301 states:

> (1). . . a presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.
>
> (2) Except for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable.

In order for the presumption in this statute to be conclusive, there must be something in the workers' compensation law proclaiming it as such.

Chapter 440, F.S., does not state that there is irrebuttable presumption. See Fidelity & Casualty Company of New York v. Moore, 196 So.2d 495 (Fla. 1940), which held that where a presumption exists, there is only a presumption until rebuttable evidence is submitted. When such evidence is submitted, that

presumption vanishes. For example, an employee on the job site intoxicated by an overdose of cocaine who is walking on the ground and is hit by a falling board from the fifth floor will be able to rebut the presumption that his injury was caused by the intoxication from cocaine.

The removal of the language "in the absence of substantial evidence," from section 440.09(3),F.S., on its face, rendered the presumption to be a presumption affecting the burden of producing evidence. See Sections 90.303 and 90.302(1), F.S. This means that the trier of fact must:

> presume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the non-existence of the presumed fact is introduced, in which event, the existence or non-existence of the presumed fact shall be determined from the evidence without regard to the presumption.

See Section 90.302(1), F.S.

When there is no drug free work place, the presumption is rebutted by clear and convincing evidence that the intoxication or influence of drugs did not contribute to the injury. Section 440.09(3), F.S. This language imposes upon the party upon whom it operates the burden of proof concerning the non-existence of the presumed fact. See Sections 90.302(2) and 90.304, F. S. A conclusive presumption precludes the opposing party from showing evidence to the contrary. This provision does not create a conclusive presumption but, rather, articulates two types of rebuttable presumptions defined by the Florida Evidence Code:

(1) a presumption affecting the burden of producing evidence when there is a drug free work place, and (2) a presumption affecting the burden of proof when there is no drug free work place.

In virtually all jurisdictions, intoxication of an employee may amount to deviation from employment which would preclude the award of benefits. In 37 states, intoxication of an employee is the basis of a separate statutory defense. The statutory defense in two states, Nevada and Texas, require no proof of causal relation between the intoxication of the employee and the accident.

The Trial Lawyers urge, as did Plaintiffs AFL-CIO/IBEW in their initial briefs, that Section 440.15(5) establishes a conclusive presumption between a misrepresentation as to physical condition and a subsequent injury or accident and goes beyond this Court's opinion in Martin v. Carpenter, 132 So. 2d 400 (Fla.1961) in preventing fraud in the job application process.

The amendment does not alter the requirement that the misrepresented condition be related to the injury suffered by the claimant. It deals only with compensation for aggravation or exacerbation of a pre-existing condition. Benefits for such aggravation of the pre-existing condition are precluded only if there is a misrepresentation regarding the previous disability.

The amendment does alter one of the criteria in the Martin v. Carpenter defense - the requirement of employer reliance upon the misrepresentation. Under prior case law, it was necessary to show that the employer either would have not hired the claimant

or would have investigated further had the misrepresentation not been made. Colonial Care Nursing Home v. Norton, 566 So.2d 44 (Fla. 1st DCA 1990).

This alteration in the requirement of pre-employment knowledge is necessary in light of recent changes in federal law. Under the Americans with Disabilities Act of 1990 (Public Law 101-336), covered employers will be prohibited from making inquiries of a job applicant as to whether the applicant has a disability. Employers will be permitted to seek information from employees regarding their disability after they are hired and thus establish a basis for claims against the Special Disability Trust Fund (SDTF). The amendment to Section 440.15(5), F.S., precludes benefits in cases where the misrepresentation by the employee at the time of hiring (not before) has the probable result of barring the employer's claim against the SDTF.

The "Neutral Doc" (also referred to as the "Super Doc") provision was found unconstitutional by the court below on the basis that it denied due process and that it violated the access to courts provision.[1] The "Neutral Doc" provision is an attempt to discourage "doctor shopping" which has been perceived as contributing to the increased costs of the workers' compensation system. By creating a source of neutral health care providers whose opinions will be followed in the absence of clear and

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[1] Thus, this issue is not properly raised on cross appeal. Further, the court below held that this provision was severable from the remainder of Chapter 90-201, Laws of Florida.

convincing evidence, both employee and employer/carriers will be discouraged from trying to shop for favorable opinions. The neutrality of the health care provider selected by the Judge of Compensation Claims under the statute warrants deference to his opinion through the creation of a rebuttable presumption.

Florida has long recognized the creation of such rebuttable presumptions as expressions of social policy. See Caldwell v. Division of Retirement, 372 So.2d 438 (Fla. 1979). Apparently, the trial court assumed that there would be no way to overcome the opinion of the neutral doctor. However, that assumption ignores that the judge of compensation claims in each case will have to consider all contrary medical opinions to be sure such evidence did not overcome the presumption. While the Act might be unconstitutional if it provided no evidence; the finding by the trial judge that this provision was unconstitutional was in error.

A detailed analysis of this issue is set out on pages 8-16 of the Chamber's Initial Brief and on pages 18-23 of AIF's Initial Brief and is re-adopted here.

The arguments of the Trial Lawyers regarding the creation of Section 440.15(3)(b)4.e. F.S., (burden of proof based on degree of disability) have been fully addressed in the briefs of AIF and the Chamber. See AIF's initial brief and the Chamber's initial brief.

A detailed analysis of this 100 mile radius issue in Section 440.15(1) is set forth in the AIF's and the Chamber's

initial briefs which are readopted here. This Court should not assume this provision will be automatically applied in such a manner as to render it unconstitutional.

2. Outright Reduction of Benefits Does Not Violate Right of Access to Courts

The Trial Lawyers argue that the outright reduction in benefits effectuated by Sections 14 and 20 of Chapter 90-201, Laws of Florida, are violative of the right of access to courts. As the testimony of Fred Kist established at the trial below, the challenged amendments relating to benefit reductions were carefully crafted to have minimal effect on the large majority of claimants. The Trial Lawyers' allegation that the new formula for calculating wage loss benefits cuts out "many claims" is speculative and unsupported by the record below. Based on the arguments set out below and the more detailed analysis set forth on pages 4-21 of the answer brief of amici, Lee County Electrical Cooperative and Harper Bros., Inc., the Legislature may constitutionally limit the amount and duration of benefits, including wage loss benefits owed to an injured worker.

The Legislature may limit the amount of compensation owed to an injured worker so long as the statute still expresses the fundamental purpose of a workers' compensation act. Mahoney v. Sears Roebuck & Co., supra. The Supreme Court of the United States long ago articulated the purpose of a workers' compensation law:

> . . . to provide, . . . not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.

Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 159, 52 S.Ct. 571, 76 L.Ed. 1026 (1932) (emphasis added).

For example, in 1979, the Florida Legislature made corrections or adjustments in the continuing evolution of the worker's compensation law by replacing existing schedules and non-scheduled injuries based upon disability with a wage-loss system in which payments were based on actual wages lost as a result of the injury. These benefits are in addition to wage replacement during the healing period, termed temporary total disability. Other benefits are also provided to individuals who suffer injuries resulting in permanent total disability.

The District Court in Mahoney compared the 1979 amendments with the 1978 law, finding that the claimant's monetary award under the prior law "would have been significantly greater." Id. In that case, the claimant was struck in the eye by a tire iron thrown by a fellow employee and suffered loss of vision in the eye. Under the law which existed prior to the 1979 changes, he would have been entitled to recover approximately $10,000. However, under the 1979 law as amended, he was only entitled to receive $1,200 for loss of vision of that eye. In finding the statutory limitation to be constitutional, the District Court in Mahoney observed:

> To be sure, the 1979 Act drastically limits the amount of compensation one may receive for such an injury. However, the statute still expresses the fundamental purpose of workers' compensation acts to provide for employees a remedy that is both expeditious and independent of proof of fault and for employers a liability that is limited and determinate.

Id. at 755.

Even though the 1979 law significantly diminished Mahoney's recovery, it did not totally eliminate the previously recognized cause of action. The District Court held that the certain remedy afforded by the Act was deemed to be a sufficient substitute for the doubtful right accorded by the common law.

This Court upheld the decision of the District Court in the Mahoney case in finding that the award under the 1979 amendments for loss of sight in one eye might well appear "inadequate and unfair", but the award did not render the statute unconstitutional. Mahoney v. Sears Roebuck & Co., supra.

The Trial Lawyers make the same "inadequate and unfair" argument here. As in Mahoney, allegations of "inadequate and unfair" results do not make the amendments unconstitutional. The Trial Lawyers allegations are unsupported in the record before this Court.

The claimant in Acton, supra, received a 25% disability rating for an injury to his left leg. Under the law that existed prior to 1979, he would have been entitled to compensation for a permanent partial disability without regard to whether or not he had suffered any wage loss. The Deputy Commissioner found that

Acton did not qualify for permanent impairment benefits under Section 440.15(3)(a) of the 1979 law because he suffered no amputation, loss of vision, or serious facial or head disfigurements, which were the only injuries for which impairment benefits were payable under the 1979 law. He also found Acton ineligible for wage-loss benefits under Section 440.15(3)(b) of the 1979 law because he had returned to work at a higher monthly wage than he received before the accident, and had suffered no wage loss. Clearly, under the 1978 law, Mr. Acton would have been entitled to receive a substantial amount of compensation for his permanent physical impairment based solely on disability.

Although limitations were placed on a workers' entitlement to compensation for a permanent partial disability under the 1979 law such that he qualified for neither an impairment benefit nor a wage-loss benefit, this Court, in Acton, held that the law

> . . . continues to afford substantial advantages to injured workers, including full medical care and wage-loss payments for total or partial disability without their having to endure the delay and uncertainty of tort litigation.

Id. at 1284.

a. Wage-Loss Benefits

i. Amendment of Section 440.15(3),F.S. (80% of 80%)

The Trial Lawyers on page 16 of their brief make unsupported allegation that the change in the amendments to Section 440.15(3),F.S., to award only 80% in wage loss benefits

denies the claimant access to court. While not addressed specifically in those terms, the overall context of the arguments of the Trial Lawyers is that these subjects taken independently have the cumulative effect of denying access to courts. Once again, this allegation does not arise to a constitutional level. Rather, it is more of the same argument that the law is "inadequate and unfair". As such, it is a challenge to the wisdom of the Legislature in balancing the requirements to protect the claimant with those requirements necessary to preserve the system. Defendants concede that there is a slight reduction in benefits. However, these reductions in benefits, much like those addressed by the courts in other reduction of benefits cases, do not prevent a claimant from receiving medical payments and other benefits under the workers' compensation law. Notably absent from the discussion regarding these slight reductions is the discussion that there is an additional pre-existing cap placed upon the wage loss system. Under this cap, no employee may recover more than 66 and 2/3% of his wages prior to injury capped at 100% of the statewide average weekly wage. For 1990, that amount is $362.00. Defendants' concede that some individuals will have a reduction under the formula enunciated by the 1990 legislature; however, not all individuals will be so affected. In any event, it is clearly within the Legislature's authority in balancing the needs of the state to provide for this reduction.

ii. Amendment of Section 440.02(24), F.S. (Exclusion of concurrent employment)

In their brief, the Trial Lawyers challenge the amendments to the "concurrent employment" exclusions. They argue that such a reduction is contrary to American Uniform & Rental Service v. Trainer, 262 So.2d 193, 194 (Fla. 1972). What the Trial Lawyers and the Plaintiffs have failed to acknowledge is the evolution, both pre-Trainer and post-Trainer, regarding the average weekly wage issue and the fact that non-covered employment is still excluded from the average weekly wage. There are no arguments made against constitutionality of this provision and it is clear that the Legislature has the right to limit the definition of the wages of the employee. Under the law prior to the 1990 amendments, there was double coverage which loaded up the payroll rate. The essence of this was that the employee was covered twice and premiums were paid for such coverage although only one employer was required to pay benefits for the injury at the work place. Clearly, there is no constitutional right to such windfall benefits. The expansion of wages has continued to such a degree that the burden is too onerous for the employer to continue to pay wages at this high level. Trainer does not operate in a vacuum. Rather, it was simply the first of several cases to expand and redefine legislative intent. Here, the legislative intent is clear, and neither Trainer nor its progeny preclude statutory change to the definition of average weekly wage. As noted in the evidence presented by the Defendants at

the trial below, current public policy demands it. It is simply not a violation of one's due process, equal protection or basic rights to put parameters on liability when the ultimate goal is to assure that there will be some accountability for all workers' compensation cases.

The Trial Lawyers adopt the unsupported allegations of the Plaintiffs that the repeal of consideration of fringe benefits in the determination of the average weekly wage (minus certain housing exceptions) denies due process, equal protection, basic rights, access to courts and impairs the obligation of contracts. As noted elsewhere in the briefs of Defendants and amici supporting Defendants, equal protection arguments require that all persons must be treated alike under the circumstances and conditions. Clearly, under the new workers' compensation law, all claimants are treated alike regarding those accidents occurring after July 1, 1990. They may not include the fringe benefits as part of the determination of the wage lost benefits. In addressing the access to courts issue, there is no violation when there is a rational basis for the statutory provision. Acton, supra. Here, the rational basis for the Legislature's decision to exclude fringe benefits from the determination of average weekly wage is that action needed to be taken to save the workers' compensation system from bankruptcy. Clearly this outweighs the interest of the employee to have his average weekly wage increased by the inclusion of fringe benefits. Furthermore, as addressed elsewhere, it is clearly within the prerogative of

the Legislature to determine what should be considered in arriving at the average weekly wage.

iii. Amendment of Section (3 strikes rule) 440.15(3)(b) 5., F.S.

Under Section 440.15(3)(b)5, F.S., the right to wage loss benefits terminates if within a two year period, any three of the four occurrences as set forth in the statutes occurs.

Each of the three occurrences must be in a different bi-weekly period. Additionally, for each of the above occurrences, the employee may be disqualified from receiving wage loss benefits for three bi-weekly periods. The 1990 Act also provides that an employee's right to wage loss benefits terminates if he is convicted or subject to imprisonment for conduct which directly affects his ability to perform the activities of his usual or other appropriate employment.

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

1987) (claimant fired for refusal to follow instructions entitled to claim wage loss while operating his own business).

The amendments to the wage loss provisions are clearly intended to ensure that the injured worker is compensated only for the wage earning capacity loss attributable to the permanent injuries sustained in the accident. The amendments terminate benefits when, within a two-year period three of the enumerated incidents occur, each in a different two-week period. Eligibility for wage loss benefits only terminates where the claimant has established, through a series of employments and termination from those jobs for causes unrelated to his physical limitations, that his loss of earnings is due to non-employment related factors.

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

reasonable means of ensuring that the injured employee is compensated only for his earning capacity losses suffered as a result of physical restrictions and not due to unrelated factors, including his own misconduct. On its face, it is neither arbitrary nor capricious. The provision affects only wage loss benefits. An employee disqualified from further wage loss under this provision is still entitled to medical and other indemnity benefits.

iv. 440.15(3)(b) 4.d, F.S. (Stair step wage loss schedule)

The Trial Lawyers challenge the limitation imposed upon the duration or periods for which wage-loss benefits are payable based upon a schedule of impairments that are determined under a new rating guide. The 1990 modification reduces the subjectivity which has existed since the wage-loss concept was enacted in 1979. The wage-loss stair steps provide an objective and determinative method of recovery. No longer will every claimant with at least a 1% permanent impairment rating be entitled to collect wage-loss benefits for 525 weeks (ten years). In reviewing the new statutory provisions, it can be concluded that the Legislature determined that employees with only minimal injuries were receiving an inordinate amount of benefits. The Legislature determined that the entitlement to draw these benefits should be tied to the severity of the injury in order to bring about equity in the allocation of these benefits. In 1979 the schedule for calculating permanent partial disability based

upon anatomic impairment was largely replaced by the wage-loss scheme designed to compensate the injured worker for economic loss rather than anatomic loss. As initially conceived, the only threshold requirement of eligibility of up to 525 weeks of wage-loss benefits was "a permanent impairment." In 1990, the Legislature has made another correction to the system by tying the length of time for which these benefits are payable to the severity of the injury. There is nothing new about this approach. Prior to 1979, a schedule of impairments existed which included "stair steps". The duration of payments was based upon the severity of the impairment.

Prior to 1978, a permanent partial disability to the body as a whole was calculated by multiplying the percentage of disability times 350 weeks. See Section 440.15(3)(u), F.S., (1977). In 1978 the Florida Legislature amended the schedule to provide for three "tiers" of disability, which had the effect of providing greater benefits to the severely impaired worker and lesser benefits to the minimally impaired worker than existed under the 1977 law.

Under the 1979 law, and up until the 1990 law, a worker with a 1% impairment of the body as a whole was entitled to claim wage-loss benefits for the same period of time (duration) as a worker with a 50% total body disability, a period of 525 weeks. See Section 440.15(3)(b)1., F.S., (1979).

The Legislature in 1990 has simply adopted a new schedule of entitlement to wage-loss benefits in which it reallocated the

available money based upon the severity of the impairment. The benefit itself, known as permanent partial disability, which has been reclassified as wage-loss benefits, has not been eliminated.

v. Amendment of Section 440.15(1)(e) 1., F.S. (Supplemental Benefits at Age 62)

The Trial Lawyers argue that Section 20 of Chapter 90-201, Laws of Florida, which terminates supplemental benefits for permanent, total disability at age 62 if the employee is eligible for social security benefits, is one of the reductions of benefits which cumulatively deny access to the court. Clearly, there are no facts supporting this allegation of unconstitutionality. As noted elsewhere, the balancing test in addressing whether a provision denies due process or access to courts requires that there be a rational basis for the state action. The unrebutted testimony of defense witness, Helen Neubauer, sets forth a rational basis for this provision. She testified that a state worker, permanently disabled, that is receiving wage lost supplemental benefits, social security benefits, and retirement benefits will earn 170% of what that individual would have earned if they had stayed on the job. Again, the Trial Lawyers are crying foul and that the reduction is "inadequate or unfair". As noted above, constitutional challenges on that basis were addressed in Mahoney, supra, and rejected.

b. Definition of Compensable Injuries

The Trial Lawyers argue that Section 14 of Chapter 90-201, Laws of Florida, abolishes a series of judicially created rules (which, as is evident from the 1990 amendments, in the Legislature's opinion inappropriately expanded workers' compensation coverage), thereby undermining the underlying philosophy of the workers' compensation law. However, before liability for payment of compensation may be imposed on an employer, a "causal connection" between the employee's injury and the employment must be shown. Fidelity & Casualty Co. of New York v. Moore, 143 Fla. 103, 196 So.2d 495 (Fla. 1940). Section 440.09(1), Florida Statutes, reads in, pertinent part, as follows:

> Compensation shall be payable under this Chapter in respect of disability or death of an employee if the disability or death results from an injury arising out of and in the course of employment.

The words "arising out of" refer to the origin or cause of the accident. Bituminous Casualty Corp. v. Richardson, 4 So.2d 387 (Fla. 1941). The phrase "in the course of employment" relates to continuity of time, space, and circumstances to the employment. Strother v. Morrison Cafeteria, 383 So.2d 623 (Fla. 1980). Whether a given accident to an employee is sufficiently related to his employer's business to make it an injury arising out of and in the course of employment is dependant on and governed by the particular circumstances. Seabreeze Indus. Inc. v. Phily, 118 So.2d 54 (Fla. 2d DCA 1960).

The phrases "arising out" and "in the course of employment" are not synonymous and it is held that where both are used conjunctively a double condition has been imposed, both terms of which must be satisfied in order to bring a cause under the act. Ward & Gow v. Krinsky, 259 U.S. 503 (1921); New York Central R.R. v. White, 243 U.S. 188 (1917). Section 440.092, F.S., abolishes judicially created exceptions to the requirement that an injury must arise out of and in the course of employment in order to compensable.

The Trial Lawyers challenge the provisions of Section 440.092 (1) -(5), F.S., which address certain judicially created rules regarding compensation of injuries arising out of participation in social and recreational activities, or arising when going and coming to work, deviating from the course of employment or traveling, or from intervening accidents. These provisions are thoroughly addressed on pages 12 - 29 of the Chambers' answer brief and therefore Defendants thus have not discussed the substantive merits of these provisions here. Defendants would point out, however, that the majority of the statutory language utilized in Section 440.092, F.S., is consistent with prior case law and judicial interpretation of common law rights. The Legislature drafted these provisions to reflect strong public policy regarding its view of the proper scope of coverage of the worker's compensation law and does not constitute on its own, nor in conjunction with the other amendments to Chapter 90-201, Laws of Florida, a violation of Article I, Section 21 of the Florida Constitution.

c. Miscellaneous Provisions

On page 21 of their brief, the Trial Lawyers argue that, if a catastrophic injury "does not manifest itself until six months after the accident, there is no compensation at all" pursuant to Section 440.15(2)(b), F.S. This is clearly erroneous. The claimant is entitled to temporary total disability regardless of whether there is a catastrophic injury. All the Legislature did in addressing this issue was to clarify its intent that catastrophic injury benefits begin and run for six months from the date of the accident and not the date of the injury as defined by the courts. Those cases have held that the "injury" begins from the date of the amputation of a foot or hand, etc. when, in fact, the "accident" which gave rise to that injury occurred some period of time earlier. The Legislature provided these extraordinary benefits for the six month period from the date of the accident to enable a seriously injured worker to have benefits that will assist in the psychological acceptance of those injuries. To argue there is no compensation at all is clearly a mis-statement.

The statement of the Trial Lawyers on page 25 of their brief that the procedural amendments to Chapter 440 have built in a five month delay is clearly wrong based on a misleading analysis of the relevant provisions. The study conducted by the Associated Industries of Florida and made part of the record below established that there was, on average, a thirteen month delay between the filing of the claim and the final hearing

before the judge of compensation claims. The Legislature was appalled at this delay and thus established procedures to expedite this process. Those procedures are now challenged as being a burden to the claimant such that it denies him access to courts. Once again, the Plaintiffs and the Trial Lawyers have failed to provide any evidence supporting that allegation. The change to the statute is simply the Legislature's direction to the judges of compensation claims that they must abide by the provisions of Fla. W.C. R.P. Rule 4.100 (Pretrial Procedure), and the time requirements of Fla. W.C. R.P. 4.080, (Notice of Hearing; Order of Deputy Commissioner). To argue that the amendments change the existing process so as to establish a built in delay exceeding five months before a claimant can obtain any kind of hearing is disingenuous as best.[2] Note for example that the fifteen days notice requirement is still in the statute. See Section 440.25(3)(b)2.,F.S. Nothing in the statute precludes a claimant from requesting an earlier hearing.

When the Trial Lawyers discuss deductible and co-insurance provisions at page 21 of their brief, they are confusing two separate sections of Chapter 440, F.S. Section 440.38(5),F.S., generally provides that carriers are authorized to provide policies with deductibles or co-payments paid by the

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[2] It's clear that in making this argument the trial lawyers have not reviewed the record of trial where, in addressing this issue, counsel for Associated Industries stated that to meet these new requirements that there were additional three judges of compensation claims provided.

employer. The employee pays none of the deductible or co-insurance under this section.

Section 440.38(1),F.S., allows for the employer to secure the payment of compensation by obtaining a 24-hour health insurance policy to provide medical benefits required under the Workers' Compensation Law. The employer would also obtain an insurance policy to provide indemnity benefits so that the total coverage afforded by both the twenty-four hour health insurance policy and the policy providing idemnity benefits would provide the total compensation required by Chapter 440, F.S.

This provision recognizes a trend toward universal health coverage whereby health coverage and workers' compensation are integrated. This procedure authorizes deductibles and co-payments under the twenty-four hour policy. The statutory provision further provides that the twenty-four hour health insurance policy should meet criteria established by Department of Insurance rule. There are several ways the deductible and co-insurance provisions could be implemented without infringing upon an injured workers' compensation remedy in an unreasonable manner. First, the co-payments or deductibles could be applied only to non-work related treatment under the policy. Secondly, the co-payments or deductibles could be applied in such a manner as to encourage utilization of health maintenance organizations or preferred provider organization utilization. No rules have been promulgated by the Department of Insurance regarding this provision as of this time. In any event, there are ways this

provision could be implemented by rule which would be constitutionally valid. The attack on this provision pending adoption of a rule is, at best, premature.

3. Attorneys' Services and Fees

a. Amendment of Section 440.19(1), F.S. (21 day rule, claims specificity)

In an effort to quickly place benefits in the hands of injured workers, the Legislature enacted Section 440.34(1), F.S., which provides that the employer has up to twenty-one days after receiving notice of a claim to either provide benefits or file a notice to controvert. See also Section 440.19(1)(e)(7), F.S. If the employer does not pay or controvert the claim within that time and the claimant retains an attorney who is successful in securing benefits, the employer/carrier then becomes liable for claimant's attorney fees. See Section 440.34(1), F.S.

This places a significant burden on the employer/carrier to make a prompt and informed decision. Considerable litigation has been commenced to determine whether the claim provided enough specific information to the employer. On some occasions, the courts held that the claims have not contained "sufficient information to enable the employer to begin an investigation." All American Pools N' Patio v. Zinnkann, 429 So.2d 733 (Fla. 1st DCA 1983); Massey v. North American Biologicals, 397 So.2d 341 (Fla. 1st DCA 1981); Latt Maxcy Corp. v. Mann, 393 So.2d 1128 (Fla. 1st DCA 1981).

Since the number of claims has drastically increased over the last decade, the employer has found it increasingly difficult to comply with the twenty-one day rule. Many attorneys representing claimants have greatly complicated the problem by filing "shotgun" claims listing all the possible benefits ever available under the workers' compensation law, without regard to when in the future the benefits may or may not become due. The "shotgun" claim does not provide the employer/carrier with adequate notice and information to determine what benefits are being requested and which issues will be litigated at a hearing. See, Sparton Electronics v. Heath, 414 So.2d 642 (Fla. 1st DCA 1982).

One of the established rules of pleading requires that the facts must be stated with reasonable definiteness, certainty, and clarity so they may be understood by the opposing party. Parker v. Panama City, 151 So.2d 469 (Fla. 1st DCA 1963).

In United States Steel Corp. v. Green, 353 So.2d 86 (Fla. 1977), this Court vacated an order awarding attorney's fees where the claimant's attorney had filed a broad unspecific claim. In Green, supra at 88, this Court held :

> [I]f either of Green's assertions were engrafted into the workmen's compensation law, every proceeding would require an employer to prepare and present a defense against a claim of permanent total disability, no matter how minor or temporary the injury giving rise to the claim. Moreover, employers could never agree to lesser awards or the need for temporary benefits at a first hearing, lest they later find themselves saddled with liability for

> permanent total disability benefits against which they never defended.

In International Paper v. McKinney, 384 So.2d 645, 648 (Fla. 1980), this Court again ruled that "boilerplate" and "shotgun" claims were insufficient notice to the employer of a claim. The First District Court of Appeals had even requested that the Division clarify its rules regarding claims. See Ridge Pallets, Inc. v. John, 406 So.2d 1292 (Fla. 1st DCA 1981).

In response to this dilemma, the Legislature amended Section 440.19(1), F.S. to require a claim to "contain the specific details of the benefits alleged to be due and the basis for those benefits". As further clarification of the matter, the legislature codified its reasoning for the amendment in Section 440.19(1)(e)3, F.S. (Supp. 1990):

> The legislative intent of this paragraph is to avoid needless litigation or delay in benefits by requiring claimants to provide the employer, carrier, self-insurance fund or servicing agent with sufficient detailed information to facilitate a timely and informed decision with respect to a claim for benefits.

Obviously, the claimant and claimant's attorney are in possession of the information regarding benefits they believe have not been provided. If an employer is unaware of specific benefits requested, he is placed under an onerous administrative burden of making an expeditious determination of what benefits, if any, are due the claimant. Specific details regarding the basis of a claim will provide the employer with adequate knowledge to make an "informed decision" on whether benefits are due an injured employee or whether it is a spurious claim.

The amended statute also provides for the mandatory dismissal of claims which fail to comply with the specificity requirements upon notice of an interested party. Section 440.19(1)(e)4, F.S., (1990). However, the Legislature recognized that some claimants are unrepresented and thus the dismissal provision does not apply to claimants not represented by counsel and the statute requires that "the division shall assist the claimant in filing a claim meeting the requirements of this section." Id. Nothing in this subsection mandates a dismissal with prejudice. Accordingly, claimants represented by counsel are not barred from refiling their claim.

b. Amendment of Section 440.34(2), F.S. (5 year limit on attorney's fees)

Arguments have been advanced that the amendments to Section 440.34(2), F.S., in 1989 and 1990 violated the Florida Constitution by limiting the amount of projected future medical benefits when calculating the benefits secured by an attorney in the determination of a fee. It seems clear that the Legislature was concerned about the amount of speculation involved by including future medical expenses beyond a five-year period in the calculation of the benefits secured by the attorney. It is important to note that future medical expenses projected five years beyond the time of the award are only one of many factors used to determine the amount of benefits secured by the attorney. Additionally, the total amount of benefits secured is again only one of may factors used to determine the value of the attorney's fee.

The Trial Lawyers want this Court to hold that altering the basis upon which the attorney's fee due from an employer is calculated is a constitutional violation. Defendants point out that 15 of the 50 states in this country that have workers' compensation laws do not provide for any attorney's fee to be charged against the employer. See Larson, The Workmen's Compensation, §83.12(b)(1), app. B-18B-1 (1990).

4. Administrative Burdens

a. Amendment of Section 440.19(3), F.S. (Specificity requirement, job search)

The Trial Lawyers criticize the requirement that wage loss claims must be filed within 14 days of the time they are due (T: 264). Mr. David Parrish testified that getting an injured worker back to work is an important part of the workers' compensation system (T: 291), and requiring a job search is an appropriate incentive to get people to go back to work (T: 292). Mr. Parrish further testified that one of the hardest things about representing claimants is to make a person go out and do a job search. The law before the 1990 enactment already required wage loss claims every two weeks. The additional requirement that the claimant conduct a disciplined job search, which is verified by prompt reporting, is the best means to channel the claimant back into the workforce.

5. **The Legislative Scheme**

Many of the changes to Chapter 440, F.S., contained in Chapter 90-201, Laws of Florida, were designed to eliminate or clarify areas of litigation and contention within the workers' compensation system regarding the compensability of an injury or the amount of benefits an injured employee should receive. Many of the procedural changes to the law are designed to avoid contested claims thereby ensuring that claimants receive their benefit in a more timely fashion. See, e.g. Section 440.13(5), F.S.; Section 440.19(1)(e), F.S., (requiring that claims be pled with greater specificity, thereby increasing likelihood that employer will pay a claim rather than controvert it); Section 440.19(1)(e)2, F.S., (requiring employer to pay claim or file notice to controvert within twenty-one days, thereby forcing the employer to give notice to the employee in a timely manner as to whether employer intends to pay claim); Section 440.19(1)(h), F.S., (requiring the Department of Labor and Employment Security's Division of Workers' Compensation (DLES) to analyze disputed claims to determine whether they can be resolved without a hearing, and take a proactive stance to prevent and resolve disputed issues); Section 440.20(9)(c), F.S., (establishing fines to be assessed against employer or carrier for every installment of compensation not paid when it becomes due); Section 440.20(12)(c), F.S. (establishing procedure for lump sum settlements for claimants with permanent impairment rating of 1 to 5 percent); Section 440.25(3)(b) 2 and 3, F.S., (requiring

pre-trial hearing to be held within 30 to 60 days after claim is filed, requiring final hearing to be held within 120 days of pre-trial hearing, allowing continuances only when request arises out of circumstances beyond the party's control); Section 440.34(2), F.S., (limiting attorneys' fee related to future medical benefits to benefits provided within five years after claim is filed as opposed to when attorneys' fee hearing is held, thus discouraging claimant attorneys from prolonging litigation.)

Other changes to Chapter 90-201, Laws of Florida, benefiting employees are geared towards reducing the incidence of work related accidents. See, e.g., Section 5 of Chapter 90-201, Laws of Florida, (creating the Division of Safety); Section 440.56(6), F.S. (increasing the fines that can be assessed for safety violations); and Sections 12 and 13 of Chapter 90-201, Laws of Florida, (creating the Drug Free Workplace Program). Additionally, employees are benefitted by the numerous provisions of Chapter 90-201, Laws of Florida, adopted to ensure the continuing integrity of the worker's compensation insurance system and expanding DLES' power and authority to regulate financially insolvent employers and penalize employers not in compliance with the insurance requirements of Chapter 440, F.S. See, e.g., Sections 30-34, 46-49 and 57 of Chapter 90-201, Laws of Florida.

CONCLUSION

The Trial Lawyers' brief reflects a fundamental misconception of the nature of constitutional law, and of the role of the court in the process of adjudicating cases challenging the validity of legislative acts. This Court has the right, and indeed the responsibility, to declare legislative acts invalid when presented with a case where a particular set of facts compel the Court to so declare but only after rejecting every construction under which the statute reasonably could be upheld. Metropolitan Dade County v. Bridges, 402 So.2d 411, (Fla. 1981). Despite these canons, the Trial Lawyers have only echoed the speculation of Plaintiffs as to means in which particular future claimants might hypothetically be affected; they have totally failed to establish in any concrete respect, much less "beyond a reasonable doubt, that the law conflicts with some designated provision of the constitution." Bridges, 402 So.2d at 413-14.

The Plaintiffs' and Trial Lawyer's attempt to sweep out the Act because of its "cumulative effect" ignores two fundamental tenets of constitutional jurisprudence. One is the requirement that all challenges except for patent facial infirmities require adjudication according to real, tangible facts before the Court can consider striking down a statute. The second, which is a logical corollary of the first, is that even if one or more provisions of a law is held invalid, the Court will sever the invalid portion from the remaining portions with

the overriding objective of not doing violence to the Legislature's purpose. Cramp v. Board of Public Instruction of Orange County 137 So. 2d 828 (Fla.1962).

Rather than repeat them here, the arguments regarding the severability of the issues analyzed in this brief, as set forth in the initial and answer briefs of Defendants and supporting amici, are dispositive and are readopted.

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