IN THE
SUPREME COURT OF FLORIDA

CASE NO. 77,179

BOB MARTINEZ, et al.,

Appellant/Cross-Appellee,

vs.

MARK SCANLAN, et al.,

Appellee/Cross-Appellant.

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

INITIAL BRIEF OF APPELLANT

ASSOCIATED INDUSTRIES OF FLORIDA

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PRELIMINARY STATEMENT

For purposes of this brief, the Plaintiffs/Appellees/Cross-Appellants will be referred to as Plaintiffs; Defendants/Appellants/Cross-Appellees will be referred to as Defendants; Intervenor/Appellant/Cross-Appellee Associated Industries of Florida will be referred to as AIF; Intervenor/Appellant/Cross-Appellee Florida Chamber of Commerce will be referred to as the Chamber; Intervenors/Appellants/Cross-Appellees National Council on Compensation Insurance and Employers Insurance of Wausau shall be referred to collectively as NCCI; Intervenor/Cross-Appellee Tampa Bay Area NFL, Inc. (the Bucs) and South Florida Sports Corporation (the Dolphins) shall be referred to as the Bucs and Dolphins. The Florida Construction , Commerce and Industry Self-Insurers Fund (FCCI); the Florida Association of Self-Insurers (FASI); the Florida Group Risk Administrators Association, Inc. (GRA); the American Insurance Association (AIA); and the Academy of Florida Trial Lawyers (AFTL) shall be referred to as Amici collectively or individually as FCCI, FASI, GRA, AIA, and AFTL.

AIF adopts the brief and the positions of Defendants/Appellant/Cross-Appellees. Additionally, to avoid duplicity of **some** of the arguments; AIF adopts the brief of Amici FCCI, et. al., and that of NCCI pertaining to the issue of the retroactive application of Senate Bill 8-B (1991), and House Bills 9-B (1991) and 11-B (1991), and the mootness issue. AIF does not adopt the argument of NCCI addressing NCCI's cross claim, i.e. NCCI's Issue III.

STATEMENT OF THE CASE AND FACTS

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

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

References to the Record on Appeal shall be noted as (R ___). References to the Appellant's Joint Appendix shall be noted as (A-___).

SUMMARY OF ARGUMENT

Section 440.15(3)(b) 4e, Fla. Stat. (Supp. 1990) does not constitute an impermkissible burden upon an injured employee seeking to obtain wage loss benefits because it requires an injured employee to demonstrate the inability to obtain employment is doe to the physical limitations imposed by the injury, rather than economic conditions or the injured employee's misconduct.

Section 440.15(2)(i) 3a, b, and c, Fla. Stat. (Supp. 1990) does not violate either the due process clause of Article I, Section 9 of the Florida Constitution (1968) or the access to courts provision of Article I, Section 21 of the Florida Constitution (1968). This provision does not violate an employee's due process rights because the statute contains a provision for a hearing to determine if the physician's opinion should be adopted by the Judge of Compensation Claims. The requirement of rebutting the physician's opinion by clear and convincing evidence does not create an access to courts violation because the employee's remedy is not completely abolished but is merely restricted, which is constitutionally permissible under the rationale of **Kluger v. White**.

Section 440.15(1)(b), Fla. Stat. (Supp. 1990) does not violate the access to courts provision of Article I, Section 21, of the Florida Constitution (1968) because it requires an employee to establish the inability to perform even light duty work within a 100-mile radius of the employee's residence before being able to receive permanent total disability benefits. The statute's requirement is rationally related to the state's objective of requiring an injured employee to relate the inability to work to the injury and since the employee receives other benefits as provided by the Act, the provision does not violate the access to courts

requirements of the Florida Constitution set forth in **Kluger v. White**.

ARGUMENT

I.

The Judge erred in ruling that certain language set forth in Section 20 of the Act is constitutionally offensive in light of the Regency Inn and City of Clermont decisions.

The language in Section 20 Chapter 90.201, Laws of Florida (the Act), creating section 440.15 (3)(b)4e, Fla. Stat. (Supp. 1990) that Judge Hall in his ruling found "constitutionally offensive" provides:

> In the case of an employee whose permanent impairment from the injury is at least 1 per cent but no more than 20 per cent of the body as a whole, the burden is on the employee to demonstrate that his post-injury earning capacity is less that his preinjury average weekly wage and is not the result of economic conditions or the unavailability of employment or of his own misconduct. In the case of an employee whose permanent impairment from the injury is 21 per cent or more of the body as a whole, the burden is on the employer to demonstrate that the employee's post-injury earning capacity is the same or more than his preinjury wage.

Judge Hall ruled this language "constitutionally offensive" because he believed the First District Court of Appeal had on at least two occasions previously observed that the above language was a constitutionally imperiled provision. (R 2695-2696).

Contrary to Judge Hall's ruling, the First District did not decide in **Regency Inn v. Johnson**, 422 So.2d 870 (Fla. 1st DCA 1982) any provision as to the issue of an employee's inability to obtain employment due to economic conditions only. **City of Clermont v.**

Rumph, 450 So.2d 573 (Fla 1st DCA 1984), was the only case in which this issue of economic conditions was addressed.

The First District in **Regency Inn** overturned three years of its own rulings without any legislative changes to the wage loss law that passed the 1979 Legislature. Until **Regency Inn**, law was that the employee had to prove that the disablity, rather than the fact work was unavailable, was the cause of the inability to work before being eligible to collect wage loss benefits. **Lake County Commissioners v. Walburn**, 409 So.2d 153 (Fla. 1st DCA 1982).

Other rulings by the First District on the 1979 wage loss concept also supported its original thinking under **Lake County**. The First District in **Bob's Barricades, Inc. v. Catalano**, 414 So.2d 580 (Fla. 1st DCA 1982) reversed a deputy commissioner's findings of wage loss benefits. An employee had worked for almost a year after a compensable injury. He was then fired. The employee argued he was fired because of his claim for workers' compensation benefits. The employer argued the employee was fired because of his attitude. The First District correctly held that there was no competent substantial evidence that the claimed wage loss was the result of the compensable injury.

However, in June of 1982, the First District in **Regency Inn** took a complete about face and adopted the dissenting opinion in **Lake County Commissioners v. Walburn**, 409 So.2d 153 (Fla. 1st DCA 1982). The dissenting opinion in **Lake County** basically stated that the prior decisions where a claimant's job was no longer available and there was no medical evidence that he was unable to work and where the claimant must first seek work in order to establish temporary total disability, "forced a claimant to prove that his work search was unsuccessful due to his disability, rather than because of the unavailability of work and such

a ruling could place a well nigh impossible burden on an injured claimant."

The **Regency Inn** decision and the overturning of the First District's own decisions over a three year period sounded the death knell of wage loss as envisioned by the drafters of the 1979 statute. No longer was the fact that an employee could not work because of economic conditions unrelated to the physical limitation taken into consideration. Now all one had to do was get a physician to state that there was an impairment, e.g.; wage loss was due. This became true even if the employee could still perform his old job, but refused to do so. **See Wilbanks v. Cianbro Corp.**, 512 So.2d 300 (Fla. 1st DCA 1987). Being laid off for economic reasons does not automatically negate this connection between wage loss and the industrial accident. **Oxford Building Service v. Allen**, 498 So.2d 523 (Fla. 1st DCA 1986), and **Nicholson v. Sammons Enterprises, Inc.**, 457 So.2d 513 (Fla. 1st DCA 1984).

Under the old scheduled injury system that was replaced by wage loss, an injured person who suffered a ten percent disability (wage earning capacity) due to an injury to an arm, was entitled to ten percent of 200 weeks or 20 weeks. Section 440.15 (3), Fla. Stat. (1978).

After **Regency Inn**, if the employee suffered a five percent permanent impairment in accordance with the AMA Guides (not wage earning capacity), lost his job for any reason and turned in forms for six months all at one time, he was now entitled to benefits for 525 weeks as long as he continued to send forms showing proper job searches. Without these job search forms, verification of a claimant's job search activities cannot possibly be verified. **Western Electric Co. v. Jackson**, 450 So.2d 282 (Fla. 1st DCA 1984); **Whitehall Corp. v. Davis**, 448 So.2d 47 (Fla. 1st DCA 1984)(without job search forms, the employee cannot

even identify where he looked for work). Gone is the protection that it was the five percent impairment to the arm that kept the employee off work. Now the employee can play the job search game, collect benefits for several months, and then settle the case (89 percent of all wage loss cases settle.). (A-16 p. 55). This was the system that was to replace the old system (20 weeks versus settlement, plus several months of benefits prior to settlement) and save money.

The First District never took into account after **Regency Inn** that the 1979 statute took away "wage earning capacity" and replaced that concept with "actual lost wages" due to injury. Introducing wage earning capacity to the wage loss system guaranteed an expensive system. The court has incorrectly focused on job searches rather than whether the injured worker could do his job as a result of physical restrictions.

The First District in support of **Regency Inn** stated:

> We believe that the reasoning and authorities set forth in the dissenting opinion in **Lake County Commissioners v. Walburn**, 409 So.2d 153 (Fla. 1st DCA 1982), are dispositive of the issue presented in this case. We also note that the statutory language on wage-loss, supra, stands in contrast to that which governs a claimant's burden in establishing permanent total disability, i.e., 'the burden shall be upon the employee to establish that he is not able uninterruptedly to . . . work due to physical limitations,' and no compensation of that character shall be payable 'if the employee . . . is physically capable of . . . gainful employment'. s.440.15(1)(b), Florida Statutes. Since the LeHigh rule would effectively limit compensable wage-loss to that which results from physical incapacity (as opposed to economic incapacity caused by job disruption accompanying industrial injury), the application of that rule to wage-loss would disregard the apparent intent of

> the legislative standards on causal relation which are framed so distinctly for the two classes of benefits. For wage-loss the statute provides simply for general causal relation by covering any such loss which 'is the result of the . . . injury.' If the intent had been to require wage-loss from physical incapacity for work (independent of job availability) as an absolute condition to compensation for wage-loss, the alternative language would surely have been used. The definition of disability in the act also utilizes a general causal relation concept by referring simply to 'incapacity because of the injury to earn . . .' and not to incapacity from physical limitations of the injury. Certainly nothing in the statutory framework for wage-loss awards evinces an intent to abandon that element of the well settled standard for capacity to earn which takes into account 'inability to obtain work of a type which claimant can perform in light of his after-injury condition . . . .' **Walker v. Electronic Products & Engineering Co.**, 248 So.2d 161, 163 (Fla. 1971).
>
> We find, accordingly, that the rule stated in LeHigh and its progeny should not govern the evaluation of work search standards for wage-loss, and the award by the deputy in this case is therefore affirmed.

The court inappropriately compared permanent total disability to actual wage loss. An immediate response by the 1983 Legislature to correct that flaw was to draft language to correct the points made by the court and to overturn the **Regency Inn** case. The language adopted to Section 440.15(3)(b), Fla. Stat. (1983) was:

> (3) PERMANENT IMPAIRMENT AND WAGE LOSS BENEFITS -
>
> (b) Wage loss benefits -
>
> 2. The amount determined to be the salary,

> wages, and other remunerations the employee is able to earn after reaching the date of maximum medical improvement shall in no case be less than a sum actually being earned by the employee, including earnings from sheltered employments. In the event the employee voluntarily limits his income or fails to accept employment commensurate with his abilities, the salary, wage, and other remunerations the employee is able to earn after the date of maximum medical improvement shall be deemed to be the amount which would have been earned if the employee did not limit his income or accepted appropriate employment. Whenever a wage-loss benefit as set forth in subparagraph 1. may be payable, the burden shall be on the employee to establish that nay wage-loss claimed is the result of the compensable injury. It shall also be the burden of the employee to show that his inability to obtain employment or to earn as much as he earned at the time of his industrial accident, is due to physical limitations related to his accident and not because of economic condition or the unavailability of employment.

In other words, if the injury did not interfere with an employee's ability to find work, no benefits were due. Rather, the First District incorrectly assumed that if there was an impairment, it must be the reason one could not find work. A plain reading of the statutory language above is clear that if economic conditions or work restrictions are the reason one cannolt work, then no benefits are due.

The First District in **City of Clermont v. Rumph** addressed the provision passed by the 1983 Legislature and stated that if it were to uphold the language of the statute it would seriously imperil the statute's constitutionality. The First District cited its holding in the **Regency Inn** case and stated that:

> the court further observed that such an approach would have the effect of withholding wage loss benefits in times of economic depression thereby . . . depriving those workers' compensation claimants of a remedy for work related injuries and seriously affecting, in our judgment, the rational balancing of the rights and interests of both employers and employees which is necessary to give validity to the wage-loss concept . . . .
>
> As **Regency Inn** thus indicates in the present case employer/carrier suggested construction of the 1983 amendment to Section 440.15 (3)(b) would seriously impel the constitutional validity to workers' compensation law. We are not obliged to construe statutory pronouncements in such a manner so as to effectuate their constitutionality. See **Miami Dolphins, Limited v. Metropolitan Dade County** 394 So.2d 981 (Fla. 1981). We are also obliged to adopt the statutory construction which is most favorable to the employee. See **Curse v. Coca-Cola Foods Division,** 389 So.2d 1177 (Fla. 1980). We therefore decline to adopt employer/carrier's suggested construction of the 1983 amendment to Section 440.15(3)(b)2. We can construe the amendment, instead, as precluding an award of wage loss benefits when predicated solely on economic considerations unrelated to the claimant's physical limitations by ordinary approximate call standards. We further read the amendment as emphasizing the requirement that claimant shall present evidence indicating that the compensable physical limitation is a contributing causative factor in the wage loss claimed.

The court's reasoning in **City of Clermont** failed to take into consideration that individuals can have physical limitations, but those physical limitations may not be the reason why they cannot find a job, thereby denying the employer the opportunity to prove that the

only reason the employee was not working was because of economic conditions. The language in the 1983 statute simply stated that "the unavailability to find a job because of economic conditions could not be due only to economic conditions or unavailability of employment but must also be related to the physical limitations of the employee." The physical limitation had to be the reason the employee was not working, not the fact that no job was available. The result of that decision was to allow benefits, even where the employee voluntarily quit his job due to reasons unrelated to injury. **Tampa General Hospital v. Lawson**, 547 So.2d 260 (Fla. 1st DCA 1989); **Johnson v. Super Food Services**, 461 So.2d 169 (Fla. 1st DCA 1984)(where the employee stole from the employer and was fired).

The court seemed to construe wage loss to mean if you had a job, were injured and suffered some physical limitation in accordance with the AMA Guides, and could not find a job because of an economic slow down, rather than because of the limiting restrictions, that not only were you entitled to wage loss benefits, but that to interpret the law to state that economic conditions and unavailability of employment alone will not result in wage loss benefits constitutionally impaired the wage loss enactment. The language of **Regency Inn** seems to be the concept of unemployment compensation and not workers' compensation.

The First District in its **Regency Inn** and **City of Clermont** rulings never grasped the concept of wage loss. Wage loss benefits are paid to those individuals who are unable to work due to their injury and their physical limitations. An individual with physical limitations may not be able to find a job in a period in which there is no economic condition keeping the employee from finding a job, but that employee still has the burden proving that the

wage loss is a result of the injury and the physical limitations and not because of the economic conditions surrounding whether or not there is a recession.

The First District in **City of Clermont**, **supra**, also stated as follows:

> We have not overlooked the contentions that our decisions will drastically affect workers' compensation insurance rates. Whether these fears are founded or unfounded, we are not prepared to say. Our decision is based upon what we consider to be legal not actual considerations. We are concerned however, that those arguing for the appellants have raised the specter of hundreds, perhaps thousands of minimally impaired employees receiving full wage loss benefits over the years even to the maximum of (approximately) 10 years provided by law because of our decision. This and other arguments in similar vein only serve to emphasize in our opinion, the survival of the attitude to adversalness instead of cooperation that in the past has characterized the administration of the workers' compensation law.

In a footnote, the court went on to state:

> We find very little of value in such arguments. It can just as well be presumed that for the most part, the "minimally impaired" employee will be rehired in the same job by the same employer; and we may also assume that in many instances even the severely injured worker will be rehired with or without prior rehabilitation by the same or other employer at wages equal to his preinjury earnings, thus drawing little or no benefits from the workers' compensation system after reaching maximum medical improvement.

Exactly what the court disdained has happened. In 1981, there were 4,618 wage loss cases and in 1988, there were 12,897 wage loss cases (both temporary partial wage loss and wage loss). This represents a substantial increase in claims. (A-16, pp. 2 and 3). An

argument could be made that the reason so many wage loss cases existed in 1988 was because of the time it takes the cases to mature. However, the statustics show that temporary partial wage loss benefits are collected for an average of 14 weeks (A-16, p. 40) and wage loss benefits are collected for an average of 38 weeks (A-16, p. 46). At that time, 89 percent of the cases are settled. (A-16, p. 46).

Again, that reasoning fails to take into consideration that if the wage loss is due to the inability to work because of restrictions or physical limitations then benefits are due and payable. However, if a person cannot find a job and it has nothing to do with good or bad economic conditions, then no benefits are due. The case took the ability to get the employee back to work, out of the hands of the system, and into the decision making power of the employee alone.

In **Garrett v. William Thies and Sons**, 544 So.2d 265 (Fla. 1st DCA 1989), the claimant had returned to work and was subsequently fired for stealing money from the employer. The court in that case found the claimant was entitled to wage loss benefits when he did a proper job search. The court ruled that the fact that the claimant had failed to qualify for one month of wage loss benefits does not necessarily preclude him from receiving wage loss benefits in the future. The claimant must show his physical limitations are only an element in the causal chain resulting in or contributing to the wage loss. The court found that this was true even though the claimant's initial unemployment status was due to conditions unrelated to his accident. **See also Oxford Building Service v. Allen**, 498 So.2d 523 (Fla. 1st DCA 1986)(in which the First District stated that being laid off from employment for economic reasons does not automatically negate the connection between

wage loss and the industrial accident. Such evidence in and of itself is insufficient to deny wage loss benefits).

The sole indicator needed to prove whether or not there was a physical limitation and therefore unable to find a job became the issue of job search and not the claimant's physical limitation. If the claimant was able to file wage loss forms showing applications for employment had been filed to various places during the week, then there was an entitlement to wage loss benefits. **See Lamajares v. Rinker Southeastern Materials Corp.**, 519 So.2d 34 (Fla. 1st DCA 1987) and **Williams Roofing, Inc. v. Moore**, 447 So.2d 968 (Fla. 1st DCA 1984).

The test of meeting the burden of whether or not the inability to find a job due to physical limitations was weakened even further in the case of **Certified Grocers v. Conerty**, 529 So.2d 1201 (Fla. 1st DCA 1988). That case stated:

> [T]he necessary causal relation may be inferred form an extensive but unavailing work search by one suffering from permanent impairment resulting from a compensable injury in accordance with **City of Clermont v. Rumph**, 450 So.2d 573 (Fla. 1st DCA 1984), **rev. denied**, 458 So.2d 271 (Fla. 1984), and that relationship is primarily a question of fact dependent upon the circumstances . . . .

Furthermore, the assumption by the First District is that if there is an impairment it must in fact cause work related restrictions was further supported in the case of **City of Miami v. Simpson**, 496 So.2d 899 (Fla. 1st DCA 1986) wherein the court held:

> The permitted inference arises insofar as claimant's employment status has been permanently altered by a compensable impairment affecting his competitive position in

the labor market.

In **Garrett v. Williams Thies and Sons, supra**, a claimant was terminated due to the fact there was a discrepancy in the amount of money she had collected versus what she had remitted back to the employer, the First District held that to deny wage loss benefits was improper. The court reasoned:

> To be entitled to wage-loss benefits, a claimant must show that his compensable physical limitation is "an element in the causal chain resulting in or contributing to the wage-loss. **STC/Documation v. Burns**, 521 So.2d 197, 198 (Fla. 1st DCA 1988), quoting **City of Clermont v. Rumph**, 450 So.2d 573, 576 (Fla. 1st DCA 1984). Since wage-loss involves inquiry, claimant's failure to make the required showing for one period does not preclude wage-loss benefits for subsequent periods. **See Regency Inn v. Johnson**, 422 So.2d 870 (Fla. 1st DCA 1982). This has been applied to situations in which a claimant returns for a successful period of post-injury. **See Sparks v. Aluma Shield Industries**, 523 So.2d 680 (Fla. 1st DCA 1988)(claimant justifiably fired for insubordination); **Western Union Telegraph Company v. Perri**, 508 So.2d 765 (Fla. 1st DCA 1987)(claimant suspended for insubordination); **Johnston v. Super Food Services**, 461 So.2d 169 (Fla. 1st DCA 1984)(claimant terminated for excessive absenteeism).

The language found to be constitutionally offensive in Section 20 of the Act states that the employee who has a permanent impairment of at least one percent but no more than twenty percent of the body as a whole has the burden to demonstrate that his post-injury earning capacity is less than his pre-injury average weekly wage and is not the result of economic conditions or the unavailability of employment or his own misconduct. The burden is placed upon the employee to demonstrate same. In **City of Clermont**, the

conditions that were feared did in fact happen and as stated by the court in that case, it is the Legislature who has the responsibility to change the statute when it finds that case law has obviated legislative intent.

With regard to this statute, the Legislature has decided to provide for the employee to have the burden of proof to establish entitlement to wage loss benefits when the degree of impairment is 20 percent or less. The Legislature also decided to shift the burden to employees to establish the employee's inability was not due to his impairment when the employee's impairment is 21 percent or more.

The Legislature has the authority to amend a statute when it finds the case law has obviated legislative intent. For the reasons set forth above, the Appellant respectfully suggests Judge Hall was in error when he ruled this allocation or shifting of burden of proof violated the Florida Constitution, and his decision should be reversed on this issue.

II.

Section 440.13(2)(i) 3a., b. and c. Fla. Stat. (Supp. 1990) does not violate either the due process or access to courts provisions of the Florida Constitution.

Section 440.13 (2)(i) 3a., b. and c. Fla. Stat. (Supp. 1990) provides for the appointment by the Judge of Compensation Claims (Judge) of an appropriate health care provider to conduct an evaluation of the injured worker and render an opinion to the Judge within 30 days after appointment.

Judge Hall held these sections to be violative of both due process under Article I, Section 9, Florida Constitution (1968) and access to courts under Article I, Section 21 of the Florida Constitution (1968). (R-2695-2696).

AIF respectfully notes the provision under challenge comes before this court with a presumption of constitutionality. **Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.**, 434 So.2d 879, 881 (Fla. 1983). As such, all reasonable doubts are to be resolved in favor of its validity. **Belk-James, Inc. v. Nuzum**, 358 So.2d 174, 177 (Fla. 1978). That presumption must be overcome by proving the invalidity beyond a reasonable doubt. **Department of Business Regulation v. Smith**, 471 So.2d 138, 142 (Fla. 1st DCA 1985).

The Plaintiffs below challenged the facial validity of Chapter 90-201, Laws of Florida, (the Act). A legislative enactment should not be held to be facially unconstitutional unless the section cannot be constitutionally applied to any factual situation. See **Voce v. State**, 457 So.2d 541, 543 (Fla. 4th DCA 1984) **pet. for rev. denied**, 464 So.2d 556 (Fla. 1985).

This court has found the test to be applied to a particular statute under a due process

challenge is whether the statute bears a reasonable relationship to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. **Johns v. May**, 402 So.2d 1169, (Fla. 1981).

This particular section of the Act provides that a Judge may appoint an appropriate health care provider to conduct an examination of an injured worker and render a report to the Judge if:

a. there is a disagreement in the opinions of the health care providers;

b. two health care providers have determined there is no medical evidence to support the claimant's complaints or the need for additional medical treatment; or

c. two health care providers agree the employee is able to return to work.

If one or more of the above circumstances arise and a written request is made by the injured employee, employer or carrier, the Judge shall order the injured employee to be evaluated by an appropriate health care provider from a list maintained by the Division of Workers' Compensation. The health care provider's opinion shall be presumed correct unless the Judge finds there is clear and convincing evidence to the contrary.

The health care provider shall have free access to the employee's complete medical records and the health care provider must render a report within 30 days after being appointed by the Judge. The health care provider will be immune from suit for rendering an opinion, except upon a showing of fraud or malice.

The Plaintiffs below contended this statute violated due process, equal protection, basic rights and access to courts. However, at trial the Plaintiffs did not present any

testimony or evidence which related to their claim that this provision was constitutionally defective or that it could not be constitutionally applied to any factual situation. As such, the Plaintiffs did not present any record proof to sustain their burden of overcoming the statute's presumption of validity beyond a reasonable doubt. **Department of Business Regulation v. Smith, supra**.

Chapter 90-201, Laws of Florida, constituted a comprehensive revision of Chapter 440, Fla. Stat. (1989) to preserve the workers' compensation system by reducing the costs in the system and improve its efficiency whenever possible. With regard to this particular provision, the Florida Legislature had before it information about physician utilization within the system and that the increase in utilization affected the overall costs to the system.

Several of the reports before the Legislature were also before Judge Hall as part of a stipulated exhibit list. One particular report was entitled "Associated Industries of Florida Closed Claims Study of Florida's Workers' Compensation Claims Closed in 1988" (April 20, 1990). That report will be referred to subsequently as the AIF Study and appears as Appellants' Joint Appendix 16. That report was developed following a review of 540 files selected at random by the Division of Workers' Compensation. All 540 files involved cases in which the employee lost time from work as a result of the injury and which were closed or completed in 1988.

The AIF Study found that employees were treated on the average by 5.4 physicians in 1988, as compared with 3.5 physicians in 1982 and 2.4 physicians in 1980. The study also found that in:

a. 62% of the cases examined, the worker was treated by 3 or more physicians;

b. 23% of the cases, the employee was treated by 5 to 7 physicians;

c. 9% of the cases the employee was treated by 8 to 10 physicians; and

d. 4% of the cases, the employee saw 11 to 19 physicians. (JA 16, pp. 24 and 25).

The study also found that payments to physicians represented 14% of the costs of the system of that year. (A-16, p. 24).

As this court is aware, there have been numerous challenges to Florida's workers' compensation law in the past 15 years. The workers' compensation system has been upheld time and time again against multi-faceted challenges to its constitutionality. **See Sasso v. Ram Property Management**, 452 So.2d 932 (Fla. 1984) (a limit on wage loss benefits did not deny access to courts); **Wood v. Harry Harmon Insulation**, 511 So.2d 690 (Fla. 1st DCA 1987) (evidentiary requirements necessary for spouse to receive death compensation did not deny access to courts); **Florida Farm Bureau v. Ayala**, 501 So.2d 230 (Fla. 4th DCA 1985) (section 440.16(7) did not violate due process or equal protection under either the Florida Constitution or the United States Constitution); and **Acton v. Ft. Lauderdale Hospital**, 440 So.2d 1282 (Fla. 1983) (scheduled wage loss did not violate equal protection).

AIF respectfully contends this provision does not violate an employee's due process, equal protection or access to courts, because it institutes a procedure whereby an employer or an employee may request an examination by a physician whose opinion will come clothed with a presumption of correctness. It is hard to see how an employee's due process rights are affected when the employee still retains the right to a hearing to contest or determine the validity of the physician opinion.

This mechanism seeks to address the increase in the number of physicians which appear to examine or treat an employee and render an opinion on that employee's condition or disability. There is no question that the Legislature could have devised any number of other mechanisms or methods for dealing with conflicting medical opinions about an employee's disability or ability to return to work. However, it selected a procedure whereby a physician is appointed by the Judge to render an opinion which will be presumed correct, unless overcome by clear and convincing evidence. This approach bears a rational relationship to the legitimate state interest of providing for efficiency of payment of benefits by eliminating endless, costly debates over a particular employee's ability to return to work, and as such is not violative of an employee's access to courts. **See Carr v. Central Florida Aluminum**, 402 So.2d 565 (Fla. 1st DCA 1981).

In holding this provision to be unconstitutional, Judge Hall noted that the clear and convincing standard to some degree usurps the fact finding responsibility of the Judge, and as such contributed to or caused this provision to be constitutionally deficient. (R 2696).

This court has in the past upheld the use of a clear and convincing standard in other contexts and has not found such an requirement to violate either the due process or access to courts provisions of Florida's Constitution. **State v. Mischler**, 488 So.2d 524 (Fla. 1986) (departures from sentencing guidelines range requires "clear and convincing reasons"). **Deer v. State**, 476 So.2d 163 (Fla. 1985) (prior conviction may not be used as "clear and convincing reason" for departure from presumptive guidelines sentence).

It is also been recognized by the First District Court of Appeal that "clear and convincing evidence" is an intermediate standard of proof, which is more than the

preponderance of evidence standard used in most civil cases and less than the beyond a reasonable doubt standard used in criminal cases. However, the use of such a standard in administrative cases seeking to disqualify individuals from participation in Florida's Food Stamp Program due to an intentional program violation is clearly permissive. **Smith v. Department of Health and Rehabilitative Services**, 522 So.2d 956, 958 (Fla. 1st DCA 1988).

The evidence and testimony presented by the Defendants at the trial below showed the Legislature had a massive amount of testimony, expert opinion, actuarial data, alternative proposals and debate present to it before adopting the Act. With regard to this particular provision, the Plaintiffs have the burden of proving beyond a reasonable doubt there is o rational basis for this section's amendment and that it is unconstitutional in all factual situations. To carry that burden, they are required to do more than argue the changes were "inadequate or unfair," since that theory of attack was rejected by this court in **Mahoney v. Sears Roebuck and Company**, 440 So.2d 1285, 1286 (Fla. 1983)(amendments to Chapter 440 did not fundamentally alter the workers' compensation system as a "reasonable litigation alternative").

The Plaintiffs below failed to carry their burden of proof that this statute is facially unconstitutional because there was absolutely no record evidence presented by the Plaintiffs to sustain their burden of overturning this particular section on a facial attack. As such, the The trial judge erred in so holding this provision to be constitutionally deficient. AIF respectfully requests this court reverse the trial judge's decision and find this statute to be constitutional.

III

Section 440.15(1)(b), Fla. Stat. (Supp. 1990), as amended, does not violate the access to courts provision of the Florida Constitution.

A portion of Section 20 of the Act amends Section 440.15 (1)(b) Fla. Stat. (Supp. 1990) to provide that in the "other cases" category, no compensation shall be paid for permanent total disability if the employee is engaged in or physically capable of engaging in gainful employment. The burden is upon the employee to establish the inability to do even light work available within a 100 mile radius of the injured employee's residence is due to physical limitation. Historically, the injured employee was required to establish the inability to do even light duty work due to physical limitation. Therefore, the Act's amendment specifically set forth a 100 mile radius of the injured employee's residence as an area in which employee investigate to assist in establishing a claim of permanent total disability in accordance with the statute.

Judge Hall held this section to be violative of the access to courts provision of Article 1, Section 21 of the Florida Constitution (1968) because it was not a reasonable alternative to common law rights.

As stated previously in this brief, this provision comes before this court with a presumption of constitutionality **Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.**, **supra**, and all reasonable doubts are to be resolved in favor of its validity. **Belk-James, Inc. v. Nuzum**, **supra**. The facial validity of this statute must be upheld unless it can be proven that this section cannot be constitutionally applied in any factual situation. **Voce**

v. State, **supra**.

The seminal case in Florida concerning statutory abolition of an existing civil remedy is **Kluger v. White**, 281 So.2d 1 (Fla. 1973). This court recognized in that case that the Legislature could abolish the statutory or common law right of access to courts by enacting a statute that provides "a reasonable alternative to protect the rights of the people of the State for redress of injuries. . . ." **Id.** at 4. This court has subsequently upheld Florida's Workers' Compensation Act against various challenges to its constitutionality. **Sasso V. Ram Property Management**, 452 So.2d 932 (Fla. 1984); **Acton v. Ft. Lauderdale Hospital**, 440 So.2d 1282 (Fla. 1983); and **Mahoney v. Sears Roebuck and Company**, 440 So.2d 1285 (Fla. 1983).

Prior to the enactment of Section 20, injured employees shouldered the burden of establishing the inability to do light duty work due to physical limitations. As such, an employee's burden theoretically ran to the entire United States to establish inability to work due to limitations. What the Legislature did by including the 100 mile radius requirement in the statute was to specifically identify the area in which an injured employee would be expected to attempt to establish an inability to perform light duty work was due to physical limitations. However, the Act did not in any way change the mechanism or the procedure by which disputes between an employer or employee would be resolved concerning an employee's eligibility for permanent total disability under Section 440.15(1), Fla. Stat. (Supp. 1990). This provision does not violate the access to courts provision of the Florida Constitution, because the employee is still entitled to a hearing and resolution of any dispute under Chapter 440. As such, it continues to constitute a reasonable litigation alternative

under **Kluger v. White, supra**.

In **Jetton v. Jacksonville Electric Authority**, 399 So.2d 396, 398 (Fla. 1st DCA 1981), it was stated that challenges to a statute's invalidity under **Kluger** will be narrowly construed to limit the instances in which constitutional violations will arise. In the instant case, we are not dealing with the complete abolition of an established cause of action as in **Kluger**, but a requirement of proof for an employee seeking to recover permanent total disability wage loss benefits. As such, the limitation does not of itself violate the **Kluger** standard.

As this court recognized in **Acton v. Ft. Lauderdale Hospital, supra**, the establishment of scheduled wage loss payments did not violate the equal protection provision of the Florida Constitution even if one employee might get more or less than another employee because overall, the workers' compensation system was found to be a reasonable substitute for the common law and previous tort remedies.

Because the Plaintiffs brought a facial challenge to this provision, they had the burden of defeating the statute's presumed validity and proving beyond a reasonable doubt that the statute's provisions would be unconstitutional under all factual circumstances. The sole testimony presented by the Plaintiffs at the trial court concerning the 100 mile job search requirement of this statute was entirely anecdotal and involved speculation by the witness concerning the geographical shape of the state. There was no testimony presented by any witness for the Plaintiff that it would be physically impossible for every injured employee to comply with the statute's requirements or that the provision would in all cases operate to deprive injured employees of an opportunity to prove entitlement to permanent total disability. AIF respectfully submits that this form of hypothetical or speculative testimony

falls substantially short of the burden of proof required of a facial challenge to this Statute.

AIF notes that any injured employee who has a claim controverted upon the basis of being physically capable of engaging in gainful employment because there is work available within a 100 mile radius of that injured employee's residence still has the ability to have a hearing pursuant to the other provisions of the Act to determine the employee's eligibility to obtain benefits. So long as the employee retains that right of a hearing, the employee's due process rights are protected and AIF respectfully contends the employee has not been denied any access to courts under the Florida Constitution.

If an employee's access to courts is not infringed because wage loss benefits terminate upon reaching age 65, then adding a requirement that an injured employee's establish an inability to work even within a 100 mile radius of their residence is also constitutionally permissible. As this court stated in **Sasso v. Ram Property Management**, 452 So.2d 932 (Fla. 1984), if the statute's amendment is rationally related to furthering a legitimate state objective and the employee receives other benefits as provided by the statute, then the provision does not violate the access to courts requirements under **Kluger v. White**, **supra**, and subsequent cases.

The Plaintiffs failed to carry their burden of establishing the statute violates the access of courts provision of the Florida Constitution as that standard articulated by this court in **Kluger v. White**, **supra**, and its progeny. The trial judge erred in so holding and AIF respectfully requests this court reverse the trial judge's finding and uphold the facial validity of this provision of the Act.

It is possible that at some future date an injured employee who has lost the right to

permanent total disability benefits pursuant to the operation of this section may well be able to bring before this court an argument that the statute is unconstitutional as applied to that particular employee. However, that is not the posture of the case before this court, since none of the individual Plaintiffs have ever alleged that they were affected by this provision of the Act.

CONCLUSION

Based upon the foregoing authorities, Associated Industries of Florida respectfully contends that Sections 440.13(2)(i) 3a, b, and c; 440.15(1)(b); and 440.15(3)(b) 4e, Fla. Stat. (Supp. 1990) are constitutional, and respectfully requests this court reverse the trial judge's rulings on these statutes and declare these specific sections to be constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Asesociated Industries of Florida was furnished by hand delivery and/or Panafax to the coiunsen the attached service list, this 28th day of January, 1991.

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