047

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 80,679

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DEC 14 1992
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Santos M. Garcia,

Petitioner,

v.

Carmar Structural, Inc./FEISCO

Respondents

_____/

PETITIONERS INITIAL BRIEF ON THE MERITS

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TABLE OF CITATIONS

Adams v. Miami Beach Hotel Association,
77 So.2d 465 (Fla.1955) 25

Alachua General Hospital v. Zimmer U.S.A., Inc.,
403 So.2d 1087 (Fla.1st DCA 1981) 19

Aldana v. Holub,
381 So.2d 231 (Fla.1980) 10

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) 13, 14, 16

Berndt v. Jacobi,
781 F.Supp. 553 (N.D.Ill. 1991) 26

Brown v. Firestone,
382 So.2d 654 (Fla.1980) 10

Brown v. Louisiana,
447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980) 7

Burris v. Mike Gatto Goodyear,
577 So.2d 1376 (Fla. 1st DCA 1991) 13

Byrd v. Richardson-Greenshields Securities, Inc.,
552 So.2d 1099 (Fla.1989) 17

Chevron v. Huson,
404 U.S. 97 (1971) 7, 8, 26

City of Pompano Beach v. Capalbo,
455 So.2d 468 (Fla.4th DCA 1984) 28

De Ayala v. Florida Farm Bureau Casualty Insurance Company,
543 So.2d 204 (Fla.1989) 26

Dickens v. State,
165 So.2d 811 (Fla.2d DCA 1964) 19

Dunn v. Blumstein,
405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) 18

Edgewater Drugs, Inc. v. Jax. Drugs, Inc.,
138 So.2d 525 (Fla.1st DCA 1962) 19

Edwards v. Arizona,
451 U.S. 477, 101 S.Ct. 1880 (1981) 8

Ervin v. Collins,
85 So.2d 852 (Fla.1956) 25

Gentry v. United States,
546 F.2d 343 (Ct.Cl. 1976) 7

Gideon v. Wainright,
372 U.S. 335 (1963) 7

Hardware Mutual Casualty Co. v. Carlton,
9 So.2d 350 (Fla.1942) 12, 16

Hoffman v. Jones,
280 So.2d 431 (Fla.1973) 8

In Re Estate of Greenberg, 390 So.2d 40 (Fla.1980),
appeal dismissed sub nom.
Pincus v. Estate of Greenberg,
450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981) 18

Johnson v. New Jersey,
384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) 8

Jones v. Seaboard Coast Line RR Co.,
297 So.2d 861 (Fla.2d DCA 1974) 19

Kerce v. The Coca Cola Company – Foods Division,
389 So.2d 1177 (Fla. 1980) 17

L. Ross, Inc. v. R.W. Roberts Construction Company, Inc.,
466 So.2d 1096 (Fla. 5th DCA 1986) 13, 16, 19

L. Ross, Inc. v. R.W. Roberts Construction Company, Inc.,
481 So. 2d 484 (Fla. 1986) 13, 16, 19

LaForge v. Cochrane,
154 So.2d 690 (Fla.1963) 8

Lawrence v. Florida East Coast Railway,
346 So.2d 1012 (Fla.1977) 8

Marbury v. Madison,
1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803) 20

Martinez v. Scanlan,
582 So.2d 1167 (Fla.1991) 4–10, 19, 25–27

McCulloch v. Maryland,
4 Wheat. 316, 407, 4 L.Ed. 579 (1819) 20

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602 (1966) 8

Mitchel v. City of Sapulpa,
857 F.2d 713 (CA10 1988) 8, 26

Petition of Florida Bar,
61 So.2d 646 (Fla. 1952) 20

Pinellas County v. Woolley,
189 So.2d 217 (Fla.2d DCA 1966) 28

Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,
588 F.2d 861 (CA8 1977) 26

Pomponio v. The Claridge of Pompano Condominium,
Inc., 378 So.2d 774 (Fla. 1979) 17

Richardson v. Honda Motor Co., Ltd.,
686 F.Supp. 303 (M.D.Fla.1988) 12

Sasso v. Ram Property Management,
431 So.2d 204 (Fla.1st DCA 1983),
affirmed, 452 So.2d 932 (Fla.1984) 9

Shapiro v. Thompson,
394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) 18

Shea v. Louisiana,
470 U.S. 51, 105 S.Ct. 1965 (1985) 8

Skinner v. Oklahoma,
316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) 18

State ex rel. Davis v. City of Stuart,
97 Fla. 69, 120 So. 335 (1929) 24

State ex rel. Nuveen v. Greer,
88 Fla. 249, 102 So. 739 (Fla.1924) 6, 9

State ex rel. Raser v. Gay,
158 Fla. 465, 28 So.2d 901 (1947) 24

State ex rel. Young et al. v. Duval County,
76 Fla. 180, 79 So. 692 (1918) 23

State of Florida v. Peters,
534 So.2d 760 (Fla.3d DCA 1988) 26

State of Florida, Department of Transportation, v. Edward M. Chadbourne, Inc.,
382 So.2d 293 (Fla.1980) 17

State v. Barquet,
262 So.2d 431 (Fla.1972) 9

State v. Statewright,
300 So.2d 674 (Fla.1974) 8

Sullivan v. Mayo,
121 So.2d 424 (Fla.1960) 10, 12, 13

Terrinoni v. Westward Ho!,
418 So.2d 1143 (Fla. 1st DCA 1982) 27

Walker & LaBerge, Inc. v. Halligan,
344 So.2d 239 (Fla.1977) 13

Williams v. Rhodes,
393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) 18

Wilson v. Clark,
414 So.2d 526 (Fla.1st DCA 1982) 19

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) 19

Zuberbuhler v. Division of Administration, State of Florida,
344 So.2d 1304 (Fla.2d DCA 1977) 19

Zweibon v. Mitchell,
516 F.2d 594 (D.C.Cir. 1975) 25

OTHER AUTHORITIES

42 USC Section 12101, et seq. 17

Article I, §10, Constitution of the State of Florida 16, 19

Article I, §10, Constitution of the United States 14, 16, 19

Florida Session Law 91-1, §54 13

Section 440.15, Florida Statutes 9

Section 440.15, Florida Statutes (1989) 9, 16

Section 440.20, Florida Statutes (1953) 11

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 4

POINT I 5

THE APPLICATION OF THE 1990 OR 1991 AMENDMENTS TO CHAPTER 440, FLORIDA STATUTES, TO THIS JULY 5, 1990, ACCIDENT VIOLATES CONSTITUTIONAL MANDATES

POINT II 27

THE JUDGE OF COMPENSATION CLAIMS ERRED IN FAILING TO AWARD THE CLAIMANT HIS FULL COMPENSATION RATE WHERE HE HAD NOT FOUND SUBSTITUTE EMPLOYMENT

CONCLUSION 29

CERTIFICATE OF SERVICE 29

INTRODUCTION

This case arose from an appeal from an Order of the Honorable Judith S. Nelson, Judge of Compensation Claims, entered on July 17, 1991. Respondents, Appellees below, are Carmar Structural, Inc., the Employer below, and FEISCO, the Self-Insurance Fund below, in this Workers' Compensation matter. Petitioner, Appellant below, is Santos M. Garcia, the Claimant below. The parties will be referred to by their names, their positions before this Honorable Court or by their positions below before the Judge of Compensation Claims (JCC).

All references to the Record on Appeal before the District Court will be through the abbreviation (R.). All emphasis is added unless otherwise indicated. All italicized wording contained in quoted materials is as contained in the quoted materials.

STATEMENT OF THE CASE

Benefits were claimed by proper form on November 14, 1990. (R. 21-47). A pre-trial stipulation was executed on March 25, 1991. (R. 15-18). Final hearing was held on July 12, 1991. (R. 1-13). The Judge's order was rendered on July 17, 1991. (R. 50-56).

The District Court of Appeal, First District, State of Florida, (hereinafter referred to as "the DCA"), after considering the briefs of the parties and after holding oral argument, ruled on October 5, 1992, and affirmed the JCC. In the opinion it was stated:

> "In Martinez v. Scanlon, 582 So.2d 1167 (Fla.1991), the supreme court affirmed a December 1990 trial court ruling that chapter 90-201, Laws of Florida, was unconstitutional because it violated the single subject rule by addressing both workers' compensation and international trade. The supreme court noted that after the trial court's judgment was rendered, the legislature had held a special session in January 1991, had separated the workers' compensation and international trade provisions into two distinct bills, and had reenacted both (chapters 91-1 and 91-5, Laws of Florida), expressly providing that "these two acts would be applied retroactively to July 1, 1990, the original effective date of chapter 90-201." Id. at 1172. The court noted the unusual procedural posture of this case, acknowledged "the legislature's perception of the substantial impact on the entire workers' compensation system if we were to hold chapter 90-201 void ab initio," and explained that it was not ruling on the 1991 act, which was not before it. It then held:
>
> > Considering all of these factors, we conclude that we can, and should, hold that **the effective date of voiding chapter 90-201 is the date of the filing of this opinion. Our decision shall operate prospectively only.** Id. at 1176.
>
> The opinion was issued on June 6, 1991.
>
> Were it not for the above-quoted language in Martinez v. Scanlon, **we would find that the law which applies to this case is the 1989 version of section 440.15(3)(b).** The supreme court has long stated that the substantive rights of the parties are fixed as of the time of injury "because the acceptance of the provisions of the Workmen's Compensation Law by the employer, the employee, and the insurance carrier constitutes a contract

between the parties which embraces the provisions of the law as of the time of injury." Sullivan v. Mayo, 121 So.2d 424, 428 (Fla.1960) (emphasis added). **The 1990 amendment in effect at the time of the accident was unquestionably unconstitutional.** The 1991 amendment was enacted only after the accident occurred, and **we would rule the retroactivity provision of the 1991 amendment unconstitutional as violating the constitutional provision against impairment of contracts.** Art. I, § 10, Fla. Const. See Hardware Mutual Casualty Co. v. Carlton, 9 So.2d 359 (Fla.1942). See also, L. Ross Inc. v. R.W. Roberts Constr. Co., Inc., 466 So.2d 1096 (Fla. 5th DCA 1985), approved, 481 So.2d 484 (Fla.1986). In principle, we find ourselves in agreement with the dissent in Martinez v. Scanlon:

> ... When a court declares a statute facially unconstitutional, it means, in plain English, that the enactment has been null and void from the outset. It is a declaration that the legislature acts outside its power when it contravenes the constitutional dictates.
>
> Having decided that the legislative enactment is a facially unconstitutional violation of the single subject rule, the Court has no power to breathe constitutional life into it for the period between its enactment and the Court's declaration of facial invalidity. How can a court require compliance with an act it says the legislature had no authority to enact? Logically, it cannot, judicial fiat notwithstanding.

Id. at 1176.

Were it possible, we would construe the majority's opinion in Martinez v. Scanlon as holding chapter 90–201 unconstitutional and void ab initio, **but ruling that any cases which had arisen during the period between its effective date and the date of the opinion, and which had been finally resolved during that period without raising the issue of the act's constitutionality, could not be relitigated.**[1] However, the language of the majority and dissenting opinions seems to negate this construction of the majority's holding, which we are constrained to follow.

Therefore, we find that the applicable law in effect at the time of the accident in this case was 440.15(3)(b), Florida Statutes, as amended by chapter 90–201, Laws of Florida, and we AFFIRM the order."

The Court also certified two questions to be of great public importance. These questions were stated as:

> "Whether chapter 90–201, Laws of Florida, would apply to a workers' compensation case in which the accident occurred after the effective date of chapter 90–201 and before the act was declared unconstitutional in Martinez v. Scanlon, and which had not been finally adjudicated during that period?
>
> If chapter 90–201, Laws of Florida, would not apply in such a case, whether chapter 91–1, Laws of Florida, would apply (i.e., whether the retroactivity provision of that act is constitutional)?"

---

[1] This was what Petitioner advocated in the argument below.

STATEMENT OF THE FACTS

Among the findings contained in the Order of the JCC rendered on July 17, 1991, (R. 54), are the following:

> "(3) Claimant, SANTOS GARCIA, suffered an industrial injury on July 5, 1990. His Average Weekly Wage is $444.38 and his compensation rate is $296.40.
>
> (4) Claimant reached a point of Maximum Medical Improvement on November 21, 1990. The parties agree that he is left with a degree of permanent partial impairment but do not agree on the percentage of same. For purposes of this Hearing, it is not necessary that I adjudicate that issue.
>
> (5) Wage loss benefits have been paid since July 12, 1990. Although the claimant has performed a work search, which the carrier has not questioned or otherwise found to be insufficient, he has been unsuccessful in obtaining employment.
>
> (6) Despite the fact that claimant has been paid no wages, salary or remuneration, the carrier has not paid him his wage loss benefits at his compensation rate of $296.40 per week. Instead they have applied the newly amended F.S. 440.15(3)(b) and paid claimant $284.40. This difference is due to the fact that 440.15(30(b), as amended in 1990, changed the formula for calculating wage loss benefits from 95% of the difference between 85% of the Average Weekly Wage and any salary, etc., earned Post–MMI to 80% of the difference between 80% of the Average Weekly Wage and post MMI earnings. This difference would be even more significant ($358.83 under old statute and $284.40 under new) but for the fact that both statutes limit the wage loss payments to 66 2/3 of the Average Weekly Wage. The old 95/85 formula, when applied to zero earnings, always resulted in an amount higher than 66 2/3 of the Average Weekly Wage, hence the automatic payout of the full compensation rate. Not so on the 80/80 formula.
>
> (7) Claimant's counsel questions the logic of a statute which cuts claimants benefits based upon no change other than a medical opinion of MMI. A claimant who is conducting a good faith work search while temporarily partially disabled will receive payments at his full compensation rate. Suddenly, once the treating physician issues an MMI report, he does the same, unsuccessful work search, and receives less in compensation. Counsel also argued that when claimants earn nothing, there is no salary, wages, etc., so the Statute is inapplicable.
>
> (8) It was the Carrier's position that 440.15(3)(b) was amended in 1990 in order to accomplish two legislative goals;
>
> (1) To motivate claimants to return to gainful employment as soon after MMI as possible.
>
> (2) To reduce the costs of Compensation benefits for carriers and employers. (R. 52)
>
> (9) I find that it is not within my authority or jurisdiction to comment on the appropriateness of the legislature's motives, the merits of the laws or the fairness of these laws as applied to individual claimants. I can only consider the statute as printed and apply it to the facts of a case. It would seem that the carrier is correct in applying the new 80/80 formula to claimant's requests for wage loss, even though there are no wages, salary or other remunderations to actually be subtracted from 80% of the Average Weekly Wage. The new statute does not, nor did the old, provide an alternative mechanism in cases where earnings were zero. I can not create one, no matter what my intentions may be in doing so.

THEREFORE, it is ORDERED as follows:

(a) The claim for wage loss benefits from 07/19/90 is DENIED.
(b) Each party is to bear the expense of its own fees and costs." (R. 51–53)

Claimant's wage loss forms covering the period of time from July 19, 1990, through June 14, 1991, were put into evidence. (R. 4). In the pretrial stipulation (R. 15–18), it was stipulated that wage loss benefits had been paid from November 22, 1990, through the date of that document. There were no allegations of inadequate job search or of any other defense other than the specific application of the 1991 statute to this July 5, 1990, accident case.

The facts as stated by the DCA are as follows:

> "The facts are not in dispute, only the application of section 440.15(3)(b), Florida Statutes, as amended on July 1, 1990. The claimant was injured on July 5, 1990, and reached maximum medical improvement (MMI) on November 21, 1990 with a permanent impairment, the degree of which is irrelevant to this appeal. He has performed an unsuccessful work search, the adequacy of which is not challenged by the carrier. The average weekly wage (AWW) is $444.38 and the compensation rate (CR) is $296.40 (66 2/3 % of the AWW).
>
> The problem arises from the fact that the carrier calculated the wage loss benefits at $284.40, using the recently amended section 440.15(3)(b) which changed the formula, from 95% of the difference between 85% of the AWW and any post–MMI earnings, to 80% of the difference between 80% of the AWW and post–MMI earnings. The judge of compensation claims noted that both versions of the statute limit wage loss payments to 66 2/3 % of the AWW, and that: "The old 95/85 formula, when applied to zero earnings, always resulted in an amount higher than 66 2/3 of the Average Weekly Wage, hence the automatic payout of the full compensation rate. Not so on the 80/80 formula." At the hearing on the claim, the claimant's attorney questioned the logic of cutting benefits for a claimant who is performing a good faith but unsuccessful work search, when the only change is that MMI has been reached. The carrier argued that the amendment is intended to motivate claimants to return to gainful employment as soon after MMI as possible, and to reduce the costs of compensation benefits for carriers and employers.
>
> The judge approved application of the amended statute, stating that "it is not within my authority or jurisdiction to comment on the appropriateness of the legislature's motives, the merits of the laws, or the fairness of those laws as applied to individual claimants" and that since the statute does not create an alternative mechanism in cases where earnings were zero, "I cannot create one, no matter what my intentions may be in doing so.""

SUMMARY OF THE ARGUMENT

The Claimant/Petitioner shows that the "prospective only" edict of this Court was incorrectly construed to have the 1990 statute apply to this case (and, thus all cases) which occurred in the "window" period between July 1, 1990, and January 25, 1991, when the 1991 Act was signed into law, irrespective of the date that the case was tried or the constitutional arguments raised. The present case was tried after the opinion in Martinez v. Scanlan, 582 So.2d 1167 (Fla.1991), was announced, June 6, 1991. This case was tried before the Judge of Compensation Claims in July, 1991. Also, the 1991, Act of the Florida

Legislature can not and should not have application to this July 5, 1990, accident on grounds that such an application violates constitutional safeguards of due process, of non-impairment of obligations of contract and violates the ex post facto provision of the state constitution.

In Point II, in the alternative, Claimant/Petitioner shows that the Judge erred in applying a wage loss formula yielding benefits less than 66 2/3% of Claimant's average weekly wage where Claimant was at less than the maximum compensation rate.

It is urged by Petitioner that both certified questions be answered in the negative and that neither the 1990 nor the 1991 Acts be applied to this case.

ARGUMENT

POINT I

THE APPLICATION OF THE 1990 OR 1991 AMENDMENTS TO CHAPTER 440, FLORIDA STATUTES, TO THIS JULY 5, 1990, ACCIDENT VIOLATES CONSTITUTIONAL MANDATES

In Martinez v. Scanlan, 582 So.2d 1167 (Fla.1991), this Court ruled that the 1990 Act which made major changes to Chapter 440, Florida Statutes, was unconstitutional. The Court stated:

> "We agree with the trial court that chapter 90-201 violates the single subject requirement and is unconstitutional. Chapter 90-201 essentially consists of two separate subjects, i.e., workers' compensation and international trade. While Martinez contends that these subjects are logically related to the topic of comprehensive economic development, we can find only a tangential relationship at best to exist. We recognize that legislative acts are presumed constitutional and that courts should resolve every reasonable doubt in favor of constitutionality. See State v. Kinner, 398 So.2d 1360 (Fla. 1981); Hanson v. State, 56 So.2d 129 (Fla. 1952). Moreover, we have held that, despite the disparate subjects contained within a comprehensive act, the act did not violate the single subject requirement because the subjects were reasonably related to the crisis the legislature intended to address. Burch v. State, 558 So.2d 1 (Fla. 1990) (1987 Crime Prevention and Control Act); Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987) (1986 Tort Reform and Insurance Act). In the instant case, however, the subjects of workers' compensation and international trade are simply too dissimilar and lack the necessary logical and rational relationship to the legislature's stated purpose of comprehensive economic development to pass constitutional muster. See Bunnell v. State, 453 So.2d 808 (Fla. 1984).
>
> Our inquiry as to this issue, however, does not end at this point. After the trial court rendered its declaratory judgment in December 1990, the legislature convened a special session in January 1991 specifically to address problems with the workers' compensation amendments of chapter 90-201. In this special session, the legislature separated the international trade and workers' compensation provisions into two distinct bills and reenacted both into law. Chs. 91-1, 91-5, Laws of Fla. The legislature also expressly provided that these two acts would be applied retroactively to July 1, 1990, the original effective date of chapter 90-201.
>
> * * *
>
> The 1991 act is not properly before this Court, and we are unable to make a binding ruling on its effect. Nevertheless, if a court were to find that the 1991 act could not be constitutionally applied because of the reenacted provisions, the question of the constitutionality of chapter 90-201 would still remain.
>
> * * *
>
> Considering all of these factors, we conclude that we can, and should, hold that the

effective date of voiding chapter 90–201 is the date of the filing of this opinion[2]. Our decision shall operate prospectively only.

Because of the unusual procedural posture of this proceeding, we advise that our ruling does not preclude any party with a specific controversy from raising any constitutional issue as applied to that party." 582 So.2d at 1172–1176

The "prospective only" ruling was effective as of June 6, 1991. See 582 So.2d at 1167. This case was tried on July 12, 1991, after the cut off date. The application of the 1990 Act to this case under these facts is clearly error, even under Scanlan. The 1990 statute was invalid on its date of passage. It was only the date of implementation of the effects of that ruling that was delayed. To do otherwise would put this Court into the position of being able to "forgive" an unconstitutional act of the Florida Legislature, a situation which would place this Court in a position superior to the Legislature, illogical in our system of three separate but equal branches, Article II, Section 3, Constitution of the State of Florida[3], as well as being outside this Court's constitutional jurisdiction[4].

In State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (Fla.1924), this Court stated:

"Where, in adjudicating litigated rights under a statute, it appears beyond all reasonable doubt that the statute is in conflict with some express or implied provision of the Constitution, it is then within the power and duty of the court, in order to give effect to the controlling law, to adjudicate the existence of the conflict between the statute and the organic law, whereupon the Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law, and renders it inoperative **ab initio**, so that **the Constitution and not the statute will be applied by the court** in determining the litigated rights. The courts alone are by the organic law empowered to authoritatively declare or to adjudge a statute to be in accord with or in conflict with the Constitution, so that the statute, if valid, stands, or, **if contrary to organic law, will by the operation of the Constitution be rendered invalid from its**

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[2] The DCA's opinion leaves the question of what significance, if any, an "effective date" has if all accidents occurring between July 1, 1990, and January 25, 1991, (hereinafter referred to as the "window" period) are all controlled by the 1990 Act, irrespective of the time that litigation occurs. Under that interpretation, Scanlan would be, essentially, an advisory opinion.

[3] "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

[4] The Legislature's and Executive's interpretation of this constitutional provision is shown by statute. Section 20.02, Florida Statutes, provides:

"20.02. Declaration of policy

(1) The state constitution contemplates the separation of powers within state government among the legislative, executive, and judicial branches of the government. The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch has the purpose of executing the programs and policies adopted by the legislature and of making policy recommendations to the legislature. The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws."

> **enactment**. 12 C. J. 800. The opinions of officials and of attorneys and others that a statute is valid may be persuasive in a judicial determination of the matter, but such opinions, and acts done pursuant to such opinions, do not affect the power and duty of the court to adjudge a statute to be in conflict with organic provisions, when in the judgment of the court there is such conflict; nor do such opinions and acts affect the operation of the dominant force of the Constitution in rendering the statute inoperative ab initio, to the extent that it conflicts with the superior law as judicially determined.
>
> If a legislative enactment conflicts with an existing provision of the Constitution, such enactment does not become a law. The intent of a Constitution may be shown by the implications as well as by the words of express provisions." 102 So. at 258–259

It is against this "void ab initio" principle, which is still generally viable[5], see Scanlan, supra, that the limits of the Scanlan "prospective only" ruling must be measured and defined. The present "prospective–only" ruling must and should be limited so that the 1989 Act covers this case. A "prospective–only" ruling has had various limits and meanings over the years. It most commonly applies to a situation where a new case overrules and changes prior precedent which had been relied on. It often means that only those cases which have been completed and where the litigation is over are immune from its effect. The opposite of such a ruling was seen in Gideon v. Wainright, 372 U.S. 335 (1963), where past convictions which had been through the courts and finalized were reopened[6]. This was true in Florida[7].

---

[5] In Gentry v. United States, 546 F.2d 343 (Ct.Cl. 1976), the Court stated:

> "It is well established that an unconstitutional enactment is void ab initio, *Norton v. Shelby County*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886), and that judges may not give effect to it. *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)." 546 F.2d at 346

[6] Retroactivity considerations are not, however, limited to the criminal area. Chevron v. Huson, 404 U.S. 97 (1971). However, Huson, supra, applies in all cases. In Brown v. Louisiana, 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980), an appeal of a criminal conviction, the Court stated:

> "Similarly, it is clear that resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based. "Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." Id., at 728, 86 S.Ct., at 1778. Accordingly, the test consistently employed by the Court to decide whether a new constitutional doctrine should be applied retroactively contemplates the consideration of three criteria: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967).
>
> Moreover, our decisions establish that "[f]oremost among these factors is the purpose to be served by the new constitutional rule," Desist v. United States, 394 U.S. 244, 249, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969), and that we will give controlling significance to the measure of reliance and the impact on the administration of justice "only when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity." Id., at 251, 89 S.Ct., at 1035; Michigan v. Payne, 412 U.S. 47, 55, 93 S.Ct. 1966, 1970, 36 L.Ed.2d 736 (1973); see also Hankerson v. North Carolina, 432 U.S. 233,

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), the Court held that, in a criminal case, where one has expressed a desire to be represented by counsel, the issue of his waiver must be judged against standards other than the existence of the fact that he responded to further interrogation. Later in Shea v. Louisiana, 470 U.S. 51, 105 S.Ct. 1965 (1985), the Court was faced with a case which was pending when Edwards, supra, was pending but not yet decided. The questioning of Shea had taken place before the ruling in Edwards. 105 S.Ct. at 1066–1067. The test was, essentially, that since the "curtain of finality" had not yet fallen on Shea's conviction, it should be reviewed under the Edwards standards as it was still not final being on appeal. The Court did not characterize this as making the Edwards ruling retroactive.

In Lawrence v. Florida East Coast Railway, 346 So.2d 1012 (Fla.1977), this Court ruled that special verdict forms were required in all jury trials involving comparative negligence in the wake of Hoffman v. Jones, 280 So.2d 431 (Fla.1973). This ruling was held to be prospective only, 346 So.2d at 1017. It was applied to all cases not tried as of the date of the Lawrence decision.

In State v. Statewright, 300 So.2d 674 (Fla.1974), the decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), was held to be prospective only ("the ruling in *Miranda* has been expressly held NOT to be retroactive. Johnson v. N.J., 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966)" 300 So.2d at 676)[8], but this Court held that it applied to cases not yet tried even where the interrogation had occurred prior to Miranda. That would seem to be on point since not only had this case not been tried before the

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242–244, 97 S.Ct. 2339, 2345, 53 L.Ed.2d 306 (1977); Adams v. Illinois, 405 U.S. 278, 280, 92 S.Ct. 916, 918, 31 L.Ed.2d 202 (1972) (plurality opinion of BRENNAN, J.)." 100 S.Ct. at 2219–2220

In Mitchel v. City of Sapulpa, 857 F.2d 713 (CA10 1988), also a criminal case, the Court discussed and summarized Huson supra, and stated:

> "The Supreme Court applies a three–pronged test for determining whether a case should be applied retroactively: (1) "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) the court " 'must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation;' " and (3) the court must "weigh the inequity imposed by retroactive application." Chevron Oil v. Huson, 404 U.S. 97, 106–07, 92 S.Ct. 349, 355– 56, 30 L.Ed.2d 296 (1971) (citations omitted)." 857 F.2d at 714–715

These considerations will be discussed later in this Point. It is, however, necessary to note that no new constitutional rule was announced in Scanlan.

[7] For example, see numerous remands beginning with LaForge v. Cochrane, 154 So.2d 690 (Fla.1963).

[8] This also would seem to apply to Shea, supra, which was a refinement of Miranda.

JCC but also the only "trial" where the issue could be raised in the case at bar was before the DCA in the prior appeal. Sasso v. Ram Property Management, 431 So.2d 204 (Fla.1st DCA 1983), affirmed, 452 So.2d 932 (Fla.1984)[9]. Certainly the acceptance of the present constitutional arguments to this case which was tried after the date of Scanlan and for which the order was not rendered until July 17, 1991, (R. 49), is consistent with the Scanlan "prospective only" edict.

As another example, in State v. Barquet, 262 So.2d 431 (Fla.1972), this Court determined an anti-abortion statute to be unconstitutional. The issue of retroactivity was also dealt with regarding persons being prosecuted for violating that statute. This Court stated:

> "Although a person convicted under a law subsequently declared unconstitutional in some instances would be entitled to be heard, we hold that this decision and judgment invalidating the abortion statutes under consideration is not retroactive, but **prospective only.** The United States Supreme Court has found no constitutional limitation on state courts proceeding in this manner. See Grimes v. State, 244 So.2d 130 (Fla.1971). In fact, federal courts have proceeded similarly. See Johnson v. N.J., 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); Warring v. Colpoys, 74 App.D.C. 303, 122 F.2d 642, 136 A.L.R. 1025 (1941), cited in 20 Am.Jur.2d, Courts, § 236. **The holding in this decision is available to those defendants who have not yet been adjudged guilty of a violation of either of these statutes involved in the case Sub judice, as well as those who have sought timely review by appeal from an adjudication of guilt, as of the filing date of this opinion.**" 262 So.2d at 438

Petitioners seek **exactly** the same definition of the Scanlan "prospective only" holding.

On the date of this accident the only workers' compensation Act in place which could pass constitutional muster, and, thus the only valid law, Greer, supra, was the 1989 statute. That Act provided greater benefits with a 95%-85% wage loss calculation formula, Section 440.15, Florida Statutes (1989), as opposed to the 80%-80% formula in place in the void 1990 Statute. The substantive character of this change is obvious since the arithmetic calculation shows a benefit rate of 80.75% of the average weekly wage, subject to the maximum compensation rate, as compared to a benefit rate of 64% of the average weekly wage, subject to the maximum compensation rate. This Claimant is not at the maximum compensation rate, (R. 15), and thus has a real and calculable interest here.

The wage loss formula, Section 440.15, Florida Statutes, which would be in effect under both the 1990 and 1991 statutes provides:

"(b) Wage-loss benefits.-

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[9] "The issue raised on appeal involves the facial constitutionality of the statute, and such an issue is not cognizable by a deputy commissioner. Accordingly, it would have been futile to raise the issue below. Therefore, we recognize a very narrow exception to the rule stated in *Sunland Hospital*, requiring preservation of an issue for appellate review. The fact that the issue raised on appeal is strictly constitutional in nature and the statute's application formed the basis for the deputy's denial of permanent disability wage-loss benefits is sufficient to permit appellate review." 431 So.2d at 207-208

1. Each injured worker who suffers a permanent impairment, which permanent impairment is determined pursuant to the schedule adopted in accordance with subparagraph (a)3., is not based solely on subjective complaints, and results in one or more work–related physical restrictions which are directly attributable to the injury, may be entitled to wage–loss benefits under this subsection, provided that such permanent impairment results in a work–related physical restriction which affects such employee's ability to perform the activities of his usual or other appropriate employment. Such benefits shall be based on actual wage loss and shall not be subject to the minimum compensation rate set forth in § 440.12(2). Subject to the maximum compensation rate as set forth in § 440.12(2), **such wage–loss benefits shall be equal to 80 percent of the difference between 80 percent of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared weekly;** however, the weekly wage–loss benefits shall not exceed an amount equal to 66 2/3 percent of the employee's average weekly wage at the time of injury."

The language in the 1989 Act on the same subject provided:

"(b) Wage–loss benefits.–
1. Each injured worker who suffers a permanent impairment, which permanent impairment is determined pursuant to the schedule adopted in accordance with subparagraph (a)3., may be entitled to wage–loss benefits under this subsection. Such benefits shall be based on actual wage loss and shall not be subject to the minimum compensation rate set forth in § 440.12(2). Subject to the maximum compensation rate as set forth in § 440.12(2), **such wage–loss benefits shall be equal to 95 percent of the difference between 85 percent of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared monthly;** however, the weekly wage–loss benefits shall not exceed an amount equal to 66 2/3 percent of the employee's average weekly wage at the time of injury."

Undoubtedly, if this Petitioner's second point of this proceeding which is grounded in statutory construction is granted or if the 1989 Act was applied, the Claimant stands to gain since the earlier formula works out to 95% x 85% or 80.75% of his average weekly wage, limited by the 66 2/3% provision, as opposed to 80% x 80% or 64% of his average weekly wage. He would also be entitled to more weeks of eligibility for wage loss benefits since under the older provision he had a maximum of 525 weeks of wage loss eligibility while under the 1990 and 1991 schemes, he is limited to only, at most, 364 weeks of wage loss eligibility and that number of weeks would probably be even more limited by the numerical amount of his impairment. However, the loss of the 2 2/3% of his AWW is enough to give this Petitioner standing to raise this issue. Scanlan, supra[10], See also Brown v. Firestone, 382 So.2d 654 (Fla.1980); Aldana v. Holub, 381 So.2d 231 (Fla.1980).

In Sullivan v. Mayo, 121 So.2d 424 (Fla.1960), a workers' compensation matter and a case cited by this Court in Scanlan, supra, as authoritative, see 582 So.2d at 1175, note 5, this Court considered whether the statute applicable to that particular accident authorized a lump sum advance payment and allowed the FIC to require security from the employee to the Carrier as a condition to the award.

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[10] "Because of the unusual procedural posture of this proceeding, we advise that our ruling does not preclude any party with a specific controversy from raising any constitutional issue as applied to that party." 582 So.2d at 1176

Claimant was injured by accident in December, 1955. In May, 1957, he filed a petition for lump sum settlement of his weekly compensation payments. On October 16, 1957, claimant, a paraplegic, was found to have a life expectancy of a specific value and that it was in his best interest to have a lump sum award. The IRC determined that Chapter 440 did not intend lump settlement provisions to apply to permanent total disability cases. The District Court reversed and, according to the Supreme Court, correctly held that the Act contained no restriction against awarding a lump sum payment in a permanent total disability case. Upon remand to the IRC it was held that the record failed to sustain a conclusion that it was in the Claimant's best interest to have a lump sum award and ordered the petition for settlement dismissed. A further petition for lump sum award was filed and another hearing held in May, 1959. The deputy commissioner ruled in August, 1959 that a lump sum payment was proper. In that order the deputy determined that the rights of the parties were governed by the Florida Statutes in force at the time of that order, as opposed to the date of the accident. That law had taken effect on July 1, 1959, and, ultimately, the order of the deputy was modified by the IRC which added a condition that the carrier receive as security for the advance payment of compensation either an assignment of Claimant's existing mortgages which were to be paid off by the lump sum payment or to be given new mortgages in the amount of the lump sum payment to be paid without interest. It was the Claimant's position before this Court that Chapter 440 had no provision requiring security to the Carrier under these circumstances. The Court stated:

> "It is well established in Florida that the substantive rights of the respective parties under the Workmen's Compensation Law are fixed as of the time of the injury to the employee. This is so because the acceptance of the provisions of the Workmen's Compensation Law by the employer, the employee, and the insurance carrier constitutes **a contract between the parties which embraces the provisions of the law as of the time of the injury**. Consequently, a subsequent enactment could not impair the substantive rights of the parties established by this contractual relationship. Hardware Mutual Casualty Co. v. Carlton, 151 Fla. 238, 9 So.2d 359; Great American Indemnity Co. v. Smith, 156 Fla. 662, 24 So.2d 42; Fidelity & Casualty Co. of New York v. Bedingfield, Fla.1952, 60 So.2d 489; Fink v. Kink, Fla.1953, 64 So.2d 770; Phillips v. City of West Palm Beach, Fla.1954, 70 So.2d 345; Hecht v. Parkinson, Fla.1954, 70 So.2d 505. Applying the rule of the cited cases to the situation before us we are compelled to hold that the deputy commissioner at the outset and the full commission in its order affirming him, committed error in concluding that the substantive rights of these parties, insofar as advance payments of compensation were concerned, were governed by the 1959 statute which took effect July 1, 1959. We again interpolate that the procedural aspects of the matter are governed by the 1959 act as pointed out above. The substantive rights are governed by the law in force when the injury occurred on December 23, 1955, and that would be Chapter 29.778, Laws of Florida 1955." 121 So.2d at 428

This Court quoted the 1953 version of Section 440.20, Florida Statutes, and then stated:

> "It is perfectly clear from an examination of the quoted statute that it does not authorize an advance payment of a portion of the weekly payments which are expected to become due eventually under the compensation order. The quoted statute authorizes the commission to determine whether it is for the best interest of an employee to receive the commuted lump sum equivalent of all future payments of compensation. In the event that the Commission so determines, it is then authorized to direct payment of the present value of all future payments of compensation computed at 4% true discount compounded

annually. Upon the payment of this sum the liability of the employer for all compensation is discharged. There was no provision in the statute governing the instant claim for the advance payment of a part of the compensation payments due with a reservoir of liability on the part of the employer remaining and potentially payable after the payment of the lump sum.

One reason that Chapter 59–422, Laws of Florida, 1959, could not be made applicable in the instant case is because under the provisions of that act the potential liability of the employer and carrier was substantially increased. This is so because under the former statute which governs this case the award of a lump sum settlement was on the basis of the computed value of the entire claim and a resulting complete discharge to the employer and carrier. Under the 1959 act the Commission, on the recommendation of a deputy, may authorize advanced payments in lump sum of an estimated 'part' of the compensation to come due leaving a residuum of potential liability to be enforced against the carrier at the end of the time covered by the advanced payment." 121 So.2d at 429–430

In Hardware Mutual Casualty Co. v. Carlton, 9 So.2d 350 (Fla.1942), this Court stated:

"The acceptance of the application of Workmen's Compensation Statutes, Acts 1935, c.17481, by employer, employee and insurance carrier constitutes a contract between the parties embracing the provisions of the statutes as they may exist at the time of any injury compensable under the terms of the statute. See Chamberlain v. Florida Power Corporation, 144 Fla. 719, 198 So. 486; Liberato v. Royer, 270 U.S. 535, 46 S.Ct. 373, 70 L.Ed. 719.

It therefore, follows that when claimant was injured in November of 1940, the Act of 1941, supra, was not in existence and was not a part of the contract.

In Page on Contracts, Vol.6, Sec. 3674, the writer says:

> 'The obligation of a contract is impaired when the substantive rights of the parties thereunder are changed. **The extent to which their substantive rights are impaired is probably immaterial since they are entitled to their rights under the original contract without any change.**'

It appears to us that to hold the provisions of Sec. 34(a), as amended by Chapter 20672, Acts of 1941, retroactive would be in violation of Sec. 10, Article I of the Constitution of the United States." 9 So.2d at 359–360

Thus, if any rights or obligations of the parties are changed in any way, irrespective of the amounts, the statute in question is substantive and the law in effect as of the date of accident applies. Interestingly, the Sullivan v. Mayo fact pattern would have left the dollar amount of the total case value the same but would have still changed the obligation. That, alone, made it substantive.

In Richardson v. Honda Motor Co., Ltd., 686 F.Supp. 303 (M.D.Fla.1988), the Court stated:

"A substantive law creates, defines; and regulates rights as opposed to procedural or remedial law which prescribes a method of enforcing the rights or obtaining redress for their invasion. Black's Law Dictionary, 4th Ed. (1951). In Florida, each side is obligated to pay its own attorney's fees unless a right to assess those fees is awarded by a statute or agreement between the parties. Young v. Altenhaus, 472 So.2d 1152, 1154 (Fla.1985). Given that rule of law, the Supreme Court of Florida has found that a '...statutory requirement for the non– prevailing party to pay attorney fees constitutes 'a new obligation or duty,' and is therefore substantive in nature.' Young, at 1154. See also L. Ross, Inc. v. R.W.Roberts Construction Co., Ind., 481 So.2d 484 (Fla.1986); Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla.1982); Love v. Jacobson, 390 So.2d 782 (Fla.3d DCA 1980); and Parrish v. Mullis, 458 So.2d 401 (Fla.1st DCA 1984)." 686 F.Supp. at 304

Here there is explicit language where the Legislature intended that the 1991 Act be retroactive.

See Florida Session Law 91-1, §54[11]. However, the effectiveness of that intent is still subject to constitutional limitations and here that language must, constitutionally, must be considered to be without effect. Assuming that the 1990 Act does not apply, then the 1991 Act, in order to be applicable, would take control of a cause of action for which the facts were in existence and established before the 1991 Act was ever passed or even proposed. In L. Ross, Inc. v. R.W. Roberts Construction Company, Inc., 466 So.2d 1096 (Fla. 5th DCA 1986), the Court was faced with a situation where a fee shifting statute in existence at the time of the creation of the claim, contained a limitation on fee amounts in actions by a subcontractor against a surety on a payment bond. After the creation of the cause of action, the limitation on fees was legislatively removed. The Court, in determining that said limitation was substantive and thus still applied to that case, stated:

> "Substantive rights and obligations created by statutes do not vest and accrue as to particular parties until the accrual of a particular cause of action giving rise to the substantive rights and obligations in a particular instance.
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> * * *
>
> It is a facet of constitutional due process that, after they vest, substantive rights cannot be adversely affected by the enactment of legislation. Likewise, but conversely, **it is fundamentally unfair and unjust for the legislature to impose, ex post facto, a new or increased obligation, burden, or penalty as to a set of facts after those facts have occurred**. For the same reason, regardless of the intent of the legislature, the legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred." 466 So.2d at 1098

In L. Ross, Inc. v. R.W. Roberts Construction Company, Inc., 481 So. 2d 484 (Fla. 1986), the above discussed decision was affirmed. In approving of the above-quoted language, this Court stated:

> "**We agree with Judge Cowart's well-reasoned opinion in L. Ross, however**. The right to attorney fees is a substantive one, as is the burden on the party responsible for paying the fee. A statutory amendment affecting the substantive right and concomitant burden is likewise substantive." 481 So.2d at 485

The Fifth District also pointed out that ordinarily the creation of an obligation "is but the negative reciprocal of the creation of a substantive legal right", 466 So.2d at 1098, note 5. Here that is also the case. A defined dollar amount difference exists.

The law in Florida is clear that the rights of a workers' compensation claimant are contractual in nature. See Sullivan v. Mayo, supra, and see also Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla.1977), a case arising after the Act became mandatory which still considered the rights involved as contractual in nature, and Judge Ervin's concurring opinion in Burris v. Mike Gatto Goodyear, 577 So.2d 1376 (Fla. 1st DCA 1991).

In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978),

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[11] The Legislature apparently foresaw a constitutional problem with retroactive application of this Act, as evidenced by the severability language in this Section.

the federal standard for the "contract clause", Article I, Section 10, Constitution of the United States, which is the same as the corresponding provision in the Florida constitution, was most recently discussed by the Supreme Court of the United States. In Spannaus the State of Minnesota passed their Private Pension Benefits Protection Act. The Court described the effects of the Act as follows:

> "Under the Act, a private employer of 100 employees or more—at least one of whom was a Minnesota resident—who provided pension benefits under a plan meeting the qualifications of § 401 of the Internal Revenue Code, was subject to a "pension funding charge" if he either terminated the plan or closed a Minnesota office. The charge was assessed if the pension funds were not sufficient to cover full pensions for all employees who had worked at least 10 years. The Act required the employer to satisfy the deficiency by purchasing deferred annuities, payable to the employees at their normal retirement age. A separate provision specified that periods of employment prior to the effective date of the Act were to be included in the 10–year employment criterion." 98 S.Ct. at 2719
>
> The Court also described some other aspects of the plan. It was stated:
>
> "The company was the sole contributor to the pension trust fund, and each year it made contributions to the fund based on actuarial predictions of eventual payout needs. Although those contributions once made were irrevocable, in the sense that they remained part of the pension trust fund, the plan neither required the company to make specific contributions nor imposed any sanction on it for failing to contribute adequately to the fund.
>
> The company not only retained a virtually unrestricted right to amend the plan in whole or in part, but was also free to terminate the plan and distribute the trust assets at any time and for any reason. In the event of a termination, the assets of the fund were to go, first, to meet the plan's obligation to those employees already retired and receiving pensions; second, to those eligible for retirement; and finally, if any balance remained, to the other employees covered under the plan whose pension rights had not yet vested. Employees within each of these categories were assured payment only to the extent of the pension assets.
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> * * *
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> During the summer of 1974 the company began closing its Minnesota office. On July 31, it discharged 11 of its 30 Minnesota employees, and the following month it notified the Minnesota Commissioner of Labor and Industry, as required by the Act, that it was terminating an office in the State. At least nine of the discharged employees did not have any vested pension rights under the company's plan, but had worked for the company for 10 years or more and thus qualified as pension obligees of the company under the law that Minnesota had enacted a few months earlier. On August 18, the State notified the company that it owed a pension funding charge of approximately $185,000 under the provisions of the Private Pension Benefits Protection Act." 98 S.Ct. at 2719–2720

The company sued and the three judge panel upheld the constitutionality of the Act. Appellate review was sought before the Supreme Court of the United States. That Court reversed the three judge panel and ruled that the Minnesota act violated the federal contract clause. It was stated:

> "There can be no question of the impact of the Minnesota Private Pension Benefits Protection Act upon the company's contractual relationships with its employees. The Act substantially altered those relationships by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake. But it does not inexorably follow that the Act, as applied to the company, violates the Contract

Clause of the Constitution." 98 S.Ct. at 2720

* * *

If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The existence and nature of those limits were clearly indicated in a series of cases in this Court arising from the efforts of the States to deal with the unprecedented emergencies brought on by the severe economic depression of the early 1930's.

In Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, the Court upheld against a Contract Clause attack a mortgage moratorium law that Minnesota had enacted to provide relief for homeowners threatened with foreclosure. Although the legislation conflicted directly with lenders' contractual foreclosure rights, the Court there acknowledged that, despite the Contract Clause, the States retain residual authority to enact laws "to safeguard the vital interests of [their] people." Id., at 434, 54 S.Ct. at 239. In upholding the state mortgage moratorium law, the Court found five factors significant. First, the state legislature had declared in the Act itself that **an emergency need** for the protection of homeowners existed. Id., at 444, 54 S.Ct., at 242. Second, the state law was enacted to protect a basic societal interest, **not a favored group.** Id., at 445, 54 S.Ct., at 242. Third, the relief was **appropriately tailored to the emergency** that it was designed to meet. Ibid. Fourth, the imposed **conditions were reasonable.** Id., at 445–447, 54 S.Ct., at 242–243. And, finally, the **legislation was limited** to the duration of the emergency. Id., at 447, 54 S.Ct., at 243. The Blaisdell opinion thus clearly implied that if the Minnesota moratorium legislation had not possessed the characteristics attributed to it by the Court, it would have been invalid under the Contract Clause of the Constitution. These implications were given concrete force in three cases that followed closely in Blaisdell 's wake." 98 S.Ct. at 2721

The Court discussed further the limitations on the sovereign powers of the states. It was stated:

"The most recent Contract Clause case in this Court was United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92. In that case the Court again recognized that although the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens," id., at 21, 97 S.Ct., at 1517, that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." Id., at 22, 97 S.Ct., at 1518. Evaluating with particular scrutiny a modification of a contract to which the State itself was a party, the Court in that case held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither necessary nor reasonable." 98 S.Ct. at 2722

* * *

In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

* * *

The effect of Minnesota's Private Pension Benefits Protection Act on this contractual obligation was severe. The company was required in 1974 to have made its contributions throughout the pre–1974 life of its plan as if employees' pension rights had vested after 10 years, instead of vesting in accord with the terms of the plan. Thus a basic term of the pension contract— one on which the company had relied for 10 years—was substantially modified. The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10–year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10–year vesting requirement.

* * *

Moreover, the retroactive state–imposed vesting requirement was applied only to those employers who terminated their pension plans or who, like the company, closed their Minnesota offices.

* * *

Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts.

* * *

But whether or not the legislation was aimed largely at a single employer, it clearly has an extremely narrow focus. It applies only to private employers who have at least 100 employees, at least one of whom works in Minnesota, and who have established voluntary private pension plans, qualified under § 401 of the Internal Revenue Code. And it applies only when such an employer closes his Minnesota office or terminates his pension plan. Thus, this law can hardly be characterized, like the law at issue in the Blaisdell case, as one enacted to protect a broad societal interest rather than a narrow class.

* * *

Moreover, in at least one other important respect the Act does not resemble the mortgage moratorium legislation whose constitutionality was upheld in the Blaisdell case. This legislation, imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees, was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's— conditions of which the Court in Blaisdell took judicial notice." 98 S.Ct. at 2723–2725

The present situation violates the federal standard which is less stringent than the state standard in Florida. Carlton, supra. Here, there is also a severe permanent impairment. The Claimant's benefits are cut irrevocably. There is no declared "emergency" and the change is without finite duration, other than the greatly shortened eligibility period for wage loss. See §440.15, Florida Statutes. Claimants will never get these lost benefits back, at least not through this Act. The "protection" is for employers and their carriers, not Claimants, in whose interest the Act is intended, historically. Claimants' benefits are cut dramatically while they get nothing new in the Act. Here employers and carriers are a "favored group" which is contrary to language in Spannaus.

Petitioner submits that since the Claimant's substantive rights vested on July 5, 1990, for this Claimant, the intent of the Legislature is not controlling since such an effort violates the due process rights of the Claimant/Petitioner, Ross, supra, and violates Article I, §10, of the Constitution of the State of Florida and Article I, §10, of the Constitution of the United States, both of which prohibit impairment of obligations, and thus rights, of a contract which came into existence on July 5, 1990, the date of this

Petitioner's accident.

The Florida standard for determination as to the test applied in obligation of contract cases was also enunciated in State of Florida, Department of Transportation, v. Edward M. Chadbourne, Inc., 382 So.2d 293 (Fla.1980), this Court dealt with a retroactivity issue focusing on a "windfall profits" statute which was an amendment to a 1974 which had allowed adjustment to road paving charges[12]. The Court stated:

> "The second issue which must be addressed is whether the 1976 amendment unconstitutionally impaired contractual obligations created pursuant to the 1974 law.
>
> The original enactment in 1974 did not contemplate that there would be windfall profits. The 1976 amendment, however, expressly records the legislative intent that windfall profits be avoided. That was a noble and just attempt to correct a consequence not foresee in the 1974 act. Unfortunately, that part of the amendment which attempted to affect existing contracts flies into the wall of absolute prohibition. **The fact that a law is just and equitable does not authorize its enactment in the face of a constitutional prohibition.**
>
> This Court has generally prohibited all forms of contract impairment. This Court recently reviewed the issue of impairment of contracts in great detail in *Pomponio v. The Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979)[13]. Additionally, Judges Ott

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[12] "Although this provision requires that the primary purpose of any governmental undertaking must be public in nature, *see Bannon v. Port of Palm Beach District*, 246 So.2d 737, 741 (Fla. 1971), this does not mean that the undertaking may not incidentally benefit private corporations or individuals. The purpose of the statute in issue was to made a fair adjustment of the price for both parties so that contractors who build public roads would not be irreparably harmed because of the sudden price escalation caused by a national oil shortage. By accepting the terms of this statute, the contractors subjected themselves to the possibility of receiving less than the original contract price. In fact, Chadbourne did receive less than its bid price on one contract." 382 So.2d at 296

[13] Here, under the rationale of Pomponio v. The Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979), the act of cutting premiums was not done in the least restrictive or punishing manner to Claimants, see 378 So.2d at 781–782, any doubt of the extent of application to present facts should be in the Claimant's favor. The doctrine of liberal construction of workers' compensation laws should also favor Claimants in this case. See Byrd v. Richardson–Greenshields Securities, Inc., 552 So.2d 1099 (Fla.1989), and Kerce v. The Coca Cola Company – Foods Division, 389 So.2d 1177 (Fla. 1980). In the context of this case and definitions or limits to be placed on the "prospective only" ruling, concepts of costs of application of the 1989 statute to this case as overriding rights given by the contract clauses, should not be a factor. See also the recently effective Americans with Disabilities Act which requires perhaps the highest level of scrutiny in actions affecting the benefits given to persons who, in the workers' compensation setting, must be a member of that minority in order to qualify for the wage loss benefits involved here. That statute, 42 USC §12101, et seq., begins with the following findings:

> "§12101. Congressional Findings and purposes
> (a) Findings. The Congress finds that–
> (1) some 43,000,000 Americans have one or more **physical or mental disabilities**, and this number is increasing as the population as a who le is growing older;
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
> (3) discrimination against individuals with disabilities persists in such critical areas as

employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that **people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged** socially, **vocationally, economically,** and educationally;

(7) **individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;**

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self–sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act–

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day–to–day by people with disabilities."

In In Re Estate of Greenberg, 390 So.2d 40 (Fla.1980), appeal dismissed sub nom. Pincus v. Estate of Greenberg, 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981), this Court stated that where a suspect class or fundamental right is involved, the State must show a compelling state interest in order to use the suspect classification. Federal cases under the Fourteenth Amendment also require that with any fundamental right or impact upon a discrete and insular minority, the state must come forward and not only show a compelling state interest but also show that there were no other less interest of ways of handling the situation. Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). In this context they must show that they have done everything possible to make sure that all waste in the system from insurance company administration on downward has, in fact, been tried and that this is the only way that the system can be saved from extinction. In Greenberg, supra, this Court stated:

> "In evaluating claims of statutory discrimination, a statute will be regarded as inherently "suspect" and subject to "heightened" judicial scrutiny if it impinges too greatly on fundamental constitutional rights flowing either from the federal or Florida Constitutions,

> and Grimes expressed conflicting views on the application of the impairment of contract clauses to the statute in question in *State of Florida, Department of Transportation v. Cone Brothers Contracting Co.*, 364 So.2d 482 (Fla. 2d DCA 1978). Little can be added to what has been discussed in *Pomponio* and *Cone Brothers*. Simply stated, the majority of this Court feels that the views expressed by Judge Grimes in *Cone Brothers* are correct and should be followed as they relate to the retroactive effect of the 1976 amendment.
>
> This Court therefore concludes that the 1976 amendment clearly affected existing contractual rights of the contractors who had entered into contracts with the state pursuant to the terms of the 1974 act, and the rights and obligations flowing therefrom cannot be affected by the 1976 amendment. Any contracts made after the effective date of the 1976 amendment would, of course, come under the statute as amended." 382 So.2d at 296–297

Appellee submits that since his substantive rights vested in July, 1990, even the stated intent of the Legislature is not controlling since such an effort violates the due process rights of the Claim-ant/Petitioner, Ross, supra, and violates Article I, §10, of the Constitution of the State of Florida and Article I, §10, of the Constitution of the United States, both of which prohibit impairment of obligations, and thus rights, of a contract which came into existence on July 5, 1990, the date of this Petitioner's accident.

This Court, in Scanlan, could not have meant to require that an unconstitutional law apply to pending cases even after the declaration of invalidity has been made. This Court simply would not have that authority[14]. Nowhere in the Constitution of the State of Florida is the power granted to this Court to excuse or forgive an unconstitutional or other illegal act of the Florida Legislature.

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952),

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> or if it primarily burdens certain groups that have been the traditional targets of irrational, unfair, and unlawful discrimination." 390 So.2d at 42–43

The term "discrete and insular minority" equates to a suspect class.
The present workers' compensation system and the changes wrought by the 1990/1991 changes in Chapter 440, Florida Statutes, have their impact on no one other than the injured workers. The ADA was not in place when Scanlan was argued.

[14] Florida operates under a system of government where the government is divided into three co–equal branches. Article II, Section 3. That provision states:

> §3. Branches of government
> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

This is clearly modeled after the federal constitutional system. Therefore, cases dealing with separation of powers issues in the federal arena should be persuasive authority under the Florida constitution. Cf. Zuberbuhler v. Division of Administration, State of Florida, 344 So.2d 1304 (Fla.2d DCA 1977); Edgewater Drugs, Inc. v. Jax. Drugs, Inc., 138 So.2d 525 (Fla.1st DCA 1962); Jones v. Seaboard Coast Line RR Co., 297 So.2d 861 (Fla.2d DCA 1974); Dickens v. State, 165 So.2d 811 (Fla.2d DCA 1964); Wilson v. Clark, 414 So.2d 526 (Fla.1st DCA 1982); Alachua General Hospital v. Zimmer U.S.A., Inc., 403 So.2d 1087 (Fla.1st DCA 1981).

the Court was faced with a question of the constitutional power of the Executive. The Court, in its discussion of the doctrine of separation of powers, stated:

> "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." 72 S.Ct at 866
>
> * * *
>
> "The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand." 72 S.Ct. at 867

In the case at bar, the allowance of an unconstitutional statute to control the benefits of a group of persons whose accidents occurred during the tenure of that statute where their rights were adjudicated **after** the statute was declared invalid, is tantamount to the Article V Florida judiciary attempting to assume the combined powers of all three branches, assuming that somewhere the power exist to forgive an unconstitutional act. The duty of the Courts is to interpret the law, not forgive or excuse the transgressions of another governmental branch[15].

In Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803), the Court stated:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. at 163
>
> "The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.
>
> In the distribution of this power it is declared that 'the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.' It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power

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[15] Interestingly, Mr. Justice Jackson, in a concurring opinion, observed:

> "If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power." 72 S.Ct at 871

This must apply to the acquiescence of any act repugnant to either constitution. "We must never forget, that it is a constitution we are expounding" McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819).

"This doctrine [separation of powers] was embedded in both the State and Federal Constitutions at the threshold of constitutional democracy in this country. The distribution of powers into three departments was not designed to promote haste or efficiency but to head off autocratic power and insure more careful deliberation in the promulgation of governmental policy. Reason and forethought are its great components. The makers of the Constitution knew the evils of arbitrary power and used every means at hand to prevent it." Petition of Florida Bar, 61 So.2d 646, 647 (Fla. 1952)

remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." 5 U.S. at 174

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of th fundamental principles of our society. It is not

therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consider–ation. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. **This is of the very essence of judicial duty.**

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their

eyes on the constitution, and only see the law.

The constitution declares that 'no bill of attainder or ex post facto law shall be passed.'

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?

'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.'

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him.

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument. The rule must be discharged." 5 U.S. at 177–180

In State ex rel. Young et al. v. Duval County, 76 Fla. 180, 79 So. 692 (1918), it was stated:

"The lawmaking power of the Legislature of a state is subject only to the limitations provided in the state and federal Constitutions; and no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law.

A statute should be so construed and applied as to make it valid and effective, if its

language does not exclude such an interpretation.

Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy, but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

The Constitution is the controlling law, and while, in appropriate proceedings properly taken, it may be the **duty** of the court to declare a legislative enactment to be inoperative in whole or in part, if it plainly violates the Constitution, yet, as under our system of government the lawmaking power of the Legislature is subject only to the limitations contained in the state and federal Constitutions, the court should, in deference to the Legislature, take care to so interpret an enactment as to make it consistent with the Constitution, if it can be done upon any reasonable consideration of the legislative intent, as shown by a fair application of all the language used to the purpose designed to be accomplished by the enactment.

Neither the Constitution nor the common law defines the line of separation between the powers that shall be exercised directly by the Legislature and those that may be indirectly exercised through delegated authority.

Where the Legislature has authority to provide a governmental regulation, and the organic law does not prescribe the manner of adopting or providing it, and the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided, either directly by the Legislature, or indirectly by the legislative use of any appropriate instrumentality, where no provision or principle of organic law is thereby violated. City of Jacksonville v. Bowden, 67 Fla. 181, 64 South. 769, L. R. A. 1916D, 913, Ann. Cas. 1915D, 99.

* * *

In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department under article 2 of the Constitution, and the conferring of it is not warranted by other provisions of the Constitution. State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639." 79 So. at 697

In State ex rel. Raser v. Gay, 158 Fla. 465, 28 So.2d 901 (1947), it was stated:

"Under our form of constitutional government sovereignty resides in the people who may impose any limitation on the executive, the legislature or the judiciary they see fit." 28 So.2d at 904

In State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929), it was stated:

"In the case of Norris v. Waco, 57 Tex. 635, it was held that, so far as the Legislature itself is concerned, its power is generally recognized to be absolute, in the absence of some constitutional provision directly controlling the matter; that what territory shall be embraced within a municipality is a political question to be determined by the law-making power, and that **an attempt by the judiciary to revise the legislative action would be a usurpation of power**.

It is believed that the above quotations give a fair compendium of the reasoning underlying the numerous cases supporting the majority view that the legislative power in this regard is absolute and unlimited, and not subject to judicial review. They come from

such high sources as to compel respectful consideration. But, as forcible, persuasive, and even brilliant as some of these arguments in behalf of the majority view are, their thoughtful perusal, and especially the conclusion arrived at, leaves something to be desired. One cannot suppress the thought that, if this view be accepted without qualification and followed to its logical conclusion, what may the Legislature not do, by way of arbitrary extension of municipal boundaries, to place the major part of the burden of taxation to support a municipality upon property owners whose lands and other property are so far removed from the range of local municipal conveniences and advantages as to completely repel any pretext of benefit therefrom? And if this doctrine be fully adopted, what becomes of those sacred and basic rights of person and property, which have their roots deep in the past and which the people of America have sought to safeguard in the Bills of Rights which have been imbedded in all their State Constitutions, and to some extent in the Federal Constitution itself—inalienable rights, some of which run back to Magna Carta, and which have long been cherished as our chief existing guaranties of individual liberty and private property, the natural heritage of every free American citizen? And what becomes of our boasted claim that nowhere in our system of government is there provided a place for absolute, arbitrary, and despotic power? At the least, that there is in our government no place for the exercise of arbitrary or unlimited power, by any of its departments, in such a way as to run roughshod over, or to encroach upon, those vital rights of the citizen which have been deliberately retained and reserved to the people, and preserved by our constitutional guaranties from invasion or impairment by governmental power of any kind, whether legislative, executive or judicial. The courts of this country have been very careful not to encroach upon the domain of the legislative and executive departments. It is highly important that they sedulously continue to follow this course and keep strictly within their own proper sphere. See Jackson Lumber Co. v. Walton County (Fla.) 116 So. 771, 789. But it is of the first importance, and **their highest duty, and within their proper function, to maintain the integrity of the Constitutions they have sworn to defend and support**. Jurists, as well as statesmen, might well remember the significant admonition of John C. Calhoun, who, speaking in the United States Senate, said: 'Of the few nations who have been so fortunate as to adopt a wise constitution, still fewer have had the wisdom long to preserve one. It is harder to preserve than to obtain liberty. After years of prosperity, the tenure by which it is held is but too often forgotten.'" 120 So. at 345

In Ervin v. Collins, 85 So.2d 852 (Fla.1956), this Court stated:

"We are called on to construe the terms the people, and we are to effectuate from the people, and we are to effectuate their purpose from the words employed in the document. We are not permitted to color it by the addition of words or the engrafting of our views as to how it should have been written." 85 So.2d at 855

In Adams v. Miami Beach Hotel Association, 77 So.2d 465 (Fla.1955), it was stated:

"We reach this conclusion for the very evident reason that an agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. * * * For courts have no right to ignore or set aside a public policy established by the legislature or the people. Indeed, there rests upon the courts the affirmative duty of refusing to sustain that which by the valid statutes of the jurisdiction, or by the constitution, has been declared repugnant to public policy." 77 So.2d at 821

Here the people have spoken in the provision found violated in Scanlan, supra.

In Zweibon v. Mitchell, 516 F.2d 594 (D.C.Cir. 1975), the Court stated:

"In any event, an unconstitutional practice, no matter how inveterate, cannot be condoned

by the judiciary." 516 F.2d at 601

> "Thus confronted with the realization that prior judicial review can serve to safeguard both First and Fourth Amendment rights, we turn our attention to possible arguments for abrogating the warrant requirement where our national security is endangered by foreign threats. In so doing, we are mindful of the warning of the Supreme Court that such arguments must not be grounded in expediency or utility, but must relate to factors that would cause the warrant procedure to needlessly frustrate legitimate gathering of foreign intelligence information. However, since appellees have not directed our attention to such factors, we are relegated to seeking the rationales which have caused several other courts to except foreign intelligence activities from the strictures of prior judicial authorization." 516 F.2d at 636–637

In a footnote, the court cited:

> "See supra, —— U.S.App.D.C. at ——, 516 F.2d at 631–633. See also Berger v. New York, 388 U.S. 41, 62, 87 S.Ct. 1873, 1885, 18 L.Ed.2d 1040 (1967) ("we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement")." 516 F.2d at 637

In the DCA's application of the "prospective only" ruling of Scanlan, that Court has violated the principle that even the government can not do indirectly that which it could not do directly. See State of Florida v. Peters, 534 So.2d 760 (Fla.3d DCA 1988); Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 588 F.2d 861 (CA8 1977); Berndt v. Jacobi, 781 F.Supp. 553 (N.D.Ill. 1991).

In considering these questions, perhaps criteria for determination of retroactivity should be reconsidered. See Huson supra, and Mitchel supra. These tests may also be of value in determining the boundaries of a "prospective only" limitation. In the case at bar, there was no argument that there was "clear past precedent" on the issue of single subject matter and it was clear to all 8 judges who looked at the issue that the 1990 Act joining international trade and workers' compensation was in constitutional violation. No issue of first impression was addressed. With these considerations in mind, the scope of the "prospective only" ruling should be as limited as possible.

The application of the Scanlan ruling to persons whose cases are tried after it became known that the Act was invalid creates an inequity for those Claimants. In De Ayala v. Florida Farm Bureau Casualty Insurance Company, 543 So.2d 204 (Fla.1989), this Court faced a discrimination against nonresident aliens with regard to death benefits under the workers' compensation act. This Court stated:

> "Florida's worker's compensation program was established for a twofold reason: (1) to see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents. *See McLean v. Mundy,* 81 So.2d 501, 503 (Fla.1955)." 543 So.2d at 206

This Court went on to state that while the Legislature can "dictate the mechanism for computing a particular worker's compensation", 543 So.2d at 206, it can not proscribe unconstitutional conditions.

There the conditions violated the federal and state equal protection constitutional clauses. Here the violation is, under the 1991 Act, the contract clauses of both the federal and state constitutions. It is respectfully suggested that the application of the 1990 Act to all accidents occurring in the "window" period would also be a violation of both contract clauses.

The 1990 provision decreases an already low payment to the claimant at a time when the Claimant has reached maximum medical improvement and must, in order to get further benefits, must usually carry out a work search without benefit of reimbursement for transportation and other attendant expenses. The inequity of applying the 1990 reduced payment to this case should point in the direction of applying the 1989 Act to this case.

The DCA's interpretation of Scanlan can not constitutionally be allowed to stand!

POINT II

THE JUDGE OF COMPENSATION CLAIMS ERRED IN FAILING TO AWARD THE CLAIMANT HIS FULL COMPENSATION RATE WHERE HE HAD NOT FOUND SUBSTITUTE EMPLOYMENT

As previously pointed out, the subject wage loss statute changed on January 25, 1991, when the Florida Legislature passed the 1991 Workers' Compensation Act. The new provision provides for the amount of wage loss benefits and states:

"(b) Wage–loss benefits.–

* * *

"Subject to the maximum compensation rate as set forth in § 440.12(2), such wage–loss benefits shall be equal to 80 percent of the difference between 80 percent of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared weekly; **however, the weekly wage–loss benefits shall not exceed an amount equal to 66 2/3 percent of the employee's average weekly wage at the time of injury.**"

It is respectfully argued that the Judge erred in her application of this provision in this situation where no wages were earned in the face of an adequate job search and in the face of all other predicates and conditions precedent for entitlement to wage loss benefits under either Act, having been satisfied. In that situation, the Claimant is entitled to his full compensation rate, not a portion. In the 1989 Act the 66 2/3 percent limitation was also present. It was obviously needed since the product of 95% and 85% would have given a rate in excess of the 66 2/3% of the average weekly wage. That, however, is not the case under the 1991 statute where no wages were earned after MMI.

In Terrinoni v. Westward Ho!, 418 So.2d 1143 (Fla. 1st DCA 1982), this Court stated:

> "Statutory language is not to be assumed superfluous; a statute must be construed so as to give meaning to all words and phrases contained within that statute. *Vocelle v. Knight Brothers Paper Co.*, 118 So.2d 664 (Fla. 1st DCA 1960)." 418 So.2d at 1146

See also Pinellas County v. Woolley, 189 So.2d 217 (Fla.2d DCA 1966) and City of Pompano Beach v. Capalbo, 455 So.2d 468 (Fla.4th DCA 1984).

The product of the two 80% figures is 64%. In other words, there is no way mathematically, if the Judge's application is correct, for the wage loss to ever exceed 64% figure when there are no wages! Since that must be true and since there is also found in the same statute a restriction limiting payment to the maximum compensation rate, there must be some reason why the language, "however, the weekly wage–loss benefits shall not exceed an amount equal to 66 2/3 percent of the employee's average weekly wage at the time of injury", otherwise redundant, was left in the Act. It is Petitioner's contention that the Legislature actually intended the current situation, where maximum medical improvement was reached and no job found even with a good faith job search, to still provide the same compensation rate as when the Claimant was medically unable to work. The converse is illogical since the Claimant, apparently, must also bear the additional burden of the costs of his job search.

The Claimant has enough burdens under the 1990 and 1991 versions of the Act which seriously diminished benefits in most cases and make them harder to get, without it being assumed or presumed that the Legislature wished to penalize the Claimant for improving past the point where he medically could not work. Such an interpretation would impede a clear intent of this Act and of all workers' compensation acts — to get the Claimant back to work as soon as possible.

CONCLUSION

The opinion of the District Court of Appeal, First District, should be quashed and the Judge's Order should be reversed and the Claimant found entitled to the full amount of his compensation rate. Both of the certified questions should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing document was served by mail on the following on this December 11, 1991:

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