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SUPREME COURT OF FLORIDA

MORTON BARRY Petitioner, v. BURDINES and THE TRAVELERS, Respondents.	CASE NUMBER: 86,365 District Court of Appeal First District No. 94-2067

ON APPEAL FROM
THE FIRST DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL ATTORNEYS

Filed in support of Petitioner's position

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PREFACE

This brief is filed upon behalf of the Academy of Florida Trial Attorneys, 218 S. Monroe Street, Tallahassee, Florida, 32301-1824. This Court granted the Academy permission to file an Amicus Curiae brief. For purposes of this brief, the Academy will be referred to as Amicus. The parties will be referred to in their capacity as either Petitioner or Respondent.

All emphasis in quotes is added by the author unless otherwise noted.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(s)(A)(v) and pursuant to the Florida Constitute, Article V, Section 3.

QUESTION ON APPEAL

The Question on Appeal as phrased by the First District Court of Appeal is:

> **WHETHER SECTION 440.15(3)(b)4.d., FLORIDA STATUTES (1991), IS SUBJECT TO AND COMPORTS WITH THE REQUIREMENTS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT?**

STATEMENT OF THE CASE

and STATEMENT OF THE FACTS

Amicus accepts and adopts the Statement of the Case and Statement of the Facts in Petitioner Morton Barry's brief.

STANDARD OF REVIEW

As this appeal presents issues of pure law, this Court's standard of review is de novo. *See Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 670 (Fla. 1993)(recognizing issues of "purely legal matters" are subject to de novo review), *affirmed in part, reversed in part* (on other grounds), *sub nom. Madsen v. Women's Health Center, Inc.*, ___ U.S. __, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

SUMMARY OF THE ARGUMENT

Petitioner's wage loss benefits were terminated at 78 weeks because of a classification based upon the type of impairment he was labeled with pursuant to a state statutory scheme. If Petitioner had been labeled with a different type of impairment, his wage loss benefits would have been terminated at a different time--depending upon the classification of the impairment in the statutory formula in section 440.15(3)(b)4.d., Florida Statute (1991). As such, the statutory scheme challenged here by the Petitioner is a classification which creates disparate impacts among the disabled.

Under the ADA, classifications which create disparate impacts among the disabled are unlawful.

To dodge the repercussions of this conflict, the First District in the instant case found that workers' compensation benefits are not within the scope of the ADA. Yet the Equal Employment Opportunity Commission--the very agency charged by Congress with implementing the ADA--stated with impeccable clarity: "ADA requirements supersede any conflicting state workers' compensation law." *See Americans with Disabilities Act of 1990: EEOC Technical Assistance Manual and Resource Directory* § 9.6.b. (EEOC 1992).

Further, Congress in drafting the Act stated within the findings and purposes section of the ADA that the federal government should enforce the standards of the ADA. Such a statement was incorporated into the act after Congress heard

testimony and studied reports that established state laws were inadequate to protect the disabled. While the ADA states that state laws which provide equal or greater protection are not preempted by the ADA, the Florida wage loss statute challenged here conflicts with the terms, the intent, and the spirit of the ADA. Thus, applying the well established principle that Congressional intent controls, this Court must defer to the Congressional intent that the ADA supersede conflicting Florida workers' compensation laws.

This very Court has twice recognized that workers' compensation benefits are "fringe benefits." The ADA by its stated terms applies to employee "fringe benefits." Not only does the Congressional intent require a finding that the ADA controls over Florida's workers' compensation laws, but the precedent of this Court, when viewed in light of the language of the ADA, also requires a finding that workers' compensation benefits are within the purview of the ADA.

Florida provides wage loss benefits in a disparate manner according to a rigid statutory classification system--the classifications are based upon the claimant's impairment ratings. Because of Petitioner's classification under subsection (III), his wage loss benefits were terminated at 78 weeks without regard to any actual factual findings that this was appropriate. Had Petitioner's classification fallen within subsection (IV), he would have received wage loss benefits for 104 weeks; had his classification fallen within the most generous formula in subsection (V), he would have received wage loss benefits for 364

weeks. § 440.15(3)(b)4.d. (III-V), Fla. Stat. (1991). Hence, Florida uses classifications which "adversely affect" the benefits provided Petitioner. The ADA, again with impeccable clarity, states: Using standards, criteria or methods of administration that have the effect of discrimination on the basis of disability are unlawful under the ADA; classifying an employee in a manner which adversely affects the opportunities or status of the employee are unlawful discrimination under the ADA. 42 U.S.C. § 12112(b)(3)(A)-(B).

Instead of the discriminatory classifications precluded by the ADA, an individual, case by case, factual determination is required under the ADA. Florida's statutory classification scheme denied this determination to Petitioner.

The wage loss classifications that caused a disparate impact on Petitioner and other similar claimants took life in a 1990 statutory revision of the Florida workers' compensation act. The Florida Legislature stated that its intent in "reducing" workers' compensation benefits was to to save employers costs on workers' compensation insurance premiums. Yet the EEOC, and Congress in its legislative history, stated that discriminatory classifications designed to save health insurance and workers' compensation insurance premiums are precluded under the ADA.

Discrimination among a class of the disabled as well as discrimination against the class of the disabled are both unlawful under the ADA. The legislative history established that discrimination *among* persons of the same class is unlawful under the ADA. The terms of the ADA also show that discrimination *among*

the disabled is unlawful under the ADA since the Act speaks of discrimination among the institutionalized. As only the disabled are institutionalized, it logically follows that the ADA precludes discrimination *among* the classes of the disabled as well as against the disabled as a class. *See Helen L. v. DiDario,* 46 F.3d 325, 335-339 (3d Cir. 1995)(holding in an ADA case that discrimination *among* a certain class of the disabled is just as unlawful under the ADA as a blanket discrimination against all the disabled).

Further, a cap upon a certain type of illness (typically AIDs) in health insurance when there is no corresponding cap on other illnesses is also unlawful under the ADA. In other words, an employer may not offer a health insurance policy which provides $100,000 in benefits for coverage for all illnesses except AIDS, for which the policy provides only $5,000 in benefits. The EEOC has found such caps on certain illnesses to be disparate treatment *among* the disabled which is unlawful under the ADA. By analogy, an employer may not cap wage loss benefits at a lower level due to the type of injury suffered. In other words, just as a health insurance carrier may not single out a certain illness for disparate treatment, neither may a workers' compensation carrier single out certain classifications of impairment for disparate treatment.

Accordingly, Amicus joins the Petitioner in respectfully requesting this Court to reverse the First District's opinion in this case and find that Florida's workers' compensation wage loss scheme is superseded by the ADA.

ARGUMENT

I. SECTION 440.15(3)(b)4.d., FLORIDA STATUTES (1991), IS SUBJECT TO AND SUPERSEDED BY THE REQUIREMENTS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT (ADA) BECAUSE IT USES DISCRIMINATORY CLASSIFICATIONS IN CONFLICT WITH THE DIRECTIVES OF THE ADA.

The Certified Question raised by the First District is closely akin to a preemption question--whether section 440.15(3)(b)4.d., Florida Statutes (1991), which limits wage loss compensation to employees according to fixed statutory classifications, is within the control of the Americans with Disability Act (ADA), which prohibits discrimination against disabled employees in their "compensation," and "other terms, conditions, and privileges of employment." The Equal Employment Opportunity Commission--the very agency charged by Congress with the responsibility of implementing the ADA--proclaimed specifically that the ADA supersedes any conflicting state workers' compensation laws. Further, the ADA, both in its very terms and in its legislative history, established a Congressional intent that the ADA supersede any conflicting state law. The ADA precludes discriminatory classifications based upon disability; its legislative history repeatedly stressed the need for individual, case by case, factual determinations as well as condemned discrimination *among* persons of the same class. Yet, Petitioner's wage loss was terminated at 78 weeks due to a classification based upon his impairment rating; if he had been

labeled with a different impairment, he would have been classified differently and received different benefits. As such, Florida's wage loss scheme is superseded by the ADA for the most basic reason: Florida's statutory scheme provides wage loss benefits in a disparate manner according to a rigid classification--not an individual factual determination--and therefore discriminates among and against disabled workers in conflict with the ADA.

A. Section 440.15(3)(b)4.d., Florida Statutes (1991), is subject to the control of the ADA because the stated Congressional intent is that the federal law control over conflicting state law; further, the EEOC has recognized conflicting state workers' compensation laws are superseded by the ADA.

When Congress enacted the comprehensive ADA, one of its stated goals was to "ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities." 42 U.S.C. § 12101 (b)(3); *See also* House Report No. 101-485(11) 1, 22-23, 101st Cong. 2d Sess.; *reprinted in* 1990 U.S. Cong. and Admin. N. 394 (hereafter House Report No. 101-485(II)) This Congressional emphasis on federal enforcement came after a Congressional finding that: "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing." House Report No. 101-485(II) at 47. *See also id.*, at 29 (finding, after hearing testimony and reviewing reports, that state laws were inadequate to protect the disabled).

In determining whether a federal law controls over a state

law, Congressional intent is the key factor. *See generally, e.g., Adams Fruit Co. v. Barrett,* 494 U.S. 638, 642, 110 S.Ct. 1384, 1387, 108 L.Ed.2d 585 (1990)(holding that whether a federal statute preempts a state law "turns on the language of the statute and, where the language is not dispositive, on the intent of Congress as revealed in the history and purposes of the statutory scheme" and holding the exclusive remedy provision of the state workers' compensation law was preempted under the federal Migrant and Seasonal Agricultural Workers' Protection Act); *Wood v. County of Alameda,* 875 F.Supp. 659 (N.D.Cal. 1995)(discussing role of Congressional intent in holding the exclusive remedy provision of California's workers' compensation law is preempted by the ADA). Thus, given the clear statement in the ADA that the federal government, not the state, should enforce standards on behalf of the disabled, the presumption must be that the ADA controls over Florida's Workers' Compensation law.

While not the traditional preemption question, the First District's certified question nonetheless triggers essentially the same analysis as a preemption question. *See Wood v. County of Alameda,* 875 F.Supp. at 661. Under Article VI of the U.S. Constitution (the Supremacy Clause), a state law is preempted "to the extent it actually conflicts with federal law..., or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). As further discussed under section B, Florida's wage loss

formula uses arbitrary classifications which terminated Petitioner's wage loss compensation at 78 weeks *solely* because of the fixed statutory classification of Petitioner. Yet the ADA forbids discriminatory classifications based upon disability and mandates instead individual, factual, case by case determinations. Further, Florida's scheme discriminates against and among classes of the disabled in contradiction of the ADA's legislative intent and history. *See discussion, infra, at* 38-44. Under the *Silkwood* analysis, Florida's wage loss scheme surely "stands as an obstacle to the accomplishment of the full purpose and objectives" of the ADA, *id.*, 464 U.S. at 248, as the ADA seeks to end discriminatory classifications and to end discrimination *among* the classes of the disabled.

In *Wood*, the federal district court, when faced with an analogous question to the one raised in this appeal, wrote:

> In light of the clear and numerous indications that the express purpose of the enactment of the ADA was to guarantee individuals with disabilities a baseline of protection through the establishment and enforcement of *federal* standards, defendant fights a very difficult uphill battle in claiming that Congress intended the ADA to "defer" to state statutes in any manner whatsoever. (original emphasis)

Wood v. County of Alameda, 875 F.Supp. at 663. Ultimately, the *Wood* Court held that the exclusive remedy provision of the California workers' compensation law was superseded by the ADA. "(T)he Court finds that Congress did not intend the ADA to defer to the California workers' compensation law at issue here. ... Where such (state) provisions are incompatible with the federal

statute, they must be denied effect." *Id.* at 664. As shown below under section B, the relevant law challenged here is "incompatible" with the ADA and, therefore, under the *Wood* analysis "must be denied effect."

Just as this Court should defer to the Congressional intent, this Court should also defer to the views of the enforcing federal agency that workers' compensation is within the control of the ADA. The Equal Employment Opportunity Commission (EEOC)--the agency charged with implementing the ADA (42 U.S.C. § 12116-17)--concluded that workers' compensation laws *are* within the scope of the ADA. The EEOC's Technical Assistance Manual states: "ADA requirements supersede any conflicting state workers' compensation law." *See Americans with Disabilities Act of 1990: EEOC Technical Assistance Manual and Resource Directory* § 9.6.b. (EEOC 1992)(hereafter *EEOC Manual*); *See also* Carla Walworth, Lisa Damon, and Carole F. Wilder, *Walking a Fine Line: Managing The Conflicting Obligations of the ADA and Workers' Compensation Laws,* 19 Employee Relations L. J. 221, 224 (1993)(citing to *EEOC Manual* to support view that workers' compensation laws are within the purview of the ADA). Implicit within the EEOC's determination is a finding that workers' compensation benefits are "compensation" or "other terms, conditions and privileges of employment" under Title 42 U.S.C. section 12112(a)(1990). While not technically controlling, these EEOC guidelines "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank, FSB. v. Vinson,* 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91

L.Ed.2d 49 (1986); *See also Carparts Distri. Ctr. v. Automotive Wholesalers,* 37 F.3d 12, 16 (1st Cir. 1994)(applying definition of "employer" from the EEOC interpretive guidelines to reach its holding). Thus, this Court owes great deference to the EEOC's determination that state workers' compensation statutes are within the control of the ADA.

Like the EEOC's determination that workers' compensation laws are within the scope of the ADA, a multitude of legal scholars have assumed, often without much discussion, that the ADA does impact and control state workers' compensation law. One such expert stated:

> Many state workers' compensation statutes distinguish among types of work-related injury or illness in defining benefit levels. At least some of these distinctions arguably discriminate based upon disability. Because Title II of the ADA applies to state and local governments generally, such disability discrimination is a prima facie violation of Title II.

Henry H. Perritt, Jr., *Americans with Disabilities Act Handbook,* 1995 Cumulative Supplement No. I, § 5.12A. (2d Ed. Wiley Law Publications 1995)

Another commentator notes that workers' compensation laws and the ADA suffer from an inherent philosophical conflict since the workers' compensation schemes emphasize a disabled worker's "inability" (impairment and loss of function), while the ADA requires an emphasis on "what persons with a disability can do." *See* Christopher Bell, *The Workers' Compensation-ADA Connection, in 1993 Americans with Disabilities Act Compliance Manual* § 11

(National Employment Law Institute Publication 1993).

The authors of *Americans with Disabilities Act: Employee Rights and Employer Obligations,* in discussing the impact of the ADA on workers' compensation, noted:

> (T)here will be many workers who are injured on the job whose injuries will be more than merely temporary and who will sustain a substantial long-term or permanent physical or mental impairment. In such circumstances, these injured workers would be considered to be individuals with disabilities covered by the ADA and entitled to reasonable accommodations.

Ogletree, Deakins, Nash Smoak and Stewart, *Americans With Disabilities Act: Employee Rights & Employer Obligations* § 6.03(7) (Matthew Bender & Co., Inc. 1995). *See also* Martin W. Aron and Richard M. DeAgazio, *The Four Headed Monster: ADA, FMLA, OSHA, and Workers' Compensation,* 46 Labor L. J. 48, 53 (January 1995) ("When an employee sustains a work-related injury or disease, the employee may also have a "disability" under the ADA....); Scott A. Carlson, *The ADA and the Illinois Workers' Compensation Act: Can Two "Rights" Make a "Wrong"?,* 19 S. Ill. U. L. J. 567, 590 (Spring 1995)("Both the ADA, and the Workers' Compensation Act address in part the same problems of compensating disabled persons. The addition of the ADA as a remedy places employers in a position of 'dual liability.'")

That commentators generally understand the ADA impacts workers' compensation laws is also illustrated by the lead article in a current law review dedicated solely to workers' compensation issues. "(F)or several reasons, the ADA is, in fact,

likely to affect the administration of state workers' compensation acts." Alison Steiner, *The Americans With Disabilities Act of 1990 and Workers Compensation: The Employees' Perspective,* 17 Workers' Compensation L. Rev. 3 (1995). Further, the author notes:

> Second, some workers' compensation claimants are, or may become, persons with disabilities protected by the ADA. Employers ...owe a duty of non-discrimination to persons with disabilities. This duty includes not only the obligation not to discriminate either intentionally or in effect, but also an affirmative obligation to reasonably accommodate the applicant's or employee's disability.
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> (B)ecause most workers' compensation employers are also covered by the ADA, the enactment of the ADA could have a direct impact on state law as well. Where employer's actions concerning workers' compensation transgress the ADA, workers are afforded an independent federal remedy against those employers.

Id., at 5-6. Thus, legal writers join the EEOC in the prevailing view: workers' compensation laws are subject to the terms of the ADA.

Despite this prevailing view that worker's compensation laws are within the reach of the ADA, the First District erroneously found to the contrary. In reliance upon *O'Neil v. Department of Transportation,* 468 So. 2d 904 (Fla.), *cert. denied,* 474 U.S. 861, 106 S.Ct. 174, 88 L.Ed.2d 144 (1985), the First District found that compensation benefits were not "compensation" or "terms, conditions, or privileges of employment" under section 12112(a) of the ADA. *See Barry v. Burdines,* ___ So. 2d __, 20

Fla. L. Weekly D1923, D1924 (Fla. 1st DCA August 23, 1995). However, *O'Neil* was not decided under the ADA; with all due respect to this Court, *O'Neil* should not be deemed applicable to this case in light of the Congressional intent behind Title I of the ADA.

Congressional intent in enacting Title I of the ADA was to protect disabled individuals from the full range of actual and potential employment related discrimination, which logically must include workers' compensation as it is an integral part of an employee's employment picture. *See* House Report 101-485(II) at 54 (stating section 12112 "is intended to include the range of employment decisions" including changes to "any" form of compensation and "fringe benefits"). The EEOC regulations define section 12112 as including "(r)ates of pay *or any other form of compensation and changes in compensation"* as well as "(f)ringe benefits available by virtue of employment." 29 C.F.R. § 1630.4(c),(f); *Cf EEOC Manual* at § 9.6.b.(finding conflicting workers' compensation laws are superseded by the ADA and thereby indicating by logical implication that workers' compensation is a "term, condition, and privilege" of employment under section 12112(a)). Further, it is unlawful to discriminate against a disabled person with regard to any "fringe benefits available by virtue of employment, whether or not administered by the covered entity." 29 C.F.R. § 1630.4(f).

Thus, "fringe benefits" are unequivocally within the scope of Title I of the ADA. This Court has previously recognized the plain truth: Workers' compensation benefits are "fringe

benefits." *See Sasso v. Ram Property Management,* 452 So. 2d 932, 934 n3 (Fla. 1984) (adopting the rational of the First District that "reducing fringe benefits (the workers' compensation benefits at issue) to reflect a productivity decline with age" was an acceptable reason for ending workers compensation benefits at age 65); *Acosta v. Kraco, Inc.,* 471 So. 2d 24, 25 (Fla. 1984)("We approved the district court's finding that this (workers' compensation) section was rationally related to the legitimate state objectives of reducing *fringe benefits* to reflect productivity declines associated with age...."), *cert. denied,* 474 U.S. 1022, 106 S.Ct. 576, 88 L.Ed.2d 559 (1985). Thus, this Court has twice recognized the undeniable fact that workers' compensation benefits are a "fringe benefit."

"Fringe benefits" are "side benefits which accompany or are in addition to a person's employment such as paid insurance, ..." *Black's Law Dictionary* 601 (5th Ed.) Workers' compensation in general, and certainly in this case, is insurance provided by the employer for the benefit of an employee who is injured on the job. In this case, the insurer is Respondent The Travelers. Unless an employer is self-insured, workers' compensation benefits are paid by an insurer. *See* § 440.38, Fla. Stat. (1991). In fact, the stated legislative intent of Chapter 440 is to provide "disability and medical benefits to an injured worker at a reasonable cost to the employer." § 440.015, Fla. Stat. (1991). In other words, workers' compensation is a special form of medical and disability insurance provided by the employer for the benefit of the employee--certainly a concept within the

definition of "fringe benefits." Thus, this Court correctly found in *Sasso* and *Acosta* that workers' compensation benefits are, at the very least, fringe benefits. As fringe benefits, workers' compensation benefits come within the scope of the ADA. *See* 29 C.F.R. § 1630.4(f); House Report 101-485 (11) at 54. Accordingly, *O'Neil* is simply not applicable to this case.

Further, again with all due respect to this Court, Justice Shaw's well reasoned and well supported dissent in *O'Neil* is far more consistent with the legislative intent behind the ADA than the majority opinion. Justice Shaw wrote:

> Wage loss benefits,..., are paid solely and directly by the employer/carrier to the employee. (cites omitted) ...
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> ...(E)mployers bear the entire cost of the system and provide all the benefits.
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> In my view wage loss is an employer-provided benefit which cannot be totally denied an employee on the basis of age when the practical effect of the denial is to place an older employee in a less favored position than a younger employee.

O'Neil v. Dept. of Transportation, 468 So. 2d at 906-08 (J. Shaw, dissenting) As this view is consistent with the Congressional intent of the ADA and with both the EEOC's regulations and its technical assistance manual, this Court should adopt Justice Shaw's dissent and apply it to this case. Hence, "wage loss is an employer provided benefit which cannot be totally denied to an employee on the basis of (a statutory classification) when the

practical effect of the denial is to place (one disabled employee) in a less favored position than (other employees.)" *Id.*

Not only is workers' compensation a fringe benefit directly within the scope of the ADA, but workers' compensation is also insurance provided by the employer to the employee. *See §* 440.38, Fla. Stat. As such, this "insurance" is within the scope of the ADA which addresses insurance both in its text and in its legislative history.

Title III of the ADA expressly forbids denial of participation, *inequality in participation, or provision of separate benefits to a person on account of disability.* 42 U.S.C. § 12182(2). This, in turn, may well apply to any insurance whether or not the insurance is deemed a "fringe benefit." *See* 42 U.S.C. 12181(7)(F); *Cf Carparts Dist. Ctr. v. Automotive Wholesalers,* 37 F.3d at 19-20 (recognizing that plaintiff might also have a claim for discrimination in insurance benefits under Title III as well as a claim under Title I for disparate treatment of AIDs claims under an insurance policy). *See also* Monica E. McFadden, *The Americans with Disabilities Act: Fighting Discrimination,* 31 Trial 67, 68 (September 1995). McFadden noted: "The ADA's legislative history supports directly applying the statute to *all insurance and employee benefits cases." Id.* at 68 and cites therein.

As such, workers' compensation insurance is directly within the scope of the ADA as a fringe benefits and as a terms of employment under Title I; alternatively (or additionally), it is within the control of the ADA as insurance under Title III. Under

either, or both, views, the wage loss scheme at hand must be viewed under the edicts of the ADA and the EEOC regulations.

The ADA specifically does not preempt other federal or state laws which "provide greater or equal protection for the rights of individuals with disabilities that are afforded by this legislation. In other words, all of the rights, remedies and procedures that are available to people with disabilities under other federal laws or other state laws (...) are not preempted by this Act." House Report 101-485(11) at 135. *See also* 42 U.S.C. § 12201(b)(no preemption of state laws which offer "greater or equal" protection); *Wood v. County of Alameda,* 875 F. Supp. at 663-4 (holding section 12201(b) "is to maximize the options available to plaintiffs by ensuring that federal statutes provide a 'floor' for a plaintiff's rights and remedies while guaranteeing that such statutes never serve as a 'ceiling'..."). As established below in section B, the provisions of Florida's workers' compensation law challenged in this appeal do, in fact, conflict with the ADA and do not offer greater or even equal protection. As such, this Court should not use the ADA as a "ceiling" against the Petitioner's claim for fair, non-discriminatory treatment under Florida's workers' compensation statute.

B. Section 440.15(3)(b)4.d., Florida Statutes (1991), utilizes arbitrary classifications based upon impairment which conflict with the ADA because the ADA requires an individual, case by case, factual determination and precludes discriminatory classifications; further, Florida's scheme discriminates among a class of the disabled in violation of the ADA's stated intent.

The ADA's language, its legislative history and the EEOC regulations all show that the Florida scheme constitutes unlawful discrimination because it involves a rigid classification or method of administration which terminates benefits in a disparate, discriminatory manner. The ADA condemns classifications based upon disability which have a discriminatory impact; the wage loss scheme challenged here classifies claimants in a manner that discriminates against Petitioner and similar individuals. The ADA's Legislative history is replete with references to the need for an individual, case by case, factual determination of benefits--not the arbitrary classification in effect in Florida for employees who become disabled on the job. Florida reduced workers' compensation benefits in 1990 with the stated intent to reduce the cost of workers' compensation premiums to the employers. Yet the EEOC specifically stated that discriminatory practices to reduce workers' compensation premiums are unlawful under the ADA. Further, the wage loss scheme discriminates against the disabled by limiting the amount, extent and kind of workers' compensation insurance available to employees solely on the basis of the type of impairment the employee is labeled with under the statutory formula. This is in direct conflict with the ADA which prohibits limiting the amount, extent or coverage of insurance available to disabled persons.

Further, the Florida wage loss scheme discriminates *among* the class of the disabled in contravention of the legislative intent to prohibit discrimination among persons of the same class.

(i) Florida's wage loss scheme is unlawful under the ADA because it utilizes classifications based upon impairments which have a discriminatory impact on the disabled.

Under the ADA, discrimination is defined to include "utilizing standards, criteria, or methods of administration- (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control;..." 42 U.S.C. § 12112(b)(3)(A)-(B). Further, "classifying" an employee in a manner which "adversely affects the opportunities or status of such...employee because of the disability of such...employee" is also unlawful discrimination. 42 U.S.C. § 12112(b)(1). Participation by the employer in a contract or other relationship with "an organization providing fringe benefits to an employee" where the organization discriminates against the employee is also forbidden discrimination. 42 U.S.C. § 12112(b)(2); *see* 29 C.F.R. §§ 1630.6(b), 1630.5 and 1630.7 (addressing unlawful, discriminatory classifications according to disability). *See also* House Report 101-485(II) at 58 (classifying an employee in a way that adversely affects his/her opportunities is discrimination) and at 61 (utilizing standards, criteria or methods of administration which discriminate on the basis of disability is not allowed).

Without question, the Florida wage law statutes uses

"standards, criteria or methods of administration" with a discriminatory impact.

Under section 440.15(3)(b)4.d.(III), Petitioner's wage loss benefits were terminated at 78 weeks solely because: 1) his injury occurred after June 30, 1990; and 2) his impairment rating fell within the rigid classification of six to nine percent set out in that section. *See* § 440.15(3)(b)4.d.(III), Fla. Stat. (1991). That section sets out a classification or "method of administration" based on impairment--an employee's benefits are strictly limited according to a narrowly drawn formula based upon impairment ratings. Thus, on its very face, this statute conflicts with the ADA which precludes classifications or "methods of administration" which create disparate impact based upon disability. *See* 42 U.S.C. § 12112(b)(1)("limiting" or "classifying" an employee because of a disability in a way that adversely affects his/her status is unlawful discrimination); 29 C.F.R. §§ 1630.5, 16030.6 and 1630.7. *See also* Perrit, *Americans with Disabilities Act Handbook, supra*, at Cummulative Supplement No. 1, § 5.12A (stating workers' compensation statutes which distinguish among types of work related injuries might discriminate based upon disability).

The provision at issue, subsection 4.d., was added to Chapter 440 in 1990 as part of a statutory revision to boost "economic development" in Florida. Chap. 90-201, 1990 Laws of Florida 894, 939. In the preface to that act, the Legislative intent in reducing workers' compensation is spelled out:

> WHEREAS, the report of the Florida Economic Growth and International Development Commission expressly finds that Florida's reputation as a high cost workers' compensation state is at odds with a favorable economic development climate, and that Florida's workers' compensation laws are inadvertent barriers to economic growth, and ...
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> WHEREAS, "Cornerstone" (Florida Chamber of Commerce Report) finds that the increasing transaction cost of workers' compensation *insurance* is a critical negative factor which adversely impacts on the overall business climate in our state, and ...
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> WHEREAS, the Legislature finds that there is a financial crisis in the workers' compensation *insurance* industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state, and...
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> WHEREAS, the *reduction* in benefits provided in this act are necessary to ensure (insurance) rates that allow employers to continue to comply with (Chapter 440), ...

Chap. 90-201, 1990 Laws of Florida at 899.

Thus, the legislative intent is beyond debate: The legislature reduced workers' compensation benefits in 1990 to boost business by cutting workers' compensation *insurance* rates. Yet the reductions are not uniform in impact, but affect employees in a disparate manner according to the classification of their impairment. A uniform reduction might arguably be permissible under the ADA, but disparate reductions due to classifications are not permissible under the ADA. *See* 42 U.S.C. § 12112(b)(1)-(3); 29 C.F.R. § 1630.5.

Before the legislature felt the need to reduce workers' insurance costs to employers to the detriment of the employees,

wage loss was generally terminated at a universal set time frame. *See* § 440.15(3)(b)4.a-c, Fla. Stat. (1989). After the 1990 legislative reduction in benefits, wage loss benefits are terminated based upon a classification of the employee's impairment. *Compare* § 440.15(3)(b)4.d., Fla. Stat. (1990). The reason for this change was to reduce the cost of workers' compensation insurance rates to the employer. Chap. 90-201, *supra*. As such, a disparate result among disabled employees has occurred in order to reduce the cost of workers' compensation insurance premiums to the employer. Yet this is *not* a defense under Title I of the ADA; to the contrary, the EEOC has specifically stated reducing insurance costs is not a permissible reason to discriminate against the disabled. The EEOC stated:

> The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums *or workers' compensation costs* to increase, would *not* be a legitimate nondiscriminatory reason justifying disparate treatment of an individual with a disability. Senate Report at 85; House Labor Report at 136 and House Judiciary Report at 71.

The Interpretative Guidance on Title I of the Americans with Disabilities Act, § 1630.15, App., *in* Appendix to 29 C.F.R. § 1630.

The House Report of the Education and Labor Committee, referenced in the above quote from the EEOC, stated: "For example, an employer could *not* deny a qualified applicant a job because the employer's current insurance plan does not cover the person's disability or because of the increased costs of

insurance." House Report 101-485(II) at 136.

Both the EEOC--the agency charged with enforcing the ADA--and Congress have plainly stated that discrimination to save money on insurance costs is unlawful under the ADA. The Florida Legislature equally plainly has stated it reduced workers' compensation benefits to save money on insurance rates. As both Congressional intent and the EEOC's rulings are due great deference by this Court, *see, e.g., Adams Fruit Co. v. Barrett,* 494 U.S. at 642, and *Meritor Savings Bank, FSB. v. Vinson,* 477 U.S. at 65, this Court should find that the challenged statutory classification is unlawful under the ADA.

Instead of rigid classifications, the ADA stresses the need for individual, case by case factual determinations. Congressional intent was to preclude classifications based upon "presumptions" and to require employers to "make employment decisions based on facts applicable to individual applicants or employees." House Report No. 101-485(II) at 58. Specifically, Congress stated: "This legislation requires individualized assessments...." *Id.* Further, in addressing the "fears" of safety or absenteeism, which are based upon "averages and group-based predictions," the House Report states: "This legislation requires individual assessments which are incompatible with such an approach." House Report 101-485(II) at 58. Thus, like discriminatory classifications, "group based predictions" such as those reflected in section 440.15(3)(b)4.d. must defer to "individual assessments."

The lengthy section of legislative history on "reasonable

accommodations" also stressed the need for a "fact-specific, case by case approach to providing reasonable accommodations...." House Report 101-485(11) at 62. *See also id.* at 64 stating reasonable accommodations must be dealt with "on a case by case basis to determine whether an undue hardship is created by providing attendants." Thus, Florida's wage loss scheme, which uses discriminatory classifications to determine the benefits a disabled worker receives, is suspect; such a rigid classification, by its very nature, precludes the "fact specific, case by case" approach required by the ADA.

While the ADA in Title IV does allow "legitimate classifications in *risks* in insurance plans in accordance with the state law," such plans must not "evade the purposes of this Act." House Report 101-485(II) at 70. *See also* 42 U.S.C. § 12201(c). Under the ADA, "insurers may continue to sell to and underwrite individuals applying for life, health or other insurance...or to service such insurance products, so long as the standards used are based on sound actuarial data and not on speculation." House Report 101-485(II) at 70. Congress was clear though that this limited allowance was only for "legitimate" classifications and that it "may not be used as a subterfuge to evade the requirements of this Act pertaining to employment..." *Id.*, at 71. *See also* 42 U.S.C. § 12201(c)(stating that provision "shall not be used as a subterfuge to evade" Title I and Title III of the ADA). In clarification of this language, the House Report noted: "Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed

under this section, *the plan may not refuse to insure or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment,* except where the refusal, limitation, or rate differential is based on sound actuarial principles, or is related to actual or reasonably anticipated experience." House Report 101-485(II) at 71.

Petitioner's wage loss benefits which were terminated at 78 weeks were not based upon classification of "risk," but were based upon classification of impairment. Therefore these provisions of the ADA which allow for "legitimate classifications in *risks*" would not apply. However, *if* wage loss benefits are deemed within section 12201(c), Respondent Travelers must--at the very least--show the decision to "limit" Petitioner's benefits to 78 weeks was based upon "sound actuarial principles, or is related to actual or reasonably anticipated experience." This is a fact question and the burden is upon Respondents. "The issue is whether insurers can prove that the disability discrimination is warranted by factual proof." McFadden, *The Americans with Disabilities Act: Fighting Discrimination, supra,* at 69.

The 78 week limit on wage loss at issue here is analogous to a cap on certain conditions in health insurance coverage. For example, terminating wage loss at 78 weeks solely because of a particular impairment classification is akin to a health insurance policy which places a $5,000 cap on a particular

disease, but not on other diseases. In both situations, benefits are limited by classifications based upon particular conditions. Yet such caps in health insurance are a violation of the ADA.

> For example, the Equal Employment Opportunity Commission (EEOC) states that a plan that excludes from coverage any pre-existing blood disorders for 18 months is presumptively discriminatory. The reason is that the exclusion would affect only a discrete group of related disabilities, such as leukemia and hemophilia.
>
> Under these guidelines, certain (insurance) cases are easy to prove.... Examples are those cases, ..., where caps are placed on benefits for HIV or AIDS-related cases while other illnesses continue to be provided higher levels of coverage. The EEOC has vigorously pursued these cases and has argued successfully that they are per se discrimination.

McFadden, *The Americans with Disabilities Act: Fighting Discrimination, supra,* at 69, citing *e.g., Mason Tenders District Council Welfare Fund v. Donaghey,* No. 93 Civ. 1154 (S.D.N.Y. Nov. 19, 1993).

In *Mason Tenders*, the New York District office of the EEOC issued a determination that the Mason Tenders District Council Trust Fund violated the ADA by changing its health insurance plan on July 1, 1991, to explicitly exclude payment for expenses arising from AIDS or ARC. *Terrence Donaghey, Jr. v. Mason Tenders District Council Trust Fund*, charge No. 160-93-0419 (January 28, 1993) *reprinted in* 25 Daily Lab. Rep. D-1 Full Text Section (Feb. 9, 1993). Respondent Trust Fund moved for summary judgment against the EEOC and its motion was denied. *Mason Tenders District Council Welfare Fund v. Donaghey,* No. 93 Civ. 1154

(S.D.N.Y. Nov. 19, 1994) *discussed at* 2 Health L. Rptr. 1565 (BNA 1994)

The EEOC's actions in that case show that limiting health insurance coverage according to the type of illness is a violation of the ADA; by analogy, limiting wage loss benefits according to the type of impairment would also be a violation of the ADA.

Further support for this position is found in the EEOC's own language and examples. As the agency charged with implementing the ADA, the EEOC indicated that plans which seek exclusions of "a particular disability, discrete group of disabilities, or disability in general" are objectionable under the ADA. The EEOC in its interim guide EEOC No. N-915.002, wrote:

> (H)owever, health-related insurance distinctions that are based on disability may violate the ADA. A term or provision is "disability based" if it singles out a particular disability (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g. cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., non-coverage of all conditions that substantially limit a major life activity).

EEOC Interim Enforcement Guidance: Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance 7 (EEOC Notice No. N-915.002) (6-8-93), *reprinted in Americans with Disabilities Act: Employee Rights and Employer Obligations, supra,* Appendix E-7 (Matthew Bender 1995) (hereafter EEOC No. N-915.002)

Stressing that it is the respondent employer/insurer who bears the burden of proof, EEOC No. N-915.002 cited two examples

of insurance plans which presumptively violate the ADA. In one, the insurer caps benefits for all physical conditions, except AIDS, at $100,000 per year, but caps AIDs benefits at $5,000. In the other example, the insurer excludes treatment of blood disorders for a period of 18 months, but does not exclude coverage of other conditions. In the first example, the EEOC noted the cap on AIDS was a disability-based distinction; in the second example, the exclusion of blood related diseases was a disability based distinction of a discrete group of related disabilities--hemophilia, leukemia, for example. EEOC No. N-915.002, *supra,* at 7-8.

Responding employers/insurers must then prove such plans are "bona fide" and not a "subterfuge" to avoid the ADA but rest upon "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." *Id.; see also* 42 U.S.C. § 12201(c). Whether the disability based distinction is a subterfuge will be determined on a "case by case basis, considering the totality of the circumstances." EEOC No. N-915.002, *supra,* at 10. While this EEOC Notice is limited to health insurance, it nonetheless offers "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See Meritor Savings Bank, FSB. v. Vinson,* 477 U.S. at 65.

By analogy, EEOC No. N-915.002 supports Petitioner's view that a classification based solely upon the type of impairment is an impermissible disability-based distinction. Under this rationale, if cutting off benefits to one class of persons (those

with AIDS in both Ms. McFadden's and the EEOC's examples) is a violation of the ADA because it discriminates against a certain type of disability, then cutting off Claimant's benefits at 78 weeks because of the type of impairment he suffers is equally a violation of the ADA.

(ii) The wage loss scheme at issue discriminates among the disabled which is unlawful under the ADA as the ADA's language and intent preclude discrimination among classes of the disabled as well as against the disabled as a class.

The Congressional intent behind the ADA included an intent to prohibit discrimination *among* classes of the disabled as well as against the disabled as a class. Congress stated:

> Virtually all States prohibit unfair discrimination *among* persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination. Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

House Report 101-485(II) at 136. Since the Congressional purpose included prohibiting discrimination "among persons of the same class," and persons disabled on the job would constitute a class, then it logically follows that discrimination against those with a certain classification of impairment in favor of those with another kind of impairment would be a prohibited discrimination "among persons of the same class."

Further, the EEOC in its *Interpretative Guidance* defines "disparate impact" to include "a disproportionately negative impact on *a class of individuals with disabilities." See The Interpretative Guidance on Title I, supra,* at § 1630.15, App. Thus, the EEOC recognizes that it is unlawful discrimination to negatively target "a" class of the disabled within "the" class of the disabled as a whole. In other words, it is just as unlawful

to discriminate *among* the disabled as it is to discriminate against the disabled as a whole class. *Id.*; *Helen L. v. DiDario,* 46 F.3d 325 (3d Cir. 1995)(discussed *infra).*

In a rather offhanded way, the First District in the instant case relied upon *Cramer v. State,* 885 F. Supp. 1545 (M.D. Fla. 1995) (appeal pending). *Cramer* erroneously found that discrimination *among* classes of the disabled is permissible under the ADA. In other words, according the *Cramer* holding, a disabled worker with a back injury could receive discriminatory treatment in contrast to a disabled worker with a hip injury and no violation of the ADA occurs. *See Cramer,* 885 F. Supp. at 1553. However, in reaching this decision, the Middle District Court does not appear to have reviewed either the legislative history of the ADA which stated "discrimination *among* persons of the same class" was precluded, *see* House Report 101-485(II) at 136, or the EEOC definition of discrimination including a negative impact among "a" class of the disabled, *EEOC Interpretative Guidance, supra.*

That discrimination is *not* allowed among the classes of the disabled is also supported by EEOC No. N-915.002; the EEOC's position in the *Mason Tenders* case; and by Ms. McFadden's analysis, all discussed above. The fact that the EEOC "vigorously pursued" cases placing caps only on certain illnesses without similar caps on all illness establishes that within the whole class of persons with illnesses, insurers may not discriminate among the different types of illnesses. Assume a person with AIDS has a $5,000 cap on benefits while a person with muscular

dystrophy (MD) has a $1 million cap (as do other covered conditions). Both the person with AIDS and the person with MD are within the class of disabled persons under the ADA. Discrimination against the person with AIDS, but not in the case of the person with MD, is discrimination "among" the classes of the disabled. That is, it is discrimination against the (sub)class of persons with AIDS in favor of the (sub)class of persons with MD. This example is not a case of discrimination against the disabled versus the non-disabled as the non-disabled person is unaffected by either the $5,000 cap on AIDS related benefits or the $1 million cap against MD related claims. Thus, discrimination *among* the disabled is *not* permissible under the ADA. *Cf.* EEOC No. N-915.002, *supra*; *Terrence Donaghey, Jr. v. Mason Tenders District Council Trust Fund, supra.* Ms. McFadden's examples further illustrate this in comparing AID claims versus cancer claims, as well as comparing diabetes-based discrimination. *See* McFadden, *The Americans with Disabilities Act: Fighting Discrimination, supra,* at 69.

Further, *Cramer* erroneously relied upon the distinguishable case of *Traynor v. Turnage,* 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988) in finding that discrimination *among* the disabled is permissible. *Traynor* concerned a challenge to a Veteran Administration regulation which denied extensions of time to use educational benefits where the petitioner was an alcoholic and where the regulation treated primary alcoholism as willful misconduct. While the willful misconduct/alcoholism issue in that case *might arguably* be analogous to the illegal drug and alcohol

provisions of the ADA, *see* 42 U.S.C. § 12114, neither illegal drugs or alcoholism have any bearing on this case. As such, even a casual reading of *Traynor* shows it is not applicable to this case.

The *Cramer* Court implicitly accepted that the Florida wage loss scheme at issue here is within the scope of the ADA and does discriminate among classes of the disabled; however the *Cramer* Court found this permissible based upon *Traynor*--a case decided two years before the far reaching ADA was even signed into law. Not only is *Traynor* not an ADA case, it does not directly address the issue of whether discriminatory classifications *among* classes of the disabled is acceptable. The U.S. Supreme Court in *Traynor* set forth the dispositive issue in that case as: "Accordingly, petitioners can prevail under their Rehabilitation Act claim *only* if the 1978 legislation can be deemed to have implicitly repealed the 'willful misconduct' provision of the 1977 legislation or forbade the Veterans' Administration to classify primary alcoholism as willful misconduct." *Traynor v. Turnage,* 485 U.S. at 547.

Traynor's application to ADA analysis has been firmly rejected by the Third Circuit, which held discrimination *among* the classes of the disabled is a violation of the ADA. *Helen L. v. DiDario,* 46 F.3d 325, 335-339 (3d Cir. 1995). In *DiDario,* the petitioner--like Petitioner here--alleged she was discriminated against under the ADA in part because she was treated differently than other disabled persons. Defendants in *DiDario*--as Respondents here--raised *Traynor* for the notion that any

discrimination against her was merely discrimination *among* the disabled and therefore acceptable. The Third Circuit flatly rejected such a legal specter and held discrimination *among* the disabled was unlawful under the ADA.

In rejecting the very argument advanced in *Cramer,* the Third Circuit distinguished *Traynor* as "not germane to our analysis" and "easily distinguishable." *Helen L. v. DiDario,* 46 F.3d at 335-6. After stating that *Traynor* was limited to an issue of "repeal by implication" of the willful misconduct statutory language, *DiDario,* 46 F.3d at 335-6, the Third Circuit stated that *Traynor* did note the Rehabilitation Act did not require that any benefit extended to one category of handicapped persons must also be extended to all other categories of handicapped persons. However, the *DiDario* Court rejected the idea that such a statement stood for the notion that the ADA would sanction discrimination among classes of the disabled.

DiDario held:

> As noted above, Congress has stated that "discrimination against individuals with disabilities persists in such critical areas as ... institutionalization." 42 U.S.C § 12101(3). If Congress were only concerned about disparate treatment of the disabled as compared to their nondisabled counterparts, this statement would be a non sequitur as only disabled persons are institutionalized.

Helen L. v. DiDario, 46 F.3d at 336.

As *Helen L.*, a federal appellate court's decision, is on point, is consistent with the ADA's intent and consistent with

the EEOC's language and actions, Amicus respectfully requests this Court adopt *Helen L.* as governing this case. Since the reliance on *Traynor* in *Cramer*, a lower federal court judge's decision, is wholly inconsistent with the controlling intent, language and actions of the ADA and the EEOC, Amicus asks that this Court reject it.

Turning again to the Congressional intent as evidenced by "the language of the statute and, where the language is not dispositive, on the intent of Congress as revealed in the history and purposes of the statutory scheme," *see Adams Fruit Co. v. Barrett,* 494 U.S. 642, we find the ADA, the EEOC regulations, and the legislative history replete with evidence that discrimination *among* the disabled is unlawful under the ADA. Permitting such discrimination *among* the classes of the disabled would be an anathema to the stated goals of the ADA. *See* 42 U.S.C. § 12101 (findings and purposes). Such a view as Respondents and *Cramer* would have this Court adopt would be wholly inconsistent with the legislative history which specifically condemns discrimination *among* classes of the disabled. *See* House Report 101-485(II) at 136. And finding that discrimination *among* the disabled is acceptable under the ADA would ignore the legislative scheme which discusses unlawful discrimination among the institutionalized as only the disabled are institutionalized; *See Helen L. v. DiDario,* 46 F.3d at 336. Beyond that, permitting discrimination among classes of the disabled is at odds with the EEOC's view of insurance coverage under the ADA. *See* McFadden, *The Americans with Disabilities Act: Fighting Discrimination,*

supra, at 69; EEOC No. N-915.002, *supra; Terrence Donaghey, Jr. v. Mason Tenders District Council Trust Fund, supra.*

Not least of all, such a restrictive view of the ADA--that one can discriminate among the classes of the disabled with impunity--flies in the face of logic and fairness. Congress intended that the ADA cure a national history of wrongs committed against the disabled. Surely such wrongs, logically considered, must include discrimination *among* the classes of the disabled as well against the class of the disabled.

"The Congress finds that...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 justifiable famous." 42 U.S.C. § 12101(9). To the end of the "elimination of discrimination against individuals with disabilities," Congress invoked "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." 42 U.S.C. § 12101 (b)(1)(4). In light of such language, this Court should find that Florida's workers' compensation wage loss scheme is superseded by the ADA as its wage loss provisions discriminate by virtue of an arbitrary classification based upon disability with a discriminatory impact among the disabled.

CONCLUSION

The ADA supersedes conflicting workers' compensation law.

Accordingly, Florida's wage loss scheme is within the purview of the ADA and is superseded by it as it conflicts with the ADA and stands as an obstacle to the accomplishment of the full purpose and objectives of Congress. Florida's wage loss classifications afford a claimant less protection than the ADA. Under the ADA, a claimant could not be discriminated against by a classification that resulted in disparate impact against the claimant; under section 440.15, a claimant is discriminated against because of classifications. Under the ADA, compensation for a class of persons suffering from a certain disability could not be cut off after 78 week due to some arbitrary classification; under section 440.15, a claimant's benefits can be cut off at 78 weeks due to an arbritrary classification. Under the ADA, insurance coverage can not discriminate "among" a class; under section 440.15, workers compensation insurance can discriminate "among" classes of claimants. Under the ADA, discriminatory classifications designed to save money on workers' compensation or other insurance premiums are precluded; under section 440.15, the disparate reduction in workers' compensation benefits was done to save money on workers' compensation premiums.

Accordingly, Amicus joins with the Petitioner in requesting that this Court reverse the First District and find that Florida's wage loss scheme is superseded by the ADA.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been furnished by U.S. mail this 23 day of October, 1995, to Cindy R. Galen, Esquire, P.O. Box 2019, Sarasota, FL 34230; to Edward A. Dion, Esquire, 307 Hartman Bldg., 2022 Capital Cir. S.E., Tallahassee, FL 32399-6583; and to Alex Lancaster, P.O. Drawer 4257, Sarasota, FL 34230.

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