IN THE
SUPREME COURT OF FLORIDA

CASE NO. 86,365

MORTON BARRY,

Petitioner,

v.

BURDINES, ET AL.

Respondents.

AMICUS CURIAE BRIEF OF THE FLORIDA WORKERS ADVOCATES

ON APPEAL
FROM THE
FIRST DISTRICT COURT OF APPEAL

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INTEREST OF AMICUS CURIAE

Florida Workers' Advocates is an organization whose membership consists primarily of attorneys who represent injured workers and who are committed to protecting the rights of those individuals. It was organized to serve as a focal point for action on a range of issues affecting injured workers. Of primary interest to FWA is the workers' compensation system, including such issues related to the adequacy of benefit levels, practice and procedure, the judiciary, access to quality medical care, adequacy of attorney's fees to assure capable representation, job safety, rehabilitation, third party litigation, and employer immunity. For these reasons, the above styled case is of significant importance to FWA.

Florida Workers' Advocates is located in Tallahassee, Florida.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Worker's Advocate adopts the Statement of the Case and Facts contained in the Brief for Petitioner, Morton Barry.

STATEMENT OF THE ISSUES

I WHETHER FLORIDA STATUTE 440.15(3)4.D CONFLICTS WITH THE FEDERAL STATUTE ENTITLED AMERICANS WITH DISABILITIES ACT AND IS IN VIOLATION OF CONSTITUTIONAL PROTECTIONS.

II WHETHER THE JUDGE OF COMPENSATION CLAIMS ERRED IN LIMITING CLAIMANT TO 78 WEEKS OF WAGE LOSS.

SUMMARY OF THE ARGUMENT

The present workers compensation law of Florida fails to provide for the Americans With Disabilities Act (A.D.A.) stated concept of "disability." The "disability" class of benefits has been completely removed from the law of Florida and no reasonable alternative substitution has been afforded. The present law concludes that the disabling effect of the injury on an individual worker is the exact same as the anatomical impairment. That statutory conclusion is nothing less than a conclusive presumption. It is axiomatic that conclusive presumptions are disfavored in the law.[1]

Furthermore, the concept of disability was pervasive in the pre-1968 version of Chapter 440, F.S. Its removal in favor of a graduated wage loss entitlement "step ladder," without a reasonable alternative violates the specialized due process in Florida's Constitution referred to as the right to "access to courts," Art I § 23, Const. of the State of Florida.

Also involved in the present case are matters implicating due process of law. When fundamental rights are involved, analysis involving due process is conceptionally similar to the highest

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[1] In Wiley v. Woods, 141 A.2d 844 (Pa. 1958), the Court stated that "due process" is:

> "A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial" 141 A.2d at 844

That seems particularly appropriate here. The subject conclusive presumption violates substantive due process.

level of scrutiny or strict scrutiny under the equal protection clause of the Constitution of the United States.[2]

When any right involved is, as in the present case, "fundamental", such as Equal Protection or access to courts, intrusion must be kept at a minimum. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), appeal dism'd sub nom, Pincus v. Estate of Greenberg, 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981), abrogated on other grounds in Shriners Hospital for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990).

In State v. Smith, 547 So.2d 131 (Fla. 1989), the Court struck down a procedure allowing ex parte orders compelling the already in-custody defendant to submit to a lineup. The Court stated:

> One of the most fundamental principles of Anglo-American jurisprudence is the guarantee of due process. The concept was first articulated in a written legal document in article 39 of Magna Charta when promulgated by King John of England on June 15, 1215. Since that time, the concept of due process has been embodied in every great charter produced by modern Western democracies. Both the fifth and fourteenth amendments of the federal Constitution, as well as article I, section 9 of the Florida Constitution, embody the concept and make binding upon the courts of florida. It is one of the central tenets of the organic law of this state, and one that restricts the power of all three branches of government.

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[2] In Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954), a companion case to Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954), a class action had been filed to integrate Washington, D.C. schools under the Fifth Amendment which does not have an equal protection clause but does have a due process clause. The Court, having decided Brown on equal protection grounds, decided Bolling on due process grounds utilizing the same reasoning under the due process clause and reached the same result. See also Gluesenkamp v. State of Florida, 391 So.2d 192 (Fla. 1980); State of Florida v. Laicht, 402 So.2d 1153 (Fla. 1981); State v. Kinner, 398 So.2d 1360 (Fla. 1981).

> As a concept rooted in the Anglo-American tradition of ordered liberty, due process is a transcendent principle of both natural and positive law, against which even the enactments of the legislature or the pronouncements of the courts will be measured.
>
> Due process rests primarily on the concept of fundamental fairness. 547 So.2d at 134.

The Americans with Disabilities Act, 42 USC §12101, et seq., ("A.D.A.") establishes rules and articulates Congressional intent by setting forth a statement of goals purposes and demands. State programs which seek to limit benefits available to individuals with disabilities are to be subjected to these demands. It is the intent of the A.D.A. to insure that disabled workers receive equal opportunity, full participation, independent living and economic self-sufficiency, none of which permanently disabled workers in Florida are able to enjoy under the current law.

The Florida Workers' Compensation Act is a "program" within the meaning of A.D.A. Eligibility under the Florida Workers' Compensation Act arises from having a compensable accident. Additionally, by virtue of having had a compensable accident, a claimant is limited in remedy to the four corners of Chapter 440, Florida Statutes. See Section 440.10, Florida Statutes (1990) and Section 440.11, Florida Statutes (1990). He or she has no other remedy. As such, the claimant is a member of an additional "discrete and insular minority", that is, persons injured and disabled from an on-the-job accident. Such injured persons are entitled under both due process and equal protection to not only the highest level of scrutiny but also the least intrusive means

of achieving the goals of the state in the absence of a compelling state interest. Saving money is not a compelling state interest. Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); De Ayala v. Florida Farm Bureau Cas., Ins. Co., 543 So.2d 204 (Fla. 1989). See also Helen L. v. DiDario, 46 F.3d 325 (2d Cir. 1995) cert. denied, Penn. Sec of Public Welfare v. Idell S. 64 U.S.L.W 3224 (U.S. Oct. 2, 1995).

In the present case the state law fails to pass either test. The Respondents have advanced no compelling governmental interest for denying or restricting benefits to disabled workers. The use of a conclusive presumption that persons with like impairments are equally disabled is illogical and unreasonable. In any event, costs could be saved by less intrusive means than cutting benefits by as much as a factor of twenty (20). The program under review fails to meet the nondiscriminatory standards of the A.D.A. and fails to pass constitutional muster.

ARGUMENT

I. FLORIDA STATUTE 440.15(3) 4.D IS SUBJECT TO THE COMMANDS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT, 42 USC §12101. FAILURE TO COMPLY VIOLATES CONSTITUTIONAL PROTECTIONS.

At inception, Florida's workers' compensation laws were aimed at relieving the hardships to workers created by on-the-job injuries. McLean v. Mundy 81 So.2d 501 (Fla. 1955), Florida Game & Fresh Water Fish Commission v. Driggers 65 So.2d 723 (Fla. 1953). The laws were a reasonable alternative to not only existing common law rights, but also statutory schemes in place when the constitution of 1968 was adopted. Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983), and Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), aff'd, Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984). For example, a workers' compensation claimant with any permanent impairment was entitled to 525 weeks of wage loss under the 1979 Act. The 525 week entitlement was dependant upon certain factors which were to be established on a monthly basis including the actual amount of wage loss, and a good faith job search. Under the 1990 Act a claimant with a modest impairment may be factored downward in over-all entitlement by twenty (20) percent.

The Act in effect in 1968 provided for a loss of wage earning capacity award dependent on the claimant's actual disability. See §440.02 (1968). This involved many factors all of which focused on the claimant's individual economic reactions to the injury. Walker v. Electronic Products & Engineering Co., 248 So.2d 161

(Fla. 1971).

In Florida Erection Services, Inc. v. McDonald, 395 So.2d 203 (Fla. 1st DCA 1981), the Court described changes from the previous Acts and stated:

> The fundamental purpose of workers' compensation is to relieve society of the burden of caring for an injured employee by placing the burden on the industry involved. Sullivan v. Mayo, 121 So.2d 424 (Fla. 1960). Although formerly the philosophy of workers' compensation was that when the employer and the employee accepted the terms of the compensation act, their relationship became contractual, under later amendments to the workers' compensation law of Florida the application of the act to employer and the employee alike became mandatory. See Sections 440.10, .38 and .43, Florida Statutes (1979); compare Howze v. Lykes Bros., Inc., 64 So.2d 277 (Fla. 1953) . . . .
>
> The most significant of the 1979 changes is in the adoption of the "wage loss" concept for determining permanent partial disability as a substitute for the award of compensation, under the old law, on the basis of diminution of wage earning capacity or physical impairment. 395 So.2d at 209-210. (emphasis added).

The version of Chapter 440 in operation at the point in time when the 1968 Constitution was adopted was the same even after the 1967 legislature had made whatever modest changes they determined to be necessary. The one constant was utilizing a "disability approach." In 1990, the constant was altered. In fact, the most significant change was the elimination of "disability" [§440.02(11) Florida Statutes: "Disability" means incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.] as a concept effecting awards of less than permanent and total disability. Indeed, in Florida, Worker's Compensation law from 1990 to the

present provides no provision for any determination of the effect of an injury as a "disability", except for total disability. Permanent partial disability benefits as a class of benefits has been abolished with no reasonable entitlement alternative substituted in its place. The Act instead indulges in an unconstitutional conclusive presumption to wit: That the disabling effect of an injury to a worker is the same as the anatomical impairment rating assigned to him. The injured worker is not entitled to an individualized assessment of his disability, he is merely assigned an impairment rating from which his entitlement to benefits has been pre-determined. That conclusive presumption, for all intent and purpose, bars the injured worker from his or her constitutionally protected access to courts, Kluger v. White, 281 So.2d (Fla. 1973).

Within these profound concepts can be found the crux of the issues that greatly disturb The Florida Workers' Advocates, issues that must be recognized and resolved. What is left of Florida's Workers' program is a restrictive state workers compensation law that is at odds with the broadened federal law (A.D.A.) impacting upon the very same subject matter.

AMERICANS WITH DISABILITIES ACT

The main focus of the brief of Petitioner evolves around the argument that Florida Statute 440.15(3)(b)4.d is subject to and therefore should be in compliance with the Americans with Disabilities Act ("A.D.A."), 42 USC §12101. The court below

focused upon Title I of that Act. See Barry v. Burdines et al, ___ So.2d ___, 20 Fla. L. Weekly D1923 (1995).

In pertinent part, the A.D.A. mandates that workers who are disabled are entitled to the equal protection, due process and access to a court of competent jurisdiction as well as equal treatment under the laws of the land, as with any suspect class. (See A.D.A. Congressional finding infra.)

Since the adoption of the A.D.A. significant alterations in judicial analysis has resulted where issues of equal protection of injured workers are involved.[3] Congressional findings supporting the A.D.A. are important if one is to better understand the issue before this court:

> "§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 whole 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

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[3] The Judge of Compensation Claims correctly concluded that he had no jurisdiction to review the constitutional challenges to a legislative act. See Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), affirmed 452 So.2d 932 (Fla. 1984). He also lacked in jurisdiction to consider an ADA challenge. See Long v. Department of Admin. Div. of Retirement, 428 So.2d 688 (Fla. 1st DCA 1983), where this Court affirmed an administrative hearing officer's refusal to consider the validity of a state pension system under Title VII of the 1964 Civil Rights Act on the basis of sex discrimination.

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." 42 U.S.C. §12101 (italics added)

In In re Estate of Greenberg, 390 So.2d 40 (Fla.1980) abrogated on other grounds in Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990), this Court concluded 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 employing 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 in order to use the suspect classification but also that no alternative means of accomplishing the valid goal are available. See, e.g., Loving v. Virginia, 388 U.S. 1, 878 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) and Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331 (1982), see also Cf. Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1972), Shapiro v. Thompson, 394 U.S. 618, 895 S.Ct. 1322, 22 L.Ed.2d 600 (1969); and Williams v. Rhones, 393 U.S. 23, 895 S.Ct. 5, 21 L.Ed.2d 24 (1968). In this context the state is required to show that it has done everything possible to insure that all legitimate surplusage or waste in the system has been examined and purged and that the resulting legislation is the only remaining, valid way that the system can be saved from extinction.

In the present case, the state has not met the burden the Constitution places upon it. The statement of legislative intent,

Section 440.015, Florida Statutes, suggests that efforts were not made to realistically save the workers' compensation system. There was little attempt to curb carrier waste, increase carrier accountability and attack employer fraud, especially in high risk industries. If such efforts were not made, then benefits to injured workers cannot be diminished because the disabled worker class is a discrete and insular minority and as such has been singled out by the legislature to bear the full brunt of cost-cutting. Cf. United States Trust v. New Jersey 431 U.S. 1, 97 S.Ct. 1515, 52 L.Ed.2d 92 (1972). Here, the State has failed to prove the negative - that all alternatives were tried and were unsuccessful - and that the curbing of benefits to those who could least afford the reductions was the only means available to insure the health of the system! Id.

This system and the changes wrought by the 1990/1991 Act in Chapter 440, Florida Statutes, have negatively impacted the person whom the Act is supposed to protect, injured workers in Florida. That is, workers injured on the job and have been deprived of rights and entitlements as well as the right to sue their employers. The workers are the "discrete and insular minority".[4]

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[4] The "discrete and insular minorities" category focuses on three characteristics of a class, including; (1) immutable characteristics; (2) historical disadvantage, and; (3) lack of political representation. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 1333-4 36 L.Ed. 2d 16 (1973) (discussing the traditional "indicia of suspectness"). Additionally, three other factors are relevant, Sasso v. Ram Property Management, 431 So.2d 204, 221 (Fla. 1st DCA 1983), affirmed, 452 So.2d 932 (Fla. 1984). These include (4) legislative

Impacted in the negative, the workers (1) have de minimus political power, (See, the 1990, 1991 and 1994 versions of Chapter 440, Florida Statutes, which have progressively lowered potential benefits); (2) have immutable characteristics; and (3) have had the historical disadvantage of being forced to accept much less than would have been recoverable at common law for the same injuries.

Further evidence of powerlessness is the fact that the Workers' Compensation Act does not prohibit discrimination which results from the step-schedule impairment system on the basis of one handicap as against another. For example, an injured worker with a Minnesota Guides impairment of 5% may well have a disability much greater than one with a 20% Minnesota Guides impairment but will receive substantially less in benefits. It is submitted that such an irrational result violates not only A.D.A., but also Equal Protection and Due Process of Law.

Discrimination based on the extent of anatomical impairment is no different than discrimination between two persons solely on the basis of skin tone or gender, even if they are of the same race

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attention through anti-discrimination statutes; (5) class members have involuntarily entered the class; and, (6) class members usually have physically identifiable characteristics distinguishing them from the rest of society. Id. In Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), the Supreme court held that although women as a class do not satisfy all of these factors, they are nonetheless deserving of heightened judicial scrutiny, 102 S.Ct. 3331, at 3336 n. 9. Thus, to the extent that the class physically handicapped persons succeeds in meeting many of these criteria, it is reasonable to expect that the Supreme Court would recognize the need to carefully examine legislation discriminating against.

or ethnic background or gender. If, for instance, a prospective employer were to refuse to hire dark skinned black men but hired lighter skinned black men, no one would argue that this was not prohibited discrimination under either the equal protection clauses of the federal and Florida constitutions, as well as a violation of Title VII of the 1984 Civil Rights Act. Here the level of "color" or "gender" is the extent of anatomical impairment. This is also an immutable characteristic over which the sufferer has no control. It is just as offensive a discrimination as the racial discrimination would be and it is prohibited by the ADA. See, Cf. Helen L. v. DiDario, 46 F.3d 325 (3d Cir.) cert. denied Penn. Sec. of Public Welfare v. Idell S., 64 U.S.L.W. 3224 (U.S. Oct. 2, 1995). But see Cramer v. State of Florida, 885 F.Supp. 1565 (M.D. Fla. 1995), currently on appeal.

The subject provision also violates substantive due process. In Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991) this Court, in describing a list not intended to be complete, stated:

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. 1, §9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose: the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a

> fundamentally unfair manner in derogation of their substantive rights. Substantive due process may implicate, among other things, the definition of an offense, see State v. Bussey, 463 So.2d 1141 (Fla. 1985); Baker v. State, 377 So.2d 17 (Fla. 1979); the burden and standard of proof of elements and defenses, see, e.g., State v. Cohen, 568 So.2d 49, 51 (Fla. 1990); the presumption of innocence, see State v. Rodriguez, 575 So.2d 1262 (Fla. 1991); State v. Harris, 356 So.2d 315, 317 (1978); vagueness, see, eg., Perkins v. State,576 So.2d 1310 (Fla. 1991); Bussey; State v. Barquet, 262 So.2d 431, 436 (Fla. 1972); the conduct of law enforcement officials, see Haliburton v. State, 514 So.2d 1088 (Fla. 1987); State v. Glosson, 462 So.2d 1082 (Fla. 1985); the right to a fair trial, see Kritzman v. State, 520 So.2d 568 (Fla. 1988); and the availability or harshness of remedies. . . . 588 So.2d at 960.

See also Conner v. Reed Bros., Inc., 567 So.2d 515, 518 (Fla. 2nd DCA 1990).

The attack upon those with lower impairment ratings does not bear even a reasonable relationship to the purposes of the changes in the Workers' Compensation Law and is an arbitrary, capricious and unconstitutional attempt of cutting premiums. The statute violates due process.

The first constitutional law case on workers' compensation in the United States Supreme Court was New York Central Railroad Company v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L. Ed. 667 (1917). In White, a worker had been killed on the job. The New York act was relatively new. The Court held the Act constitutional but stated:

> The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it

shall remain unchanged for his benefit, Munn v. Illinois, 94 U.S. 113, 134; Hurtado v. California, 110 U.S. 516, 532, 4 S.Ct. 111, 28 L.Ed. 232 (1884); Martin v. Pittsburg & Lake Erie R.R. Co., 203 U.S. 284, 27 S.Ct. 100, L.Ed. 184 (1906); In re Second Employers' Liability Cases, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1911).

Here 78 weeks is just not adequate and also does not represent a "reasonable alternative" to lost common law rights.

If, on the other hand, the subject provision is interpreted as including the concept of disability, then the subject provision violates substantive and procedural due process as it indulges a conclusive presumption, that the economic effects of the injury are no more or no less than the impairment rating. In McFarland v. American Sugar Refining Co., 241 U.S. 79, 36 S.Ct. 498, 60 L. Ed. 899 (1916), the Court stated:

> As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35, 43. The presumption created here has no relation in experience to general facts. 36 S.Ct at 500

See also United States v. Provident Trust Co., 291 U.S. 272, 54 S.Ct. 389, 78 L.Ed. 793 (1934).

In Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), a case brought under the IRS code, the Court stated:

> . . . and likewise no doubt of the power of that body [Congress] to create a rebuttable presumption that gifts made within a period of two years prior to death are made in contemplation thereof. But the presumption here created is not of that kind. It is made definitely conclusive -- incapable of being overcome by proof of the

> most positive character. Thus stated, the first question submitted is answered in the affirmative by Schlesinger v. Wisconsin, 270 U.S. 230, and Hoeper v. Tax Commission, 284 U.S. 206. The only difference between the present case and the Schlesinger case is that there the statute fixed at two; and there the Fourteenth amendment was involved, while here it is the Fifth Amendment. The length of time was not a factor in the case. The presumption was held invalid upon the ground that the statute made it conclusive without regard to actualities . . (emphasis added)

Schlesinger, cited in Heiner, has since been applied many times by the lower federal courts, by the Board of Tax Appeals, and by state courts; and none of them seem to have been at any loss to understand the basis of the decision, namely, that

> a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.
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> The suggestion of the state court that the provision was valid as necessary to prevent frauds and evasions of the tax by married persons was definitely rejected on the ground that such claimed necessity could not justify an otherwise unconstitutional exaction.
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> The government makes the point that the conclusive presumption created by the statute is a rule of substantive law, and, regarded as such, should be upheld;
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> A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof, Mobile, J.& K.C.R. Co. v. Turnipseed, 219 U.S. 43, and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result it the same, unless we are ready to overrule the Schlesinger case, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to

> the question of its technical characterization. **This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.** For example, Bailey v. Alabama, 219 U.S. 219, 238, Manley v. Georgia, 279 U.S. 1, 5-6 "It is apparent," this court said in Bailey (at 219 U.S. 239) "that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.
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> * * *
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> If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law." 52 S.Ct. at 360-362[5]

Any conclusive presumption which significantly reduces or, as in this case, eliminates any chance of collecting benefits or exercising a remedy, here that translates into eliminating proof of the actual effect of the injury on wage earning capacity, is violative of Article I §21 of the Constitution of the State of Florida. The reason being, is that it denies access to courts in that there is no individualized assessment or opportunity to be heard. Furthermore it denies due process since there are simply no grounds of "expediency or policy" for requiring these presumptions or legislative solutions. There is no fundamental fairness as far as the injured worker is concerned. It is hornbook law that the basic consideration of due process is fundamental fairness. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1985);

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[5] See also Yellow Springs Exempted Village School District Board of Education et al. v. Ohio High School Athletic Association et al., 443 F. Supp. 753 (S.D. Ohio 1978) reversed on other grounds Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association, et al., 647 F.2d 651 (6th Cir. 1981); Owens v. Roberts, 377 F.Supp. 45 (M.D. Fla. 1974).

Vaughn v. State, 456 S.W.2d 879 (Tenn. 1970); Pinkerton v. Farr, 220 S.E.2d 682 (W.Va. 1975)[6].

The Supreme Court of the United States stated that conclusive presumptions in the law are invalid. In McFarland v. American Sugar Refining Co., 241 U.S. 79, 36 S.Ct. 498, 60 L. Ed. 899 (1916), the Court noted that:

> As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35, 43. The presumption created here has no relation in experience to general facts. 36 S.Ct at 500.

See also United States v. Provident Trust Co., 291 U.S. 272, 54 S. Ct. 389 (1934). See, Cf. e.g. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Florida Statute at issue conclusively presumes that the effect of an injury on an individual is only the number of weeks that the schedule provides, nothing more. This permanent presumption is an unconstitutional violation of due process.

In Yellow Springs Exempted Village School District Board of Education et al. v. Ohio High School Athletic Association et al. 443 F. Supp. 753 (S.D. Ohio 1978), the school district, by rule, excluded girls from the varsity basketball team. The Court, in

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[6] In Wiley v. Woods, 141 A.2d 844 (Pa. 1958), the Court stated as a definition of "due process":

> "A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial" 141 A.2d at 844

That seems particularly appropriate here. The subject conclusive presumption violates substantive due process.

holding that the action was, in fact, state action and therefore invalid, stated:

> Two governmental objectives could be proffered to support the Association rule. First, the State arguably has an interest in preventing injury to public school children. Second, the State could contend that prohibiting girls from participating with boys in contact sports will maximize female athletic opportunities. Both are palpably legitimate goals. To achieve these goals, however, the State must assume without qualification that girls are uniformly physically inferior to boys. The exclusionary rule, as it relates to the objective of preventing injury, creates a conclusive presumption that girls are physically weaker than boys. The rule, as it relates to the objective of maximization of female opportunities, creates an equally conclusive presumption that girls are less proficient athletes than boys. However, these presumptions are in fact indistinguishable since both posit that girls are somehow athletically inferior to boys sole because of their gender.
>
> A permanent presumption is unconstitutional in an area in which the presumption might be rebutted if individualized determinations were made. Cleveland Bd. of Edu. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)."

This is precisely what occurred in the present case. Petitioner Barry was never given the opportunity to have an individualized assessment of his disability. Nor was he permitted to explain the need for benefits. (See also Walker V. Electronic Products & Engineering Co., supra.)

In Yellow Springs Exempted Village School District Board of Education et al. v. Ohio High School Athletic Association et al. 647 F.2d 651 (6th Cir. 1981), the court reversed on the basis that the district court should not have concluded the case by summary judgment.

Additionally, in Owens v. Roberts, 377 F.Supp. 45 (M.D. Fla. 1974), the Court concluded:

Inextricably bound up with the equal protection claim is the procedural due process contention. We find no difficulty whatsoever in holding that the reflexive denial of assistance without affording the affected individuals the prior opportunity to rebut the conclusive presumption that they were purposefully attempting to avail themselves of welfare assistance is violative of procedural due process. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Sniadach v. Family Finance, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); Bell v. Burson, supra; Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Merriweather v. Burson, 439 F.2d 1092 (5th Cir. 1971); Lage v. Downing, 314 F.Supp. 903 (S.D.Iowa 1970); Hunt v. Edmunds, 328 F.Supp. 468 (D.Minn. 1971); Caldwell v. Laupheimer, 311 F.Supp. 853 (E.D.Pa.); Barnett v. Lindsy, 319 F.Supp. 610 (D.Utah 1970); Cf. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Therefore, we conclude that the statute is unconstitutional as it is applied through the regulation and the regulation must fall.

II. THE JUDGE OF COMPENSATION CLAIMS ERRED IN LIMITING CLAIMANT TO 78 WEEKS OF WAGE LOSS ELIGIBILITY

It could be argued, as suggested in Bolton v. Scrivner, 36 F.3d 939 (10th Cir. 1994), that Petitioner/Claimant is not one that would otherwise be recognized as being within the Americans with Disabilities Act (ADA). The basis for this argument may be that an on-the-job accident of the nature of petitioners does not qualify him for A.D.A. coverage. This proposition is incorrect.

In Bolton the court affirmed a summary judgment on a civil A.D.A. complaint. In so doing, it noted:

> The A.D.A. prohibits discrimination' against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment," 42 U.S.C. §12112(a). At issue in this case is whether Bolton is an 'individual with a disability.' The term 'disability' means, with respect to an individual--(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Id. §12102(2). Although Bolton alleged in his complaint that Scrivner discriminated against him on the basis of a "perceived" impairment, and argued in opposition to summary judgment that he has a "record" of impairment, he limits his argument on appeal to whether he has a disability as that term is defined in subparagraph A of §12102(2).
>
> The A.D.A. does not define the term "major life activities." We are guided by the definition found in regulations the Equal employment Opportunity Commission (EEOC) has issued to implement Title I of the ADA, 29 D.F.R. Pt. 1630. See 42 U.S.C. §12116 (requiring the EEOC to issue regulations to implement Title 1 of ADA); cf. School Bd. of Nassau County v. Arline, 480 U.S. 273, 279, 107 S.Ct. 1123, 1127, 94 L.Ed.2d 307 (1987) (treating Rehabilitation Act[7] regulations promulgated by the Department of Health and Human Services as" an important source of guidance on the meaning of §504 [of the Rehabilitation Act]'") (quoting Alexander v. Choate,

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[7] Rehabilitation Act of 1973, 29 U.S.C. §794.

469 U.S. 287, 304 n. 24, 105 S.Ct. 712 n. 24, 83 L.Ed.2d 661 (1985)). The A.D.A. regulations adopt the definition of "major life activities: found in the rehabilitation Act regulations, 34 C.F.R. §104. See 29 C.F.R. Pt, 1630, Appendix to Part 1630 -- Interpretive Guidance on Title 1 of the Americans with Disabilities Act, §1630.2(i) Major Life Activities. The term "means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." To demonstrate that an impairment "substantially limits" the major life activity of working, an individual must show "significant restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Id. §1630.2(j)(3)(i) (emphasis added). The regulations specify that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 36 F.3d at 942-943.

Here the Petitioner Barry was entitled to 78 weeks of wage loss eligibility in accordance with Fla. Statute §440.15. As noted, the judge could not consider the issue of constitutionality because he was a non-constitutional judge of compensation claims. The physical impairment to Petitioner significantly limits his major life activities, including working. However, Petitioner is capable of performing the essential functions with or without reasonable accommodation. In fact Dr. Shkolnikov's testimony to this effect was accepted by Judge Willis.

In School Board of Nassau County, Fla. v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987), the United States Supreme Court held that an individual with a contagious disease such as tuberculosis is handicapped within the meaning of §504 of the Rehabilitation Act. Id. at 1132. The Court concluded that a school teacher who developed tuberculosis could not be discriminated against on the basis of having acquired the disease. Therefore, under federal legislation, a worker who acquires a

handicap is not distinguishable from one who always was afflicted. Thus, workers who sustain injuries rendering them permanently disabled are held to be handicapped under federal law. See also Harris v. Thigpen, 941 F.2d 1495, 1524-1526 (11th Cir. 1994). See also Byrne v. Board of Education, 979 F.2d 560 (7th Cir. 1991) (one with permanent impairment from allergy to a mold may have a "disability" under the Act[8]); Guice-Mills v. Derwinski, 967 F.2d 794, 797 (2d Cir. 1992) (nurse with depressive illness was handicapped individual under the Rehabilitation Act because her illness and medication regimen kept her from being able to arrive at work on time)[9]; Vickers v. Veterans Administration, 540 F.Supp. 85, 86-87 (W.D. Wash. 1982) (person with hypersensitivity to tobacco smoke was "handicapped individual" under the Rehabilitation Act); Taylor v. U.S. Postal Service, 771 F.Supp. 882, 887-888 (S.D. Ohio, 1990) (one with knee and back injuries which effect the injured party's ability to perform physical labor might be "handicapped individual" under the Rehabilitation Act); Coley v. Secretary of the Army, 689 F.Supp. 519 (D.Md. 1987) (one with physical impairments substantially limiting work ability-here a 15 pound weight limitation and not working in cold or dampness-was "handicapped individual" under the Rehabilitation Act); Perez v. Philadelphia Housing Authority, 677 F.Supp. 357 (E.D.Pa. 1987), affirmed 841 F.2d 1120, (person with severe lumbosacral sprain and radiculophy was "handicapped individual" under the Rehabilitation

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[8] "The Court must ask 'whether the particular impairment constitutes for the particular person a significant barrier to employment" 979 F.2d at 565.

[9] See also Carty v. Carlin, 623 F.Supp. 1181 (D.C.Md. 1985).

Act); Harrison v. Marsh, 691 F.Supp. 1223 (W.D.Mo. 1988) (typist who had lost muscle tissue to mastectomy was "handicapped individual" under the Rehabilitation Act).

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court declare the 1990/1991 Workers Compensation Act of Florida to be in violation not only the principles articulated within A.D.A. but also violative of Equal Protection and Due Process of Law including Florida's access to courts provision. It is further submitted that Petitioner be awarded the benefits prayed for.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express this 24th day of October 1995, to Cindy R. Galen, Esquire, P.O. Box 2019, Sarasota, FL 34230, Edward A. Dion, Esquire, 307 Hartman Bldg., 2012 Capital Cir. S.E., Tallahassee, FL 32399-6583, and Amy L. Sergent, Lancaster & Eure, P.A., 711 N. Washington Blvd., Sarasota, Florida 34236.

By: 
Fletcher N. Baldwin, Jr.