IN THE SUPREME COURT OF FLORIDA

MORTON BARRY, Petitioner,	)	
vs.	)	Case No. 86,365
BURDINES, et al., Respondents.	)	

On review of a decision
of the 1st District Court of Appeal,
certifying a question to be of great public importance

BRIEF OF AMICUS CURIAE, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, DIVISION OF WORKERS' COMPENSATION

In support of the position of Respondents

Edward A. Dion, General Counsel
Fla. Bar No. 267732
David C. Hawkins, Senior Attorney
Fla. Bar No. 655279
Suite 307, Hartman Building
2012 Capital Circle, Southeast
Tallahassee, FL 32399-2189
904-488-9370

Attorneys for Amicus, Florida Department of Labor and Employment Security, Division of Workers' Compensation

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INTEREST OF AMICUS

The legislature directed the Division of Workers' Compensation, Department of Labor and Employment Security, to "assume an active and forceful role" in the administration of the workers' compensation law to assure that the system "operates efficiently and with maximum benefit to both employers and employees." § 440.44(2), Fla. Stat. (1993). For this purpose, the legislature delegated particular functions to the Division, such as establishing a uniform permanent impairment rating schedule for the determination of all impairment income benefits. §§ 440.15(3)(a)2 and 3, Fla. Stat. (1993). The Division's statutory responsibilities are directly implicated by the question certified by the First District Court of Appeal, which asks "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" (ADA). 42 U.S.C. §§ 12111--117.

STATEMENT OF THE CASE AND OF THE FACTS

The Division does not dispute the Statement contained in the Petitioner's Initial Brief, but adds the following clarification. The procedural posture of this case suggests that Petitioner's brief comes to this Court essentially in the form of a complaint that is subject to a motion to dismiss by Respondents. Petitioner raised his ADA claim in his Amended Petition for Benefits in a workers' compensation proceeding, alleging simply

that the challenged section is "violative of the Americans With Disabilities Act." The complaint was unopposed by the employer/carrier as to that issue, for it is beyond dispute that the issue exceeds the jurisdiction of a judge of compensation claims. It is therefore misleading for Petitioner to represent that the judge made a "finding" of disability under the ADA. Further, it is disingenuous for Petitioner to urge this Court to accept the "finding" on the stated basis that Respondents never disputed it. Initial Brief at 27.

Similarly, a friend of Petitioner argues that the state has failed its burden of justifying the legislative line drawing in the challenged statute. See Amicus Curiae Brief of The Florida Workers' Advocates at 10-11. This boilerplate pleading overlooks the procedural history. The state was not a party to the underlying proceedings and the Division participates for the first time in the instant appeal.

The record comes to this Court without adversarial testing before a tribunal of competent jurisdiction of the factual basis of the ADA claim or the prayer for relief. For the reasons that follow, however, the Division believes that the federal question posed by the district court can be resolved in the procedural posture of this case.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal certified a focused federal question: whether the legislative limits on the period of

eligibility for wage-loss under the 1991 workers' compensation law[1] violates the non-discrimination provision of Title I of the ADA.[2]

Decisional law of the United States Supreme Court construing the predecessor of Title I's non-discrimination provision supports a construction that allows this Court to avert conflict between the state and federal laws. A balance of "countervailing considerations" recognizes on the one hand that a disabled individual is entitled to meaningful access to benefits. On the other hand, the ADA does not compel states to cast aside concerns for fiscal integrity of its program or reasonable costs to the employer. Alexander v. Choate, 469 U.S. 287 (1985). The state workers' compensation scheme respects the goal and the limits of this balance.

Moreover, the ADA ensures that disabled persons are placed on even footing with non-disabled persons. Traynor v. Turnage, 485 U.S. 535 (1988). Despite Petitioner's urging, the ADA does not direct that wage-loss benefits be allocated equally among one or more classes of disabled persons.

For these reasons, Petitioner has failed to establish a prima facie case of discrimination, lacking proof that the apportionment of wage-loss benefits impermissibly discriminates against injured employees who are permanently impaired.

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[1] § 440.15(3)(b)4.d, Fla. Stat. (1991).

[2] 42 U.S.C. § 12112(a).

Assuming for argument that Florida's wage-loss provision violates Title I, Petitioner has not articulated a claim for relief that would enable this Court to make him whole. Essentially, Petitioner wants "greater benefits," that is, more money. His grievance is, in part, that Respondents failed to assess his "age, education, skills, training and work history and actual anticipated [sic] earnings loss." Although the wage-loss provision imposes no such requirement, it is pure speculation whether a rewrite will yield greater, or possibly lesser, benefits as applied. Further, Petitioner proposes no solutions as to how this Court ought to remix the social and economic values of wage-loss in light of ADA's balancing, which assures that the benefits do not make costs to the employer unreasonable or render the plan fiscally unsound.

ARGUMENT

I. THE ALLOCATION OF WAGE-LOSS BENEFITS UNDER SECTION 440.15(3)(b)4.d, FLORIDA STATUTES (1991), IS NOT INCOMPATIBLE WITH THE TEXT OR THE UNDERLYING PURPOSES OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT.

This is the first case in which this Court has taken the opportunity to consider the relation between the federal ADA and the state workers' compensation law. In only two other reported decisions have courts considered ADA limitations on state workers' compensation benefits. In Cramer v. State, 885 F. Supp. 1545 (M.D. Fla. 1995), Petitioner's counsel filed a class action claiming that the legislature impermissibly conditioned the duration of eligibility for wage loss on an employee's physical

impairment rating.[3] The federal district ruled that the workers' compensation law provides disabled individuals with protection at least equal to that of the ADA and therefore is not preempted by the ADA. 42 U.S.C. § 12201(b). Further, it ruled that the workers' compensation law made no impermissible distinction between disabled and non-disabled individuals. 42 U.S.C. § 12112(a). As of this date, an appeal is pending in the United States Court of Appeals, Eleventh Circuit.

In the other, a unanimous panel of the district court below expressly relied on Cramer to hold that Petitioner failed to show an ADA violation. Barry v. Burdines, 20 Fla. Law Weekly D1923, D1924 (Fla. 1st DCA Aug. 23, 1995).[4] The Division maintains that there is no reason for disturbing the results reached in Cramer or Barry.

The theory advocated by Petitioner's counsel in Cramer, the case below, and the instant proceedings is identical--the legislative scheme impermissibly favors one disabled person over

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[3]The representatives of the class were two injured employees whose permanent impairment benefits derived from subsequent enactments of the section challenged in the instant proceeding. §§ 440.15(3)(a), Fla. Stat. (Supp. 1990) and 440.15(3)(a), Fla. Stat. (1993). Named as defendants were the State of Florida; Lawton Chiles; Tom Gallagher; Shirley O. Gooding; Gerald A. Lewis; Broedell Plumbing Supply, Inc.; FCCI Mutual Insurance Company; Florida Employers Insurance Service Corporation; Winn-Dixie Stores, Inc.; and Crawford & Company.

[4]Amicus incorrectly reports that the district court found that workers' compensation benefits are not within the scope of the ADA. Brief of Amicus Curiae Academy of Florida Trial Attorneys at 9.

another disabled person.[5] The question framed by the First District Court of Appeal is narrow and requires a comparison of the federal and state statutes.

The departure point in a statutory construction case is the language of the statute itself. The ADA establishes civil rights protection for persons with disabilities, yet Title I makes no mention of state workers' compensation laws, or, for that matter, award of benefits to injured employees. Instead, the cornerstone of Congress's non-discrimination policy under Title I is enacted as a general rule:

> No covered entity shall discriminate 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). Both Congress and the Equal Employment Opportunity Commission, one of several agencies to which Congress delegated administrative authority, elaborate on the meaning of this section.

A "covered entity" is defined as "[a]n employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2); 29 C.F.R. § 1630.2. The ADA defines "discriminate" by example, to include:

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[5]More completely stated, Petitioner asserts that the wage-loss benefit scheme discriminates against "those lesser-impaired but more disabled persons who receive less eligibility for workers' compensation benefits in favor [of] those greater impaired but lesser disabled persons." Initial Brief at 7-8.

> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> . . .
>
> (3) 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 a common administrative control.

42 U.S.C. § 12112(b)(1) and (3); 29 C.F.R. §§ 1630.5 and 1630.7.

A "qualified individual with a disability" under the ADA means:

> [A]n individual with a disability who, with or without reasonable accommodation,[6] can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8). With respect to an individual, "disability" means "(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." 42 U.S.C. § 12102(2); 29

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[6]Defined at 42 U.S.C. § 12111(9).

C.F.R. § 1630.2(g). Each term has special meaning under the Code.[7]

The Florida workers' compensation law is a comprehensive system that prescribes four benefit classifications. Two classifications, "permanent total disability"[8] and "temporary total disability,"[9] authorize benefits for employees whose injuries prevent them from working indefinitely or for a specified time. In each instance, benefits are calculated as a percentage of the average weekly wage at the time of the injury. Under a third classification, "temporary partial disability," benefits are calculated as a percentage of the difference between

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[7]See 29 C.F.R. § 1630.2(h)(defining "physical or mental impairment" as "(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities"); 29 C.F.R. § 1630.2(j)(defining "substantially limits"); 29 C.F.R. § 1630.2(i)(defining "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

[8]An employee who suffers an injury specified in the statute, such as the loss of both hands, in the absence of conclusive proof of substantial earning capacity, is entitled to compensation. Other injuries may qualify as permanent total if established by the facts, in which event compensation is provided until the employee is not engaged in, or physically capable of engaging in, gainful employment. § 440.15(1), Fla. Stat. (1991).

[9]An employee with a disability that is "total in character but temporary in quality" is eligible to receive compensation, not to exceed 260 weeks. An employee who suffers an injury specified in the statute, such as loss of an arm, shall be paid temporary total disability not to exceed 6 months from the date of the accident. § 440.15(2), Fla. Stat. (1991).

the employee's average weekly wage at the time of injury and the remuneration the employee is able to earn during recovery.[10]

The fourth classification, entitled "permanent impairment and wage-loss benefits," arises after the employee has reached "maximum medical improvement" so that the injury prevents the employee from returning to his or her pre-injury physical condition. This is the focus of the instant cause and requires discussion.

Essentially, compensation for wage-loss benefits under this section is a percentage of the average weekly wage at injury, payable for a statutorily specified number of weeks that corresponds to the employee's impairment rating. The wage-loss benefit under this section is defined as follows:

> Each injured worker who suffers a permanent impairment, which permanent impairment is determined pursuant to the schedule adopted in accordance with subparagraph (a)3, is not based solely on subjective complaints, and results in one or more work-related physical restrictions which are directly attributable to the injury, may be entitled to wage-loss benefits under this subsection, provided that such permanent impairment results in a work-related physical restriction which affects such employee's ability to perform the activities of his usual or other appropriate employment. . . .

§ 440.15(3)(b)1., Fla. Stat. (1991).

Of importance, Florida workers' compensation law considers both "disability" and "impairment" in awarding benefits. A "disability" refers to decreased wage-earning ability or direct economic harm. § 440.02(11), Fla. Stat. (1991)("incapacity

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[10]Benefits shall be paid for temporary partial disability not to exceed 260 weeks. § 440.15(4), Fla. Stat. (1991).

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"). In comparison, "permanent impairment" is unrelated to the economic aspects of the injury and means "any anatomic or functional abnormality or loss, existing after the date of maximum medical improvement, which results from the injury." § 440.02(19), Fla. Stat. (1991).

Consequently, the workers' compensation definition of "disability" does not correspond to the definition of "disability" under the ADA. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g). Instead, the ADA definition of "disability" is more like the workers' compensation definition of "impaired," although the two definitions are not equivalents. For instance, an injured employee with a permanent impairment may be unable to "perform the essential functions of the employment position that such individual holds or desires," preventing him or her from invoking the protection of the ADA. 42 U.S.C. § 12111(8). Also, an injured employee with a broken leg that heals within several months may claim workers' compensation, but not relief under the ADA because the employee is not "disabled." Petitioner illustrates when one individual may seek relief under both laws--workers' compensation for medical and wage-loss benefits and the ADA for reasonable accommodation.

The challenged section contains two functional components. The first prescribes a method of calculating wage loss:

> Such benefits shall be based on actual wage loss and shall not be subject to the minimum compensation rate

> set forth in s. 440.12(2). Subject to the maximum compensation rate as set forth in s. 440.12(2), such wage-loss benefits shall be equal to 80 percent of the difference between 80 percent of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared weekly; however, the weekly wage-loss benefits shall not exceed an amount equal to 66⅔% of the employee's average weekly wage at the time of injury. . . .

§ 440.15(3)(b)1., Fla. Stat. (1991). The second prescribes the period of benefit eligibility for injuries occurring after June 30, 1990:

> 4. The right to wage-loss benefits shall terminate upon the occurrence of the earliest of the following:
>
> . . .
>
> d. For injuries occurring after June 30, 1990, the employee's eligibility for wage-loss benefits shall be determined according to the following schedule:
>
> . . .
>
> (III) Seventy-eight weeks of eligibility for permanent impairment ratings greater than 6 and up to and including 9 percent.

§ 440.15(3)(b)4.d.(III).

In sum, this section awards wage-loss benefits for permanent impairment during weeks of wage-loss, in direct proportion to the impairment rating, and for a statutorily determined period based on the impairment rating.

A. PETITIONER FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION UNDER TITLE I OF THE ADA.

Petitioner has the burden of proving a claim under the ADA. United States Equal Employment Opportunity Comm'n v. AIC Security Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

The elements of a prima facie case under Title I require proof that Petitioner is disabled within the meaning of the ADA; that Petitioner is qualified, with or without reasonable accommodation, to perform the essential functions of the job; and that the employer subjected Petitioner to an adverse decision on account of a disability. Failure to establish one element ends the inquiry. Owens v. United States Postal Service, 37 F. 3d 1326 (8th Cir. 1994).[11]

As to several elements, Petitioner's theory is inconsistent with the basic teachings of the United States Supreme Court, notably Alexander v. Choate, 469 U.S. 287 (1985), and Traynor v. Turnage, 485 U.S. 535, 549 (1988). Each of those cases construed the related non-discrimination provision of the Rehabilitation Act of 1973.[12]

In Choate, the Court considered whether Tennessee could properly institute a cost-saving measure that reduced from 20 to 14 annual days the inpatient hospital care covered by the state

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[11]The district court in Cramer assumed for purposes of its Order that the representative employees of the class were qualified under the ADA, but found that the wage-loss benefit section did not violate the non-discrimination section of the ADA. In contrast the district court panel, below, concluded that Petitioner failed to establish an ADA violation.

[12]In terms comparable to the non-discrimination provision of the ADA, the Rehabilitation Act states:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794. In 1984, the Congress amended the section, in part, substituting "qualified individual with a disability" for "qualified handicapped individual."

Medicaid program. Medicaid recipients challenged the measure, claiming that the reduction disproportionately affected the handicapped.

The case focused on the quality of the access that a program must provide to handicapped individuals. The Court observed the following admonition:

> Any interpretation of Sec. 504 must . . . be responsive to two powerful but countervailing considerations--the need to give effect to the statutory objectives and the desire to keep Sec. 504 within manageable bounds. . . . We reject the boundless notion that all disparate-impact showings constitute prima facie cases under Sec. 504.

Choate, 469 U.S. at 299. On one side, the balance recognizes that an "otherwise qualified handicapped individual" must have meaningful access to a benefit. Tennessee's 14-day limit on inpatient hospital care did not deny Medicaid recipients meaningful access.

> Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit remains the individual services offered--not "adequate health care."

Id. at 303. The Court concluded that "[t]he Act does not . . . guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed." Id. at 304 (citation omitted).

By extension, Choate supports a conclusion that the ADA does not compel the legislature to apportion wage-loss benefits

equally among injured employees with a permanent impairment. Like Tennessee's Medicaid, Florida's workers' compensation scheme need not precisely tailor benefits to meet the needs of an individual injured employee. And like Medicaid, the scheme takes into account employee-specific information in establishing a wage-loss benefit level, including the physical evaluation to arrive at a rate of impairment and lost wages.

On the other side, the balance respects the state's interest in maintaining the fiscal integrity of state programs. Pandazides v. Virginia Bd. of Educ., 946 F. 2d 345, 350 (4th Cir. 1991)(citation omitted). Congress's ADA policy echoes this balancing by excusing a covered entity from making a reasonable accommodation if the accommodation imposes "an undue hardship on the operation of the business of such covered entity," 42 U.S.C. § 12112(b)(5)(A), or requires "significant difficulty or expense" on the part of the entity. H.Rep. No. 101-485(II), p.68 (1990), U.S.Code Cong. & Admin. News 1990, p. 350.

The wage-loss payment calculus of section 440.15 respects a similar balancing of interests--providing disability and medical benefits to injured employees at a reasonable cost to employers. § 440.015, Fla. Stat. (1991).

Finally, the Medicaid recipients in Choate claimed that the inclusion of an annual durational limit on inpatient coverage rendered the entirety of Tennessee's Medicaid plan in conflict with the Act. The Court rejected this argument, concluding that "nothing in the pre- or post-1973 legislative discussion of Sec.

504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid." Id. at 307 (emphasis added). Likewise, the ADA contains no textually certain expression of Congress's desire to interfere with the policy choices of state legislatures in targeting workers' compensation benefits to particular injured employees and setting time-limits on eligibility.

In Traynor, the Court reviewed a decision of the Veterans' Administration that denied a request for an extension by two honorably discharged veterans to use their educational assistance benefits under the "GI Bill." The Bill required veterans to exhaust the benefits within 10 years of discharge unless they were prevented from using their benefit within 10 years due to "a physical or mental disability which was not the result of [their] own willful misconduct." The veterans sought an extension, explaining that they were disabled on account of alcoholism. Applying its rule, which established a conclusive presumption that alcoholism that is not the product of mental illness is considered to be "willful misconduct," the Administration denied the requests.

The veterans charged that the Bill violated the Rehabilitation Act by creating a special benefit for disabled veterans who are disabled through no fault of their own. Alternatively stated, the Bill treats disabled veterans, who may obtain extensions provided they do not become disabled by their

own "willful misconduct," different from able-bodied veterans, who are precluded absolutely from obtaining an extension.

A majority of the justices upheld the Administration decision, agreeing that "Congress is entitled to establish priorities for the allocation of limited resources." Traynor, 485 U.S. at 549. Further, they observed that "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to other categories of handicapped persons." Traynor, 485 U.S. at 549; see also Modderno v. King, 871 F. Supp. 40, 43 (D.C. 1994) (concluding that the allocation of benefits in the treatment of mental illness and physical illness was within the agency's discretion to allocate benefits "amongst an encyclopedia of illnesses," and that mere disparity in the allocation presented no cognizable claim under Section 504).

Traynor supports a conclusion that the allocation of workers' compensation benefits between classes of injured employees is not inconsistent with the ADA, even though one or more classes may not be entitled to receive equal benefits.

Petitioner and Amicus contend that Traynor can be distinguished on the basis of Helen L. v. DiDario, 446 F. 3d 325 (3d Cir.), cert denied sub nom. Pennsylvania Secretary of Public Welfare v. Idell S., 116 S.Ct. 64 (1995), which concerned the operation of two Pennsylvania programs to assist the physically disabled. One program operated institutional nursing homes and the other operated attendant care, which enabled an individual to

live at home. Plaintiff qualified for the attendant care program, but due to lack of funding, the Commonwealth placed her in a nursing home and wait-listed her for attendant care. Plaintiff was required to receive services in the nursing home, which lacked contacts with non-disabled persons. She alleged that the Commonwealth violated Title II of the ADA "by providing services in a nursing home rather than in the 'most integrated setting appropriate.'" Id. at 328.

A panel of the Third Circuit ruled that the plaintiff was entitled to summary judgment. The court regarded Traynor as "easily distinguished," id. at 335, explaining that Traynor was unconcerned with the "integration mandate" of the ADA. Id. at 336. Moreover, "Congress has stated that 'discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization.' 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." Id. (citation omitted).

The circuit court's decision in Helen L. offers insufficient logic to break with United States Supreme Court precedent in the circumstances of this case. Traynor interpreted the non-discrimination provision of the Rehabilitation Act of 1973, which is the forerunner of the non-discrimination provision of Title I. As such, Traynor is highly relevant. Helen L. considered eligibility for services under alternative care programs, not

wage-loss benefits under workers' compensation. As noted above, not all permanently impaired employees are "disabled" within the meaning of the ADA. Finally, the Third Circuit panel advocates for an interpretation of the ADA that ought to emerge from Congress rather than the courts.

B. THE ADA DOES NOT PREEMPT § 440.15(3)(b)4.d, FLORIDA STATUTES (1991).

Congress enacted an express preemption provision, which provides in part, that the ADA shall not invalidate or limit state remedies, rights, or procedures that provide "greater or equal protection." 42 U.S.C. § 12201(b). If as argued above the challenged benefit provision and the ADA can be harmonized, then the state law need not yield to the federal. Certainly, injured employees are free to bring suits under both, for each provides a separate basis of relief. See Wood v. County of Alameda, 875 F. Supp. 659, 665 (N.D. Cal. 1995).

Remedies not preempted by the ADA include state tort claims that award greater remedies than prescribed by the ADA,[13] public health laws that impose requirements on certain employees, employers, or businesses, but do not discriminate with respect to persons with disabilities,[14] and disease control laws that require all employees in a specified job category to follow

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[13]H.Rep. No. 101-336, p. 70 (1990), U.S.Code Cong. & Admin. News 1990, p. 493.

[14]H.Rep. No. 101-336, p. 84 (1990), U.S.Code Cong. & Admin. News 1990, p. 593.

particular hygienic procedures.[15] Section 440.15(3)(b) exhibits similar characteristics in that it creates an entitlement to wage-loss, whereas the ADA contains no such guarantee.

C. IF WORKERS' COMPENSATION IS "INSURANCE" UNDER THE ADA, AS PETITIONER ASSERTS, THEN RESPONDENTS HAVE A POTENTIAL DEFENSE TO A NON-DISCRIMINATION CLAIM UNDER TITLE I

Petitioner and the Academy of Florida Trial Attorneys assert that workers' compensation is "insurance" within the scope of the ADA.[16] If the contention is true, Respondents may have a defense under Title I to this action.

Congress intended to treat the insurance industry differently by carving out an exception under Title I. It declared that Title I neither prohibits nor restricts the following:

> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based or not inconsistent with State law; or
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> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering risks that are based on or not inconsistent with State law. . . .

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[15] Id.

[16] Initial Brief at 18 (citing § 501(c), codified at 42 U.S.C. § 12201(c)); Brief of Amicus Curiae Academy of Florida Trial Attorneys at 24, 33-37.

42 U.S.C. § 12201(c)(1) and (2).[17] The history of this section reports that the ADA "afford[s] to insurers and employers the same opportunities they would enjoy in the absence of this legislation to design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification. This legislation assures that decisions concerning the insurance of persons with disabilities which are not based on bona fide risk classification be made in conformity with non-discrimination requirements." H.Rep. No. 101-485(II), p.137-38 (1990), U.S.Code Cong. & Admin. News 1990, p. 420-21.

The insurance industry operates on principles of risk underwriting, classification, or administration. Underwriting refers to "'the application of the various risk factors or risk classes to a particular individual or group (usually only if the group is small) for the purpose of determining whether to provide insurance.'" Piquard v. City of E. Peoria, 887 F. Supp. 1106, 1120 (C.D. Ill. 1995)(quoting EEOC Interim Policy at 1054-55 n.15). This section "requires that underwriting and classification of risks be based on sound actuarial principles or

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[17]Section 12201 leaves unaffected "the way that the insurance industry does business in accordance with State laws" and "the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services, claims, and similar insurance related activities based on classification of risks as regulated by the States." H.Rep. No. 101-485 (II), p.136 (1990), U.S.Code Cong. & Admin. News 1990, p. 419.

be related to actual or reasonably anticipated experience." H.Rep. No. 101-336, p. 71 (1990), U.S.Code Cong. & Admin. News 1990, p. 494; see also 4 ADA Compliance Guide at p. 3 (July 1993)(citing EEOC interim enforcement guide that would justify a disability-based distinctions in an employer-provided health insurance plan that is supported by actuarial data or "'reasonable experience'") (citation omitted).

In comparison, section 440.15(3)(b)4 codifies the state's policy for allocating funds among the class of injured employees with permanent partial impairments. Benefit allocation is driven by legislative aims of assuring "quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer." § 440.015, Fla. Stat. (1991). This distinction, coupled with silence in section 12201(c) that would bring state-prescribed workers' compensation benefits within its ambit, suggest that Congress may not have extended the exemption to such benefits.

However, similar principles guide the assessment of impairment. For injuries after July 1, 1990, including those suffered by Petitioner, the legislature adopted the Minnesota Department of Labor and Industry Disability Schedule as the standard for determining physical impairment. § 440.15(3)(a)3, Fla. Stat. (1991). Petitioner's 9% impairment rating was determined by a physician utilizing the 1983 Minnesota Disability Schedule. Rather being arbitrary, as Petitioner argues, the

Supreme Court of Minnesota found that the Schedule demonstrates objectivity.

> As part of the overhaul of the state workers' compensation system in 1983, the legislature authorized the Commissioner of Labor and Industry to establish a schedule of degrees of disability arranged according to the body part impaired. The schedule was intended to avoid subjective and widely divergent impairment ratings by physicians for the same injuries, which had fostered litigation. The new schedules promote objectivity by providing a percentage figure of disability, formerly left to the discretion of the physician. The schedule was also intended to be exhaustive; over 1,000 categories of injuries are included.

Weber v. City of Inver Grove Heights, 461 N.W. 2d 918, 919-20 (Minn. 1990)(citations omitted); see also Schmidt v. Modern Metals Foundry, Inc., 424 N.W. 2d 538, 541-42 (Minn. 1988) (reporting that the 1983 amendments establishing the disability schedule represented a legitimate legislative objective "to decrease costs, avoid benefit stacking, reduce litigation, reduce the need for reliance on often conflicting medical testimony, and promote objectivity, consistency, and more uniform results in workers' compensation decisions").

This year, the Texas Supreme Court rejected constitutional attacks against its workers' compensation law, which relies on a system of rating impairments like Florida in 1991. As to the permanent partial benefits, the court noted:

> Although debated among experts, physical impairment is one criteria for measuring benefits, and it was within the Legislature's discretion to utilize this standard. At least twenty-three other states use impairment, as measured by the [American Medical Association's Guides to the Evaluation of Permanent Impairment] or some similar rating method, in awarding workers' compensation benefits.

Texas Workers' Compensation Comm'n v. Garcia, 893 S.W. 2d 504, 522 (Tex. 1995)(footnote omitted).

The objectivity of impairment rating shown by Weber and the wide-spread acceptance of schedules noted by Garcia strongly suggest that Florida's impairment system respects reasoned legislative choices and refute Petitioner's assertion that the statute is wholly arbitrary. The workers' compensation scheme for benefit allocation demonstrates attributes of objectivity akin to accepted practices of the insurance industry. If workers' compensation is "insurance," as Petitioner argues, Respondents ought to be able to assert a defense under Title I because they simply paid benefits "based on . . .State law." 42 U.S.C. § 12201.

II. ASSUMING THE EXISTENCE OF AN ADA VIOLATION, PETITIONER HAS NOT EXPRESSED CLEARLY A BASIS FOR RELIEF AND ASKS THIS COURT TO SPECULATE ON CRITERIA THAT WOULD MAKE HIM WHOLE.

Assuming for argument that Florida's wage-loss provision violates the ADA non-discrimination standard, the Division confesses difficulty in answering the particular remedy Petitioner would have this Court fashion. In part, Petitioner "seeks eligibility for wage loss and impairment disability benefits based on his disability and not merely upon the utilization of an impairment rating." Initial Brief at 39. Wage-loss benefits are not based "merely" on impairment ratings, but take into account an employee's lost wages, subject to a cap of 66⅔ of the average weekly wage.

Also Petitioner asks for "declaratory relief pursuant to 42 U.S.C. § 2000(e) declaring that the Respondents' acts violate the ADA and granting Petitioner entitlement to benefits greater than are presently afforded under Fla. Stat. § 440.15(3)." Initial Brief at 39. Title 42 contains no such citation. Instead, the prayer appears to seek relief under one or more declaratory judgment laws[18] and enforcement provisions of Title VII of the Civil Rights Act of 1964.[19]

The ADA imports the enforcement provisions of Title VII. 42 U.S.C. § 12117(a). The Division acknowledges that state and federal courts have concurrent jurisdiction to adjudicate Title VII claims. Yellow Freight Syst., Inc. v. Donnelly, 494 U.S. 820, 826 (1990). A principal purpose of Title VII guides enforcement of ADA claims, that is "'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" A remedy ought to restore persons as nearly as possible to the position they would have been in had the wrong not occurred. Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1090 (1983)(plurality)(citation omitted).

Essentially, Petitioner asks this Court to rewrite section 440.15(3)(b)4. He presumes that the judiciary is equipped to

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[18]28 U.S.C. § 2201(a)(creating remedy and empowering federal courts to grant relief); § 86.011, Fla. Stat. (1991)(granting to circuit and county courts the jurisdiction to render declaratory judgments).

[19]42 U.S.C. §§ 2000e-4, 5, 6, 8, and 9.

redefine the social and economic values of wage-loss, a task that is constitutionally within the province of the legislature. Unlike Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), where the Court rehabilitated the Florida Contraband Forfeiture Act by prescribing minimal due process requirements, the instant cause presents a claim of substantive complexity. Further complicating the search for appropriate relief, Petitioner proposes no solutions as to how this Court ought to remix those factors in light of the balancing of interests inherent in a fiscally sound benefit plan. Choate, 469 U.S. at 299.

Petitioner also assumes that, if the section did all he wants, he would be entitled to "greater benefits," that is, more money. The premise is neither logical nor legally supportable. The ADA does not mandate that legislatures provide particular services, Williams v. Secretary of the Executive Office of Human Services, 609 N.E. 2d 447, 452 (Mass. 1993), or establish system-wide percentages of benefits. Id. at 453. Nor does the ADA guarantee that greater benefits alone will remedy a violation. It is pure speculation whether a rewrite of the section to require an assessment of Petitioner's "age, education, skills, training and work history and actual anticipated [sic] earnings loss," Initial Brief at 20, will yield greater, or possibly lesser, benefits.

The absence of a clearly stated basis for relief makes difficult the crafting of appropriate remedy by this Court or by a lower tribunal on remand.

CONCLUSION

For the reasons expressed above, the Division urges this Court to decline Petitioner's invitation to find conflict between the workers' compensation law and the ADA.

Respectfully submitted this 20th day of November 1995.

David C. Hawkins

Edward A. Dion, General Counsel
Fla. Bar No. 267732
David C. Hawkins, Senior Attorney
Fla. Bar No. 655279
Florida Department of Labor and
Employment Security
Suite 307, Hartman Building
2012 Capital Circle, Southeast
Tallahassee, FL 32399-2189
904-488-9370

CERTIFICATE OF SERVICE

I hereby certify that an original and seven copies of the foregoing Brief of Amicus Curiae, Department of Labor and Employment Security, Division of Workers' Compensation, have been filed with Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399, and that a true and correct copy was furnished by U.S. mail to Alex Lancaster, Esq., Lancaster & Eure, P.A., Post Office Drawer 4257, Sarasota, FL 34230, Attorney for Petitioner; Claire Hamner Matturro, Esq., 869 Lee Road, Cairo, GA 31728, attorney for Amicus Academy of Florida Trial Attorneys; Fletcher N. Baldwin Jr., Esq., University of Florida, College of Law, Gainesville, FL 32611-7625, attorney for Amicus The Florida Workers Advocates; and Cindy R. Galen, Esq., O'Riorden, Mann, Hootman, Ingram & Dunkle, P.A., Post Office Box 2019, Sarasota, FL 34230, attorney for Respondents, this 20th day of November 1995.

David L. Hawkins