SUPREME COURT OF FLORIDA

MORTON BARRY, Petitioner, v. BURDINES, et al. Respondents.	)	Case No.: 86,365 District Court of Appeal, 1st District No. 94-2067

ON APPEAL
FROM THE
FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF

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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 Constitution, Article V, Section 3.

QUESTION ON APPEAL

The Question on Appeal from 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 OF THE FACTS

This case arises out of an accident that took place when the Petitioner, who is now 68, was injured in an accident out of and in the course of employment on August 6, 1992, while working for Respondent, Burdines. (R. 6) Prior to that time he had been working for the employer for over a year and one-half, had good health and no disability to his back. He had an average weekly wage of $211.99 per week. (R. 25,120,121) Burdines, at all times pertinent to this case had employed more than 25 employees. (R. 121)

After the accident, the Petitioner received temporary total disability compensation from the date of the accident through the date of maximum medical improvement which, according to Dr. Lilla Shkolnikov, was November 23, 1992. (R. 31) Thereafter, beginning on November 23, 1992, the Petitioner received 78 weeks of wage loss in accordance with Fla. Stat. §440.15. (R. 7,8,25,26) During these 78 weeks, the Petitioner returned to work at Burdines where they reasonably accommodated his return to work. However, at the job, he was only physically able to make approximately one half of his pre-injury wages or approximately $100.00 per week due to his disability. He left Burdines in January of 1993. (R. 121)

The Petitioner was not able to return to full-time work after reaching maximum medical improvement and had to work at limited activities. He was not able to return to his preinjury wages and, due to his disability, he could not do many of the activities he was performing prior to his accident at his place of employment.

(R. 121,19,20,71)

Dr. Lilla Shkolnikov testified by deposition. (R. 28) She is a board-certified Physical Medicine and Rehabilitation Specialist or Physiatrist. (R. 28) She indicated that she first saw the Petitioner in August of 1992. His complaints were of right-side back pain which appeared to be the result of an L4-L5 disc injury received from the accident of August 6, 1992. (R. 31) She treated his back problem conservatively and kept the Petitioner off total work activities until November 23, 1992 when she opined that the Petitioner reached a point of maximum medical improvement and indicated that there would be no further significant medical improvement. She stated he would be left with a physical impairment. (R. 31, 32)

Dr. Shkolnikov testified that she felt the Petitioner had a 9% impairment rating using the Minnesota Guidelines required by Florida Law. She placed severe limitations on the Petitioner and indicated that he could only lift around 10 pounds, stand two hours, walk two to three hours, sit two hours and drive two hours. She also indicated that he could occasionally reach, climb, bend and squat, and that these limitations would be of a permanent nature. In her opinion, the Petitioner had a physical impairment which would significantly limit his major life activities. She also indicated that he was significantly restricted in the manner, condition and duration of activities requiring the use of his back and this was a major life activity, which would be restricted for him as compared to the physical abilities and activities he did not

have prior to the accident. (R. 32-38) She also opined that the nature and severity of this impairment was of such a duration that it was expected to last over a lifetime. Not only was the injury permanent but was expected to have a long-term impact on the Petitioner's ability to work. She felt that the Petitioner would be permanently impaired and significantly restricted in his ability to perform certain classifications of job activities. (R. 32-39)

Anita Rothard also testified extensively by deposition (R. 49-84) and indicated that she had an undergraduate degree in sociology and psychology from the University of California, a two-year Master's degree in Rehabilitation Counseling from the University of Southern California and that she was a licensed mental health counselor in Florida and nationally certified as a Certified Rehabilitation Counselor and a Certified Vocational Evaluator. (R. 50-52)

Ms. Rothard indicated that she interviewed the Petitioner and reviewed the medical depositions and reports. (R. 52, 53) She also testified extensively as to her background and experience in working with disabled persons. The Judge of Compensation Claims accepted Ms. Rothard as an expert in the field of rehabilitation. She opined that, because the Petitioner was limited physically in accordance with Dr. Shkolnikov's testimony, the Petitioner would fall within the meaning of a disabled person as that term was used in the Americans with Disabilities Act. (R. 53-58)

At the hearing held on Wednesday, May 18, 1994, there was an agreement between the parties that the Petitioner was injured on

August 6, 1992, while working for Burdines and that the Petitioner was paid temporary total disability benefits until reaching maximum medical improvement on November 23, 1992. There was also an agreement that the Employer/Carrier paid to the Petitioner 78 weeks of wage loss in accordance with Fla. Stat. §440.15. All the parties agreed that the Petitioner was not permanently totally disabled and that reasonable accommodations had been made by the employer after the Petitioner returned to work for the employer upon reaching maximum medical improvement. The parties agreed also stipulated that the employer had 25 or more employees.

It was the position of the Petitioner that the payment to him of only 78 weeks of benefits in accordance with the impairment schedule set forth in §440.15 Fla. Stat. violated the Petitioner's rights under the Americans with Disabilities Act and that he had been denied the same eligibility or opportunity for wage loss benefits that all other "disabled" persons injured while working for the employer are entitled. It was also the Petitioner's position that payment of wage loss for 78 weeks violated several State and Federal Constitutional rights. It was the position of the Employer/Carrier that they had not violated any of the rights of the Petitioner under the Americans with Disabilities Act and this court was without jurisdiction to award benefits based upon constitutional issues, either Federal or State raised by the Petitioner.

After hearing all the evidence and reviewing the testimony, the Judge of Compensation Claims, The Honorable Joseph E. Willis,

entered an Order on June 20, 1994, in which he analyzed the various arguments of the parties and the factual situations involved. Judge Willis found that the stipulations of the parties would be accepted along with the deposition testimony of Dr. Shkolnikov and Anita Rothard. (R. 124, 125) Judge Willis then analyzed the issues brought before the hearing and concluded that he was unable to make a determination as to whether or not the Florida Workers' Compensation Law, in effect on the date of the Petitioner's injury, violated the Americans with Disabilities Act since it was not within his power as a non-constitutional Judge of Compensation Claims to find the statute in question violated any of the State of Florida or U.S. Federal laws brought forth by the Petitioner herein. He, therefore, found that the Petitioner was not eligible for any further wage loss benefits and denied the Petitioner's claim herein.

From the Order entered on June 20, 1994, appeal was properly taken on June 22, 1994. By per curium opinion dated August 23, 1995, the First District Court of Appeal declined to find that the Petitioner had established a violation of the Americans With Disabilities Act, but certified the following question as being of great public importance:

> 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?

This Court has jurisdiction pursuant to Rule of Appellate Procedure 9.030(a)(2)(A)(v).

SUMMARY OF THE ARGUMENT

The purpose of the Americans with Disabilities Act is to eliminate discrimination against disabled persons. Florida's Workers' Compensation Law violates the ADA by denying Petitioner an individualized assessment of his disability and by segregating and classifying disabled individuals entitled to wage loss compensation benefits using an arbitrary impairment rating. This system completely ignores other factors which relate to and actually determine disability.

The purpose of Florida's Workers' Compensation law is to quickly and efficiently extend benefits to workers injured on-the-job and to compensate them for their inability to earn wages which they were earning prior to their injury. To effectively carry out this purpose, judges should look at the employee's work history, education, job skills, impairment rating, training and actual wage loss in determining actual disability and entitlement to workers' compensation disability benefits.

However, injured workers in Florida are not permitted an evaluation of all of these factors. Persons eligible for workers' compensation disability benefits in Florida are not entitled to an individualized assessment under current Florida law to determine their disability. By denying these persons such an assessment and by enforcing the "scheduled injury" scheme, the Respondents are unlawfully discriminating against those lesser-impaired but more disabled persons who receive less eligibility for workers' compensation benefits in favor those greater impaired but lesser

disabled persons.

To allow entitlement to workers' compensation benefits based strictly on an impairment rating, which may or may not adequately reflect disability, thwarts the Congressional goal of providing a national mandate for the elimination of discrimination and segregation against persons with disabilities. The Americans with Disabilities Act applies and prohibits any and all discrimination against disabled persons. The Florida law violates the Americans with Disabilities Act.

ARGUMENT

ISSUES ON APPEAL

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?

SUGGESTED ANALYTICAL SOLUTION

In resolving almost all issues presented herein, the following is a suggested four-step process which will aid in the analysis.

1. Does the Americans With Disabilities Act apply to protect injured workers from the discrimination which results from the workers' compensation law? Resolution of this issue requires an examination of:

   a) the Legislative history of the Americans with Disabilities Act and related disability legislation; and

   b) cases brought under the ADA and similar laws which protect disabled persons from discrimination;

2. Is the Petitioner "disabled" and entitled to the protections of the Americans with Disabilities Act? Issues herein will generally include such matters as:

   a) whether or not the Plaintiff has pleaded sufficient facts to allege that he/she is "disabled" within the meaning of the statute; and

   b) whether or not the Plaintiff has pleaded sufficient facts to allege that he/she meets the statutory definition of a "qualified individual with a disability"?

3. Are state workers' compensation laws properly subject to

ADA scrutiny? Issues herein will generally include such matters as:

a) whether or not Congress intended workers' compensation to fall within the meaning of the ADA;

b) whether or not workers' compensation is under the control of the employers versus the government; and

c) whether or not workers' compensation is actually a term, condition, privilege or fringe benefit covered by the ADA?

4. Does the Florida Workers' Compensation Act violate the Americans with Disabilities Act? Issues herein will generally include such matters as:

a) whether or not the "step schedule impairment" and "impairment schedule" systems actually limit, segregate or classify; and

b) whether or not the discrimination is based upon disability?

If all four questions can be answered in the affirmative, then the workers' compensation statute must fall. Each issue will be considered in turn.

I
DOES THE ADA APPLY TO PROTECT INJURED WORKERS FROM THE DISCRIMINATION WHICH RESULTS FROM THE WORKERS' COMPENSATION LAW?

A. LEGISLATIVE HISTORY OF THE ADA

The enactment of §504 of the Rehabilitation Act of 1973, which covered employers who were recipients of federal funds, along with the Architectural Barriers Act of 1968 and the Urban Mass

Transportation Act of 1970, began a long-awaited process which would ultimately lead to the ADA. Section 504 of the Rehabilitation Act was the first official Congressional recognition of societal barriers and prejudices which exist for people with disabilities. Congress recognized that people with disabilities as a group face similar discrimination in employment, education and access to society. See 42 U.S.C. §12101.

The Rehabilitation Act is a classic civil rights act, and although extending basic civil rights protections to persons with disabilities, the Rehabilitation Act did not require the private sector to extend these rights to persons with disabilities without benefit of a federal grant or contract. There was a definite need for legislation more comprehensive than the Rehabilitation Act. Id.

Past discrimination was due to the attitude of society that disabled persons were not entitled to the protections that other groups of Americans enjoy. This attitude resulted in their persecution, exclusion and segregation. Twenty-six years after the Civil Rights Act of 1964, the United States finally conferred upon disabled persons the same civil rights protections other minorities enjoy. See 42 U.S.C. §12101, et seq.

The Americans with Disabilities Act was initiated by a draft bill prepared by the National Council on Disability. The first version of the ADA was introduced to Congress in April 1998. In May 1989, a finalized version of the ADA was introduced. The ADA was officially passed on July 26, 1990, when President George Bush

signed the ADA into law. See U.S. Senate Committee on Labor & Human Resources Subcommittee on the Handicapped and U.S. House of Representatives Committee on Education and Labor Subcommittee on Select Education (Sept. 1988) and U.S. House of Representatives Committee on the Judiciary (May, Oct. 1989).

The ADA is based on the idea that people with disabilities are capable members of society and should be treated as such. Accommodating them is a basic tenent of civil rights. There are forty-three million Americans with disabilities. Prior to the Rehab Act, these persons with disabilities had not been considered as part of the societal norm, so no effort had been made to bring down the barriers that existed. 42 U.S.C. §12101(a)(1) et seq. The ADA is not only a civil rights action for many unknown persons with disabilities, it is also self-serving legislation for society at large. Through birth, disease, advanced age, or accident, we all have the potential to be or know someone who is disabled. See U.S. Senate Committee on Labor and Human Resources Subcommittee on the Handicapped and U.S. House of Representatives Committee on Education and Labor Subcommittee on Select Education 1988.

The substantive provisions of the ADA are drawn from §501, §503 and §504 of the Rehabilitation Act of 1973. The procedural provisions come from the Civil Rights Act of 1964. The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." See 42 U.S.C. §12182(b)(1).

The Senate and House committees found that existing state and

federal law was inadequate to address discrimination against people with disabilities. See House Labor report at 47, Senate Report at 6, 18-19. The ADA contains two concepts of anti-discrimination. One is the traditional civil rights characteristics; i.e., prohibiting limitation, segregation or classification on the basis of discrimination. 42 U.S.C. §12112(b)(1). The second concept is that a person's disability is often relevant to his or her ability to perform a job or enjoy a service. However, all disabled persons must not be viewed in a vacuum. The underlying goal is to identify aspects of the disability that effect job performance and determine whether modifications or adjustments should be made. See 42 U.S.C. §12111(a) and 29 C.F.R. §1630.2(a). These goals mandate the individualized assessment that Petitioner is seeking through this action.

The ADA protects an "individual with a disability." See 42 U.S.C. §12112, §12132, §12182. One prong in the "disability" definition is one of an impairment that "substantially limits" a disabled person in a "major life activity." Major life activities include "...walking, seeing, hearing, speaking, learning and working." See 29 C.F.R. §1630.2(i) and 28 C.F.R. §36.104(2). The ADA requires "reasonable accommodation" for disabled employees. 42 U.S.C. §12112(b)(5). It also requires modification of "policies, practices, and procedures" and provision of "auxiliary aids and services" and physical changes in the access of the goods and services. 42 U.S.C. §12182(b)(2a) II - IV, §12183. In the employment arena, the basic requirement is that a person with a

disability may not be discriminated against on the basis of his/her disability in terms of hiring, firing, promotion or other aspects of employment.

An employer or other covered entity cannot deny a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions in dispersing benefits. Decisions which are not based on risk classification must be made in conformity with the ADA. See 29 C.F.R. §1630.16.

Congressional understanding of the effect of discrimination on people with disabilities was strongly expressed in the findings and purposes in Section 2 of the ADA, 42 U.S.C. §12101 which states:

"(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, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

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

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualifications 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 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 stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the nations'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."

The ADA presents new opportunities to persons with disabilities in the United States. People with disabilities are beginning to be viewed as active, contributing members of our society. Unfortunately, this segment of our population that was excluded for so long has found that the law will not quickly change attitudes that have developed over many years. Society, with the help of the ADA, needs to work to erode barriers and to provide accessibility to a higher quality of life for all disabled Americans.

Before passage of the Americans with Disabilities Act, discrimination based on a persons' disability was subject to a rational review standard. In McGann v. H & H Music Company, 946 F.2d 401 (5th Cir. 1991), the Court accepted the employer's alleged rational basis for discrimination: that equal coverage for AIDS or other conditions would bankrupt the plan. The ADA challenges disability distinctions in insurance and treats them as race-based distinctions are treated under the Civil Rights Act. Insurers and employers currently use factors the ADA defines as disabilities to limit the scope, duration, or eligibility requirements for their plans. Common examples include limits on benefits for diabetes, arthritis, heart disease, drug addiction, and alcoholism, and pre-

existing condition exclusions or limitations on coverage.[1]

The ADA's legislative history supports applying the statute to insurance and employee benefits cases. See Legislative History of Public Law 101-336, The Americans With Disabilities Act, Serial Number 102-A, 102-B and 102-C. The House and Senate Committees Report specifically names insurances that cover employment benefits under Title I. Under Title III, the legislative history states: "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 impose increased risk." See Legislative History supra at 182, 409, 511.

The ADA prohibits "disparate treatment" and disparate impact" which is defined as classifications based directly on different disabilities or classifications having the effect of discrimination based on disability, which tend to screen out people with disabilities. See 42 U.S.C. §12112(b) and Legislative History, supra at 128, 160, 334, 378. Section 501(c) of the ADA states:

> "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, kind of coverage available to an individual, or charge a

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[1] Congressional Res. Serv. Insuring The Uninsured: Options and Analysis, Serial No. 100-dd, 100-bb, and 100-0, Doc. No. 440, 100th Cong., 2nd Sess. (1988) as cited in the Americans With Disabilities Act: Fighting Discrimination, Monica E. McFaden, Trial Magazine, September 1995.

different rate for the same coverage solely because of physical and 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." See Legislative History supra at 183, 409, 511.

Thus, insurers cannot deny coverage without an independent actuarial analysis of the risk, cannot refuse to provide insurance simply because it would be more expensive, or implement pre-existing condition clauses or other clauses that result in disparate impact. This data cannot be outdated or inaccurate, or based on myths, or fears, stereotypes, or false assumptions. The Defendant insurer must provide proof of an undue hardship or unacceptable risk. Under the ADA, classifications on the basis of disability are permitted only if:

(1) the validity of the differentiation can be documented by recent data; or

(2) the costs of creating a classification premium, or benefit program not based on disability would be unduly burdensome or would fundamentally alter the nature of insurance or benefit product.[2]

The Florida Workers' Compensation law violates the intention of drafters of the ADA by limiting and denying benefits to disabled

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[2] Congressional Res. Serv., Insuring the Uninsured: Options and Analysis, Serial No. 100-dd, 100-bb, and 100-0, Doc No. 440, 100th Cong., 2nd Sess. (1988) as cited in the Americans With Disabilities Act: Fighting Discrimination, Monica E. McFaden, Trial Magazine, September 1995.

persons based on an arbitrary impairment rating. Claimants for workers' compensation benefits require an individualized assessment of all factors which render them disabled and in need of wage loss benefits including: age, education, skills, training and work history and actual anticipated earnings loss. Denying coverage without this analysis simply because it is less expensive and expedient discriminates against persons with disabilities and perpetuates the societal barriers the ADA was conceived to eradicate.

B. PROTECTING DISABLED PERSONS

The purpose of the ADA is to eliminate handicapped based discrimination and segregation. If Congress, in enacting the ADA, had been only concerned about disparate impact or treatment of the disabled as compared to their non-disabled counterparts, the statement of Congressional purpose, which provides a national mandate for the elimination of discrimination against individuals with disabilities as stated in 42 U.S.C §12101(2)(b)(1), would be non sequitur. Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995).

The ADA is not only concerned with the disabled versus non-disabled but also with discrimination of disabled persons in favor of other disabled persons. In Martin v. Voinovich, 840 F.Supp. 1175 (S.D. Ohio 1993), the court stated that a strict rule that the Rehabilitation Act §504 could never apply between persons with different disabilities would thwart the goal of eliminating handicapped-based discrimination and segregation. Id. at 1192.

In the instant case, the Court of Appeals cited to Cramer v.

State, 885 F. Supp 1545 (M.D. Fla. 1995), which case involved similar issues as are presented herein. In Cramer, the District Court determined, after hearing on the Defendants' motion to dismiss, that, "although Workers' Compensation statutes would violate the ADA if they somehow discriminated against individuals with a disability as opposed to non-disabled individuals, such a statute is not at issue here." Id. at 1549 However, the District Court's holding is very narrow. In Cramer, the Defendants' motions to dismiss were granted based primarily on the court's conviction that the holding in Traynor v. Turnage, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618, (1988), and its progeny were dispositive of the issues in the case. For the reasons that follow, the District Court judge's reliance on these cases is misplaced.

First, the court incorrectly applied Traynor and assumed that the Plaintiffs' challenge only applied to disabled versus disabled persons. Although this is one facet of the Cramer case, the Plaintiffs also challenged the discrimination which occurs when nondisabled persons with an impairment rating are favored over disabled persons with little or no impairment ratings in determining eligibility for wage loss benefits. Under Fla. Stat. §440.15, (1990 and 1993), persons who are not disabled, but nonetheless have an impairment rating, will receive disability compensation based on their impairment rating. Disabled persons with little or no impairment rating can actually receive less disability than non-disabled persons with a large impairment rating. Discrimination is inherent in this system. The ruling in

Traynor is limited to disabled versus disabled persons, and it is not logical or correct to apply Traynor to those situations of non-disabled being favored over disabled as presently exists under Fla. Stat. §440.15.

Second, the court in Martin v. Voinovich, 840 F. Supp 1175 (S.D. Ohio 1993) held that even though certain persons served by Defendant's programs happened to be mentally retarded, the discrimination suffered by Plaintiffs solely by reason of their additional handicap was actionable under §504. Id. at 1191. The court held that "nothing in §504 suggests that it can never apply between persons with different handicaps" and that such a ruling would "allow discrimination on the basis of disability". Id. at 1192. Severity of a handicap is itself a handicap which cannot be the sole basis for denying access to a program, benefit or service. Id.

Third, Traynor was brought under the Rehabilitation Act. In Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995), the Plaintiff brought her discrimination suit under the Americans With Disabilities Act. In DiDario, the court found that the ADA prohibited unnecessary segregation of an individual with disabilities in relation to other disabled persons. Id. at 332, 334. The court found that the Rehab Act contains weaknesses that "arise from its statutory language, the limited extent of its coverage, inadequate enforcement mechanisms and erratic judicial interpretations." Id. at 330, citing Burgdorf, The Americans With Disabilities Act: Analysis and Implications of a Second-Generation

Civil Rights Statute, 26 Harv. C.R. - C.L.L. Rev 413,431 (1991).

In 1990, Congress addressed the need for more comprehensive civil rights' legislation to eliminate discrimination against individuals with disabilities. It was this need to provide a clear, strong, consistent, enforceable standard that resulted in the ADA. See H.R. Rep No. 485(11) 101st Cong. 2d Sess 40,50(1990), Id at 330. Clearly, DiDario clarifies and refines Traynor and illustrates why Traynor is not applicable herein. When the ADA is applied to the Traynor facts and to the facts at hand, discrimination against disabled persons in favor of other disabled persons is a violation of the ADA.

Fourth, disabled persons who were denied the benefit in Traynor were not being denied benefits based solely on their handicap. The Plaintiffs were denied the benefits based upon their own willful misconduct. The court reasoned that the anti-discrimination parts of the Rehab Act could not be used to overcome their own willful conduct which attributed to their disability. The court found a legitimate governmental interest to disallow benefits to those who had engaged in willful misconduct. Under these circumstances, the discrimination of disabled versus disabled was permissible. Conversely, the Petitioner herein is not guilty of any misconduct which would justify discrimination in his entitlement to benefits and there is no legitimate government interest for denying the benefits to a person who is otherwise qualified for them.

Fifth, the plaintiffs in Traynor, prior to being denied

benefits, had already been granted the opportunity for an individual inquiry and assessment into whether or not they were eligible for the benefits. Each individual who claimed to have been disabled by alcoholism was entitled under §1662(a)(1) to an "individualized assessment" of whether his or her alcoholic condition was the result of mental illness. Id. at 1383. The Petitioner herein, unlike in Traynor, has never been given an opportunity for an individualized assessment to determine eligibility for disability benefits. The Petitioner's eligibility has been predetermined by equating his level of disability to his impairment rating and, as previously shown, the predetermination is not logical and not in harmony with the legal definitions of the terms "impairment" and "disability". These terms are being used synonymously in Fla. Stat. §440.15 when they, in fact, are not synonymous.

Sixth, in addition to the requirement of an individualized assessment, discrimination against a group of disabled persons in favor of other disabled persons is not permitted without a legitimate governmental interest which outweighs the individual rights of the disabled persons. Discrimination within subclasses of disabled persons is only permitted if it is based on some legitimate and compelling governmental interest; such as, (a) public policy objection where individuals exhibited willful misconduct (see Traynor, supra); (b) contagiousness posing danger to the public health and safety (see School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987), and

Casey v. Lewis, 733 F.Supp.1365 (D.Ariz.1991)); (c) fundamental alteration of the program (see Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995); or (d) the class of disabled persons could not benefit from the service (see Garrity v. Gallen, 522 F.Supp. 171 (D.New.Hamp 1981).

The requirement of an individualized assessment was mandated by the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). Therein, the court held that blanket discriminatory prohibitions against disabled individuals, even within a class of disabled persons, is prohibited, and an individualized inquiry is mandated to determine whether or not an individual is otherwise qualified for the benefit sought. Further, the court determined that there was no legitimate governmental interest which would outweigh the individual's right to the benefits.

In Pandazides v. Virginia Board of Education, 946 F.2d 345 (4th Cir. 1991), the court held that a Board cannot merely mechanically invoke any set of requirements and pronounce the handicapped applicant not otherwise qualified. There must be an individualized inquiry and findings of fact. To forego the individualized assessment reduces the term "otherwise qualified" to a tautology. The situation of the Petitioner herein is exactly what the court in Pandazides was trying to prohibit. If a person is disabled, there must be some type of individualized inquiry to determine his or her disability, and no mechanical set of preestablished standards, as is present in Fla. Stat. §440.15, can

be relied upon to determine entitlement or eligibility for benefits. Petitioner has been denied an individualized assessment in determining his eligibility for disability benefits.

The Cramer opinion, and its reliance on Traynor, should be rejected as the basis for the lower court's holding as it is not controlling herein. The Americans With Disabilities Act was enacted after the Traynor decision, to "set in place the necessary civil rights' protections for people with disabilities" and to broaden the general prohibition against disability-based discrimination contained in the Rehab Act. Helen L. DiDario, supra, at 329. An "individualized assessment" to determine eligibility for benefits is mandated, and a blanket denial or categorization of benefits based strictly on impairment is in violation of the very purpose of the ADA. For this reason, the lower court's judgment was in error and should properly be reversed.

II
IS THE PETITIONER "DISABLED" AND ENTITLED TO THE PROTECTIONS OF THE AMERICANS WITH DISABILITIES ACT?

Petitioner's physical impairments were the result of an on-the-job injury. Petitioner is now "disabled" under 42 U.S.C. §12102 (2)(A), in that his permanent physical impairment substantially limits one or more of his major life activities. Petitioner also meets the definition of a disabled person under 42 U.S.C. §12102(2)(B), because he has a record of such physical impairment. Petitioner is disabled under 42 U.S.C. § 12102(2)(C), in that Respondents, their agents and employees, regard Petitioner

as having physical impairments to an extent that they believe Petitioner is unable to perform essential functions of his job.

Under 42 U.S.C. §12111, whether or not Petitioner is a "qualified individual with a disability" is a factual determination. A Petitioner is a "qualified individual with a disability" if he is "qualified to perform the essential functions of the job, with or without reasonable accommodation." 42 U.S.C. § 12111(8).

The Court should accept the findings of the Judge of Compensation Claims as true. Judge Willis made an evidentiary finding that Petitioner was disabled, and the Respondents have never disputed this fact, either in the lower court or on appeal.

III
ARE STATE WORKERS' COMPENSATION LAWS PROPERLY SUBJECTED TO ADA SCRUTINY?

In O'Neil v. Department of Transportation, 468 So.2d 932 (Fla. 1985), cert. den., 474 U.S. 861 (1985), the Florida Supreme Court was called upon to decide if the prohibitions of the federal Age Discrimination in Employment Act extended to the state workers' compensation laws. The Florida Supreme Court, in accepting the DCA's reasoning that workers' compensation fell outside of the ADEA, based their decision on the following two factors:

First, §623(a) of the ADEA was titled, "Employer Practices." The court reasoned that this implied that Congress intended the prohibitions of ADEA to reach only those matters over which employers have control. Since employers have no control over the state workers' compensation law, the court reasoned, Congress must

not have intended it to be encompassed by the ADEA. The court emphasized that the title itself was significant since it was specifically designated as "Employer Practices."

Second, in upholding the state statute, the court also found it significant that the Department of Labor's interpretation of the federal statute, contained in 29 C.F.R. §860.1 et seq, (1983), supported the finding that ADEA was only meant to apply to those matters over which the employers had control because subsection §860.120(e) specifically recognized that the availability of government benefits, such as Medicare, may be based upon age and these sections clearly distinguished between employer vs. government-provided benefits.

A close scrutiny of the Age Discrimination in Employment Act demonstrates that it is quite distinguishable from the Americans With Disabilities Act in numerous aspects:

First, the ADA has no title "Employer Practices" designation. Instead, the ADA at 29 C.F.R. §1630.4 makes a broad, inclusive and categoric title of "Discrimination Prohibited." The wording of the two sections in the ADA and ADEA is fairly identical except for the titled headings. This difference is not unintentional and is evidence of specific Congressional intent not to limit the proscriptions and prohibitions of the ADA only to matters over which the employer has control.

Second, the more recent ADA enactment, unlike the older ADEA, does not make any distinction between government versus employer acts or benefits. In fact, the ADA is much broader in all its

definitions. These broad definitions are further evidence of Congressional intent that the ADA's breadth be far-reaching in terms of prohibiting discrimination to disabled persons

Third, unlike the ADEA, the ADA makes no requirement of "employer control" over the policy or behavior in question versus "government control." The ADA is extremely broad and all-encompassing.

Fourth, the preemption clause of the ADA, contained in 29 C.F.R. §1630.1(b) and (c), states that, although the ADA does not preempt any state law that grants disabled individuals greater protection than the ADA, state laws which go below the ADA's minimum standards would violate the federal statute. In other words, the ADA sets a "base line" which all other state laws cannot go below. This is significantly different from the preemption clause of the ADEA, found at 29 C.F.R. §860.120(9), which specifically provides that the ADEA does not preempt state age discrimination in employment laws.

The ADA sets a baseline or minimum standard which the state law must meet and not go below. If there is a conflict, the federal law obviously must prevail. 29 C.F.R. §1630.1 (b) and (c) specifically indicate it is no defense to rely on a state statute which violates the ADA. Also, 29 C.F.R. §1630.4(i), when read in conjunction with 29 C.F.R. §1630.1 (b) and (c), can only lead to the conclusion that state laws which go below the ADA's "base line" must give way to or be preempted by the higher standards of the federal ADA. To argue otherwise means Congress intended to allow

state laws which discriminate against disabled persons to exist side by side with the ADA. This clearly cannot be the intent of the ADA.

Fifth, even if workers' compensation benefits are not determined to be included under the ADA's catch-all provision of 29 C.F.R. §1630.4(i) of "any other terms, conditions, or privileges of employment," they are properly included as, "fringe benefits available by virtue of employment, whether or not administered by the covered entity" under 29 C.F.R. §1630.4(f). This language obviously shows specific Congressional intent to include activities which are outside the employer's control, such as workers' compensation benefits. In addition, in the case of Acosta v. Kraco, Inc., 471 So.2d 24 (Fla. 1985), citing Sasso v. Ram Property Management 452 So.2d 932 (Fla. 1984), app. dismissed, 105 S.Ct 489 (1984), the Florida Supreme Court stated that workers' compensation benefits are "fringe benefits." Therefore, it is obvious that workers' compensation benefits must fall within the provisions of §1630.4(f), if not §1630.4(i).[3]

Sixth, in interpreting the ADA, Congress, the EEOC and the federal courts have all looked primarily for guidance in Title VII

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[3]**29 C.F.R. §1630.4**, Discrimination Prohibited, states: "It is unlawful for a covered entity to discriminate on the basis of disability . . . in regard to: . . .(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;.." (emphasis added). If Sasso is indeed controlling, and workers' compensation benefits are properly classified as "fringe benefits," it matters not that the carrier in this case is not an employer of the claimant. An insurance carrier is prohibited from discriminatory conduct under this section.

of the 1964 Civil Rights Act. The language of the ADA at 42 U.S.C. §12112(a) closely resembles Title VII at 42 U.S.C. 2000e-2(a), which prohibits employment discrimination on the basis of race, color, religion, sex or national origin. The similarities between these two laws are not unintentional, and this is evidenced by the legislative history, the similar wording and phraseology of the laws and the enforcement agencies' and courts' interpretations thereof.

Seventh, the EEOC has also published "A Technical Assistance Manual On The Employment Provisions (Title I) Of The Americans With Disabilities Act", Volume I, Tab 300. Section 9.6 (b) specifically states that the ADA requirements supersede any conflicting state workers' compensation laws.

In summary, workers' compensation must fall within the meaning of "terms, conditions, privileges" and/or "fringe benefits" of employment. It is obvious that Congress did not intend to exclude state laws which are in conflict with the language and policies of the ADA. Accordingly, state workers' compensation laws are properly subjected to ADA scrutiny. The next issue is whether or not the state law discriminates.

IV
DOES THE FLORIDA WORKERS' COMPENSATION LAW VIOLATE THE ADA?

It is unlawful under the ADA for a covered entity to "limit, segregate or classify" employees with disabilities in a way that adversely affects their employment opportunities. See 29 C.F.R. §1630.5. Since employees with disabilities are to be afforded

equal access to whatever health insurance coverage the employer provides other employees, it is clear that discrimination is not allowed against one group of disabled persons in favor of another group of disabled workers. Furthermore, as under the Rehabilitation Act, benefit reductions adopted for discriminatory reasons will violate the ADA. See Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712 (1985).

Benefits to disabled persons cannot be denied or segregated or classified in a discriminatory manner. One group of disabled persons cannot be entitled to benefits while others are denied benefits based on discriminatory reasons. The ADA prohibits discrimination in favor of or against other disabled workers. There cannot be disparity in the treatment of one group of disabled workers versus another group of disabled workers.

The American Medical Association's publication, Guides to the Evaluation of Permanent Impairment, Fourth Edition, defines the terms of "impairment" and "disability" as used therein. The Guides define the word "impairment" as, "an alteration of an individual's health status that is assessed by medical means," as compared to the term "disability" which is "an assessment by non-medical means of an alteration of an individual's capacity to meet personal, social or occupational demands, or statutory regulatory requirements." Stated another way, "impairment" is what is wrong with the body part organ system and its functioning; "disability" is the gap between what the individual can do and what the individual needs or wants to do.

The AMA guidelines also point out that an individual who is "impaired" is not necessarily "disabled" and that impairment gives rise to disability only when the medical condition limits the individual's capacity to meet the demands of life's activities.

The intent of the Florida Workers' Compensation Law is to assure the quick and efficient delivery of disability and medical benefits to an injured worker. Fla. Stat. §440.02 defines "disability" as an 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. "Permanent impairment" is defined under Fla. Stat. §440.02, as meaning any anatomic or functional abnormality or loss, which exists after the date of maximum medical improvement and which results from the injury. A "disabled" person, as defined by the Americans With Disabilities Act, means a person who has a physical impairment that substantially limits one or more major life activities, or who has a record of such impairment, or is regarded as having such an impairment. There is no significant difference between the ADA and Florida law definitions. The definitions of disability and impairment as used in the ADA, Florida Statutes and the by the AMA, are quite similar and practically synonymous.

To further analyze the arguments herein, use the hypothetical example of Plaintiffs "A," "B," and "C". The illustration is as follows: First, assume "A" has pre-injury wages of $300.00 and post-injury wages of $150.00 and 9% impairment rating. "B" has the same pre-injury wages as "A" and post-injury wages of $200.00 and

a 19% impairment rating. "C" has pre- and post-injury wages of $300.00 and a 19% impairment rating. All three injured workers have the same compensation rate (2/3 x $300.00 or $200.00).

	PRE-INJURY WAGES	POST-INJURY WAGES	IMPAIRMENT	DISABILITY	COMPENSATION RATE
A	300	150	9%	50%	200
B	300	200	19%	33%	200
C	300	300	19%	0%	200

Under Florida Workers' Compensation Law prior to July 1, 1990, "A" and "B", after reaching maximum medical improvement, would both be entitled to receive approximately two-thirds of the difference between their pre-injury wages and post-injury wages for 525 weeks. All disabled workers in Florida at that time had the same eligibility of 525 weeks for wage loss benefits regardless of their impairment. Once they had a disability, they were entitled to approximately two-thirds of the difference between their pre-injury wages and post-injury wages for the same length of time. "C," with an impairment but no disability, was not eligible for benefits.

Under Florida Workers' Compensation Law between July 1, 1990 and January 1, 1994, "A" would only be entitled to approximately two-thirds of the difference between pre-injury wages and post-injury wages for 78 weeks. The 78 weeks are predetermined based upon the 9% impairment rating. By contrast, "B", who was less disabled, but had a higher impairment rating than "A", is entitled to two thirds of the difference between his pre-injury wages and post injury wages for 230 weeks (19% = 230 weeks). In other words, "A", who is more disabled, is not entitled to the same eligibility

for benefits as "B" and is entitled to actually less benefits.

Under the Florida Workers' Compensation Law in effect after January 1, 1994, "A" would be entitled to 27 weeks (9% x 3) times $100.00 (which is 50% of his $200.00 compensation rate) or $2,700.00 total for his disability. By contrast, "B" would be entitled to 57 weeks (19% x 3) times $100.00 (50% of his $200.00 compensation rate) or $5,700.00. Here again, the lesser disabled but more impaired "B" is entitled to more benefits than the more disabled "A", who is less impaired. "C" will also receive $5,700.00, like "B", even though he suffers no disability.

Under all three scenarios, we have disabled and impaired workers entitled to workers' compensation disability benefits. Their entitlement to disability benefits is a term, condition, privilege, or fringe benefit of their employment required by law. While there may be some instances where disabled workers are entitled to or eligible for the same benefits, clearly the eligibility for these benefits in Florida is based strictly on an impairment rating after July, 1990.

The plan for the 1990 and 1993 Workers' Compensation laws was to "schedule" all injuries based on impairments. This is quite similar to prior Florida Workers' Compensation Laws in which entitlement to benefits was based upon "scheduled injuries," which were separated and distinguished from whole-body injuries. The leading Florida case on this issue was Magic City Bottle & Supply Company v. Robinson, 116 So.2d 240 (Fla. 1959). Therein, Justice Drew, writing for the Court, recognized that the underlying

principle of compensation law--all compensation law--is that benefits relate to loss of earning capacity and not to physical injury, as such. In scheduled benefits, the basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, based on observed probabilities in many similar cases, instead of a specifically proven one based on the individual's actual wage loss experience. The Court noted that to avoid this impossible task, the apparently "cold-blooded system" of putting average price tags on arms, legs, eyes and fingers has been devised.

Obviously, Magic City was decided prior to the Americans With Disabilities Act becoming effective. Nonetheless, it is noteworthy that although the terminology might have been slightly varied, the distinction between disability and impairment has long been recognized.

The Petitioner urges that Fla. Stat. §440.15(3) is in violation of the ADA. It is clear that many disabled workers in the Florida workers' compensation system may not be entitled to the same eligibility for wage loss disability benefits as other disabled workers. There is no question Fla. Stat. §440.15(3), quantifies eligibility for disability compensation to injured workers based upon impairment ratings, without regard to disability. The law clearly allows more eligibility for benefits to greater-impaired persons than it does to lesser-impaired persons and clearly all disabled persons are not entitled to the same eligibility for benefits.

Payment of disability benefits in Florida disregards the distinction between disability and impairment as those definitions are defined in Florida statutes, including the 1993 and 1994 statutes, case law, and as commonly used in medical guides such as those published by the American Medical Association. In addition, the Florida law considers disability to be synonymous with impairment. Herein lies the fallacy of the law.

It is clear that lesser-impaired disabled persons are not eligible for the same benefits as other disabled persons who have a greater impairment rating. For example, someone who is disabled and who will suffer a 50% reduction of his earnings for the remainder of his life may only be entitled to 78 weeks of eligibility for benefits, while another person who has a greater impairment rating but has a lesser disability or no disability at all may be entitled to more eligibility for impairment benefits. This is true under Florida Workers' Compensation Law after 1990.

Benefits under Fla. Stat. §440.15 (3) (1990) and (1993) are disbursed based upon impairment ratings--the larger the impairment rating, the greater entitlement to benefits. The fault in the system is that disability cannot be quantified by impairment. The scheduled injury system is based on a false premise. It fails to take into consideration other factors such as the individual's age, work history, education, and wage loss in determining disability benefit eligibility. The discriminatory disbursement of benefits based strictly on impairment is analogous to the disbursement of benefits based upon skin color. A system wherein the lighter the

skin, the greater the benefits, would obviously not be acceptable. The system by its very nature is discriminatory.

Petitioner does not allege that all persons entitled to wage loss automatically have had their ADA rights violated. Petitioner only alleges that disabled persons like him (those injured and disabled workers entitled to Florida Workers' Compensation disability benefits who have a small impairment rating but larger disability) are discriminated against in favor of other injured workers with a larger or greater impairment but with little or no disability.

As the court explained in Baker v. California Land Title Co., 349 F.Supp. 235 (Cal. 1972), discrimination is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored. The Florida Workers' Compensation law discriminates against disabled persons because their benefits have been limited, segregated and classified under Florida law based strictly upon impairment without regard to actual disability.

Florida Statute §440.15 (1990) and (1993) violates the Americans with Disabilities Act in that it limits, segregates and classifies eligibility for benefits for disabled persons based upon the use of an impairment rating without regard to other factors which contribute to an individual's actual disability. The "scheduled injury" system of Fla. Stat. §440.15 is not rationally-related to the goal of compensating a disabled worker for lost earnings suffered because of his disability. For these reasons,

the state law discriminates in violation of the Americans With Disabilities Act, and must therefore be declared invalid.

CONCLUSION

Petitioner, MORTON BARRY, seeks to enforce his rights under the Americans with Disabilities Act. He seeks eligibility for wage loss and impairment disability benefits based on his disability and not merely upon the utilization of an impairment rating.

Petitioner requests this Court to grant 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).

Respectfully submitted this 24th day of October 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US mail 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; Jerold Feuer, Esquire, 402 N.E. 36 St., Miami, FL 33137-3913; Professor Fletcher Baldwin, University of Florida College of Law, 2500 S.W. Second Avenue, Gainesville, FL 32611; and Claire Matturo, Esquire, 869 Cairo, GA 31728.

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