SUPREME COURT OF FLORIDA

MORTON BARRY,

Petitioner,

vs.

BURDINES et.al

Respondents
_____/

Case No.: 94-02067

Case No.: 86,365

District Court of Appeal,
First District #94-2067

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF

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This is an appeal from an Order, entered August 23, 1995, of the State of Florida, In the District Court of Appeal, First District.

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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 as phrased 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

Respondents, BURDINES AND THE TRAVELERS, respectfully submit that the Statement of the Case and Facts as set forth by Petitioner in his Brief is incomplete and, in some instances, inaccurate. As such, Respondents supplement the Statement of the Case and Facts as follows:

The Petitioner, MORTON BARRY, was injured as a result of an industrial accident while working for Burdines on August 6, 1992. (App. 2) After his industrial accident, the Petitioner returned to work at Burdines; restricting his work to approximately two days per week. (R. 18, 19) The claimant began receiving wage loss benefits beginning November 23, 1992 and, at that time, he returned to work at Burdines and was reasonably accommodated according to his restrictions. (App. 3) The claimant left his employment at Burdines in or about January, 1994 and began working as a part-time substitute teacher. (R. 21); (App. 3)

The claimant's Claim for Benefits was that he was disabled and had a disability, wage loss greater than 78 weeks; that §440.15, Fla. Stat. is violative of the Americans with Disabilities Act (ADA) since it discriminates against the claimant who is disabled and has a disability and the Statute and the employer/carrier do not allow the claimant the same eligibility for disability and wage loss benefits allowed to all disabled workers; penalties, interest, attorney's fees, costs; and that §440.15, Fla. Stat. violates the claimant's rights under the Florida Constitution and the United States Constitution for equal access and due process and equal

protection rights. (R. 26) The employer/carrier defended on the grounds that the claimant had received all wage loss benefits to which he is entitled under the Florida Workers' Compensation Act; that §440.15, Fla. Stat. is not violative of the ADA; that the Judge of Compensation Claims does not have jurisdiction to decide the issue of whether §440.15, Fla. Stat., violates the ADA; that §440.15, Fla. Stat. does not violate the claimant's constitutional rights under the Florida or Federal law; no penalties, interest, costs or attorney's fees are due. (R. 26)

A hearing was held on May 18, 1994 before the Honorable Joseph E. Willis, Judge of Compensation Claims. (R. 2) The parties stipulated that the claimant was not permanently totally disabled and had received 78 weeks of wage loss benefits which expired the end of April, 1994. (R. 25) Additionally, the parties agreed that the claimant had an impairment rating of 9% and reached maximum medical improvement on November 23, 1992. (R. 25) The claimant testified and entered into evidence the depositions of Dr. Lilla Shkolnikov and Anita Rothard, as well as various portions of § 440., Fla. Stat. and parts of the Florida Impairment Rating Guide and the Guides to the Evaluation of Permanent Impairment. (R. 27-65; 83-109)

The Judge of Compensation Claims issued an Order on June 20, 1994 wherein he analyzed the arguments as set forth by the claimant and found that it was not within his jurisdiction as a non-constitutional Judge of Compensation Claims to rule upon whether the Florida Workers' Compensation Law, in affect on the date of the

claimant's injury, violates the ADA. (R. 120) He further found that the parties agreed that the claimant was not permanently and totally disabled; that the claimant was entitled to 78 weeks of benefits in accordance with § 440.15, Fla. Stat. and was paid these benefits; and that the claimant was not eligible for any further wage loss benefits under the Florida Statutes and, therefore, denied the claimant's claim with prejudice. (R. 128) Thereafter, the Appellant filed a timely Notice of Appeal. (R. 129)

The Judge of Compensation Claims' Order, entered on June 20, 1994, was appealed and by a per curium opinion dated August 23, 1995, the First District Court of Appeal found that the Petitioner had not established a violation of the ADA. However, they 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?

STANDARD OF REVIEW

This Appeal presents an issue of law thereby creating a de novo standard of review.

ISSUES ON APPEAL

ISSUE:

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

SUMMARY OF ARGUMENT

The question before this Honorable Court 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 (ADA). Respondents contend that this section is not subject to the ADA, however, if it is found that it is subject to the act then the statute comports with the ADA and both laws can be implemented simultaneously. The Florida Workers' Compensation Law and the ADA do not conflict and, the Florida Workers' Compensation Law is an added benefit thereby creating an equal and/or greater right to an individual which also allows both laws to act simultaneously.

Both the Florida Workers' Compensation Law and the ADA were implemented for different purposes and defines "disability" as two separate concepts. The concept of disability must be taken into account when determining whether the Florida Workers' Compensation Law comports with the ADA. Under the Workers' Compensation Act, all injured employees, whether "disabled" (as defined by the ADA) are entitled to, and have equal access to, Florida Workers' Compensation benefits based upon an impairment rating. The opportunity and eligibility to obtain the benefit is the same for all individuals. The amount of the benefits differ, however, the amount of benefits received in most insurance plans differ and differences which an individual may recover for loss of wage earning capacity is inherent in the very nature of the wage loss system. An impairment rating is individually assigned, as is the

amount of the claimant's wage loss (based upon his individual average weekly wage); his pre-injury earnings, and his post-injury earnings.

Under the Workers' Compensation Law, no benefits are being capped based upon a particular disability, a discreet group of disabilities, or disability in general. The claimant's physical condition may or may not be a "disability" (as defined by the ADA) and can be any condition resulting from an industrial accident. All injured employees are eligible for wage loss benefits once they are assessed with an impairment rating and given individual physical restrictions caused by their industrial accident. T h e employer/carrier is not discontinuing benefits to one class of persons as the class of persons involved within the workers' compensation scheme are individuals who have been injured in an industrial accident, is assigned an impairment rating, and has restrictions diminishing their wage loss capacity.

No certain type of injury is being discriminated against as all persons who suffer from an industrial accident and who have an impairment rating and restrictions receive benefits for a specific amount of time. The time limit is a method in which an individual can be subsidized subsequent to reaching maximum medical improvement in order to assist him in re-entering the job market.

Respondent respectfully submits that there is no equal protection or ADA violation as all members of the class, the class being individuals injured as a result of an industrial accident, are eligible for wage loss benefits; all members of the class

receive an amount based upon their own individual injury as assessed by a physician who assigns an impairment rating; their own individual restrictions; and their individual average weekly wage, pre-injury earnings, and post-injury earnings. The impairment rating is not limited to a certain "disability" and any individual suffering from an industrial injury may be assigned with the same impairment rating and would be entitled to the same benefits based upon a static formula applied equally to everyone in that class. Therefore, there is no violation of the ADA as there is no disability-based distinctions being applied.

Respondent respectfully submits that the Petitioner's argument is flawed in that he is equating an impairment rating with a "disability" (as defined within the ADA) and is stating that the class allegedly being discriminated against is a class of individuals within a specific impairment rating rather than the entire class which consists of all injured workers entitled to benefits under the workers' compensation system.

Workers' compensation benefits are not employer-provided benefits but are benefits which are scheduled and determined by the Florida Legislature and Division of Worker's Compensation. The employer has no direct control over the provisions and, as such, workers' compensation is not employer-provided benefits but, rather, is a government-provided benefit. Since it is mandatory, it is not a "fringe benefit" provided to employees. In the case at bar, the employer, Burdine's, did not establish any classifications nor did they determine the standards, criteria, or methods to

determine the amount of benefits the claimant could receive under the Workers' Compensation Law. Burdine's did not discriminate in any fashion against the claimant due to a "disability" as that term is defined under the ADA. Burdine's provided the claimant with the opportunity to receive workers' compensation and, indeed, the employer/carrier provided seventy-eight weeks of wage loss benefits to the claimant. Neither the employer nor carrier singled out a particular disability, a discreet group of disabilities, or disability in general. Any classifications cannot be attributed to the employer or carrier as they are equally providing the opportunity to the claimant for him to receive workers' compensation benefits as prescribed by the Florida Legislature.

As there is no conflict between Section 440.15(3)(b) 4.d Fla. Stat. (1991) and the ADA, both laws may exist simultaneously and both may provide benefits so long as the individual is qualified to receive benefits under both systems. The employer/carrier would therefore be liable under both the workers' compensation statute and the ADA, but neither would supersede the other. Both would work in tandem as both provide their own definitions of disability, have their own goals, and are designed for different purposes and different protections to individuals. The standards, criteria, methods of administration, and the payment of wage loss benefits is rational and furthers the objectives of the State of Florida.

Wherefore, Florida Statute Section 440.15(3)(b) 4.d, (1991) is not subject to the ADA. However, if the statute is subject to the ADA, it comports with the requirements of Title I of the ADA.

Therefore, respondents respectfully request that this Honorable Court find that the workers' compensation statute in question is valid, is not superseded by the ADA, and that the statute is applicable to protect the interests of all individuals injured as a result of an industrial accident.

SUGGESTION TO THE COURT

Respondents respectfully submit that prior to deciding this case, this Court should consider the fact that since the Judge of Compensation Claims lacked jurisdiction to determine whether Section 440.15, Florida Statutes (1991) violated the provisions of the ADA, the Florida Constitution, or the Federal Constitution, his Order wherein he makes specific findings regarding the ADA, the meanings within the act, and the affect or meaning of the deposition testimony of Dr. Lilla Shkolnikov and Anita Rothard are null and void and not binding. They are merely dicta. See Bigler v. Department of Banking & Finance, 392 So.2d 249 (Fla. 1974). The only valid findings in the Judge's opinion are that he is without jurisdiction to find that the claimant's rights have been violated under the ADA, the Florida Constitution or the United States Constitution; and that the claimant is not permanently totally disabled, was entitled to 78 weeks of wage loss benefits in accordance with Section 440.15, Florida Statutes (1991), that those benefits were paid, and that the claimant was not eligible for any further wage loss benefits under the Florida Statutes. (App. 9, 10)

Additionally, Respondent respectfully submits that this Court should also take notice that when the Petitioner filed his Claim for Benefits before the Judge of Compensation Claims, he failed to assert any ADA claim with the Equal Employment Opportunity Commission (EEOC), as required by the ADA. Therefore, the claimant has not exhausted his legal remedies and cannot rely on the Judge

of Compensation Claims' opinion, nor the opinion of the First District Court of Appeal, regarding any findings as to issues relating to the ADA.

Specifically, a person seeking to recover based upon a claim under the ADA is required to file a charge with the EEOC. See 42 U.S.C. 12100 et. seq. Thereafter, the EEOC determines whether there is a right for the Petitioner to sue and, if so, issues a right-to-sue letter. Respondents respectfully submit that the Petitioner failed to pursue his ADA claim with the proper administrative authority and, as such, lacked standing before the Judge of Compensation Claims, the First District Court of Appeal, and this Honorable Court.

ARGUMENT

ISSUE ON APPEAL

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

Respondents agree that Section 504 of the Rehabilitation Act of 1973 is the basis upon which the ADA was drafted. The ADA is based upon the idea that people with disabilities must be treated fairly and be mainstreamed into society. As such, there are several situations in which individuals with disabilities must be accommodated. 42 U.S.C. 12101 et. seq.

The ADA prohibits discrimination against individuals with disabilities in employment, public services and transportation, public accommodations, and telecommunication services. Id. Title I of the ADA, which is the subject of this Appeal, became effective on July 26, 1992, for employers of 25 or more employees and on July 26, 1994, for employers of 15 or more employees. Title I prohibits discriminatory hiring and personnel practices against qualified individuals, and requires employers to make reasonable efforts to accommodate an individuals' mental or physical limitations, as long as the accommodations do not present an undue hardship to the employer. 42 U.S.C. 12101 et. seq.

The ADA prohibits employers from discriminating against qualified individuals with disabilities who, with or without a reasonable accommodation, can perform the essential functions of a job. The Act defines the terms "disability" "qualified individuals" and, according to the EEOC, the definition of the term

"disability" under the ADA reflects a congressional intent to prohibit the specific forms of discrimination that people with disabilities face. The definition is tailored to the purpose of eliminating discrimination prohibited by the ADA and, therefore, it may differ from the definition of "disability" under other statutes. A determination of whether a charging party has a "disability" turns on whether he or she meets the ADA definition of that term. EEOC Compliance Manual §902.

A charging party has a "disability", for purposes of the ADA, if he (1) has a physical or mental impairment that substantially limits a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. At least one of these conditions must be met in order for the individual to be considered to have a "disability" under the ADA. 42 U.S.C. 12101 et. seq. The definition of impairment under the ADA is a physiological disorder affecting one or more of a number of body systems or a mental or psychological disorder. Id. In order to have a "disability" the disabled individual must have an impairment which substantially limits a major life activity. Examples of major life activities include caring for oneself; performing manual tasks; walking; seeing; hearing; speaking; breathing; learning; working; sitting; standing; lifting; and mental and emotional processes such as thinking, concentrating, and interacting with others. Id.

An impairment is substantially limiting if it prohibits or significantly restricts an individual's ability to perform a major

life activity as compared to the ability of the average person in the general population to perform the same activity. When deciding whether there is a substantial limitation of the major life activity, one must look at the nature and severity of the impairment, the duration or expected duration of the impairment, the permanency or long term impact of the impairment, and whether the impairment substantially limits an individuals ability to work by preventing or significantly restricting the individual from performing a class of jobs or a broad range of jobs in various classes. Id.

The next prong in determining whether the individual is afforded protection under the ADA is to determine whether that individual is a "qualified individual". In order to be a "qualified individual with a disability", for purposes of the ADA, the individual must be able to perform the essential functions of the employment position that the individual holds or desires, with or without reasonable accommodations. 42 U.S.C. 12111. Therefore, in order to come within the protection of the ADA the individual must be able to perform the particular job in question, with or without an accommodation. Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963 (E.B.N.C. 1994).

Title I also provides that:

> ...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.

The term "discriminate" includes limiting, segregating, or classifying a job applicant or employee which adversely effects his opportunities or status due to the disability; participating in a contractural or other arrangement or relationship which has the effect of subjecting the qualified applicant with a disability to the discrimination prohibited; utilizing standards, criteria, or methods of administration that have the effect of discrimination due to disability; or that perpetuate the discrimination of others who are subject to common administrative control. 42 U.S.C. 12112.

Since the ADA is a Federal statute, it may, in appropriate situations, supersede any existing State law. However, in order for a Federal law to supersede a State law, there must be conflict between the two. See Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed. 2d 752 (1983). Additionally, in order to avoid the Federal law (ADA) from superseding the State law (the Florida Workers' Compensation Law), the State law must provide greater or equal protection for the rights of individuals with disabilities than are afforded by the legislation (ADA). Silkwood v. Kerr-McGee Corporation, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984); See 42 U.S.C. 12201(b).

The Florida Workers' Compensation Law of 1991 does not conflict with the ADA and affords greater or equal protection to individuals. Therefore, both laws may act simultaneously without the ADA superseding the Florida Workers' Compensation Law. Pacific

Gas & Electric Company, supra. The Florida Workers' Compensation Law and the ADA were implemented to achieve different goals and for different purposes. The ADA was implemented to protect qualified individuals with disabilities from employment discrimination; while the Workers' Compensation Law was implemented to provide the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer. 42 U.S.C. §§12101, 12112; §440.015, Fla. Stat. (1991).

It is important to distinguish the definition of "disability" within the laws. 42 U.S.C. 12102 (1990); §440.02(11), Fla. Stat. (1991). An individual, under the Florida Workers' Compensation Law, is receiving benefits for loss of wage earning capacity and does not involve any form of discrimination in terms of employment opportunities against a "disabled" individual as defined within the ADA. Therefore, there is no conflict between the Statutes and they can be enforced simultaneously. Additionally, the Workers' Compensation system affords greater or equal protection as all injured employees are covered and all who are eligible receive compensation based upon their loss of wage earning capacity regardless of their "disability". These benefits are in addition to any mandates within the ADA and therefore, are equal to, and/or greater than, those afforded by the ADA. Therefore, pre-emption is not applicable. See Silkwood, supra; Pacific Gas Company, supra.

Under the Florida Workers' Compensation Law, disability is defined as the 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. §440.02(11), Fla Stat. (1991). Compensation under the Florida Workers' Compensation system is designed to compensate a worker for a loss of wage earning capacity attributable to, and resulting from, an industrial injury; not for loss of earnings or pain and suffering. See J. J. Murphy & Son, Inc. v. Gibbs, 137 So. 2d 553 (Fla. 1962); Port Everglades Terminal Company, Inc. v. Canty, 120 So. 2d 596 (Fla. 1960). Disability for Florida Workers' Compensation purposes is grounded both on loss of wage earning capacity and on actual physical impairment. Walker v. Electronic Products and Engineering Company, 248 So. 2d 161 (Fla. 1971). The underlying principle is that benefits relate to loss of earning capacity and not physical injury. Magic City Bottle & Supply Company v. Robinson, 116 So. 2d 240 (Fla. 1959). The Florida Legislature specifically defined "disability" and it is a term of art under the Florida Workers' Compensation Act. It is not equated with "handicap" or "disability" as defined under the ADA. Rather, disability, for purposes of Florida Workers' Compensation, refers to the claimant's wage earning capacity. See §440.02(11), Fla. Stat. (1991).

The distinction between disability under the Florida Workers' Compensation Law and the ADA is significant in that workers' compensation has a specific definition of disability (wage earning capacity) and is designed to compensate an injured worker, regardless of whether he is "disabled" as defined within the ADA.

The Florida Workers' Compensation system is not an insurance plan, is State run, is a mandatory scheme which employers are

required to provide and allows all persons, whether or not "disabled" (under the definition within the ADA) to entitlement to benefits.

Respondents respectfully submit that Florida Workers' Compensation benefits are not employer provided benefits but are benefits which are scheduled and determined by the Florida Legislature and Division of Workers' Compensation. Petitioner claims that Workers' Compensation falls within Title I of the ADA as it is considered a term, condition, or privilege of employment or, alternatively, a fringe benefit available by virtue of employment, whether or not administered by the covered entity. 29 C.F.R. §1630.4(i); 29 C.F.R. §1630.4(f).

Although the cases of Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984), appeal dismissed, 105 S.Ct. 489 (1984) and Acosta v. Kraco, Inc., 471 So.2d 24 (Fla. 1985) stated that workers' compensation benefits are "fringe benefits" such a statement was not definitive in regards to whether it is a fringe benefit under the ADA and these cases are not dispositive that workers' compensation is a fringe benefit of employment. All injured employees, whether "disabled" under the definition within the ADA, are entitled, and have equal access to Florida Workers' Compensation benefits based upon an impairment rating. An injured worker may or may not be a "disabled" person as defined by the ADA. Regardless of whether the person is "disabled" he is entitled to Florida Workers' Compensation benefits. The opportunity and eligibility to obtain the benefit is the same for all individuals.

In O'Neil v. Department of Transportation, 442 So.2d 961 (Fla. 1st DCA 1983), the District Court of Appeal found that the Florida Workers' Compensation Law did not constitute a "term, condition, or privilege of employment" under the Age Discrimination & Employment Act. The court found that although workers' compensation is part of an employment contract between the employer and an employee it did not mean that Congress intended the provision of various state workers' compensation laws to fall within the prohibitions of Age Discrimination & Employment Act. O'Neil, supra.

The ADA requires that "No covered entity shall discriminate against a qualified individual with a disability 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. In the case at bar, Respondents respectfully submit that Florida Workers' Compensation is not a benefit plan, is not employee compensation, and does not fall under "other terms, conditions, and privileges of employment" within the ADA. Additionally, Workers' Compensation is not a health plan, nor a disability plan, but rather, is a type of social welfare which compensates an injured employee for his loss of wage earning capacity. Additionally, Florida Workers' Compensation is an additional benefit offered to injured employees, regardless of whether they are "disabled" (as defined by the ADA). This additional benefit is available to all employees, is mandatory, and is therefore not a "fringe benefit" or "term, condition, and privilege of employment". See O'Neil, supra

Although the amount of benefits an injured worker may receive differs based upon an impairment rating, the amount of benefits received in most insurance plans differ. A State does not violate equal protection merely because the classifications are imperfect. If the classification has some reasonable basis it does not offend the constitution simply because the classification is not mathematically perfect or that in practice it results in some inequality. Dandridge v. Williams, 397 U.S. 471, 485-86, 90 S.Ct. 1153, 1161-62, 25 L.Ed.2d 491 (1970) citing Lindsley v. Natural Carbonic Gas Company, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911).

Some inequality and imprecision within in a statute will not render the statute invalid. Acton II v. Ft. Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983), citing In re Estate of Greenburg, 390 So. 2d 40, 42 (Fla. 1980), appeal dismissed, 450 U. S. 961, 101 S. Ct. 1475, 67 L. Ed. 610 (1981). The fact that an injured worker may recover a different amount for the same injury due to individual differences in wage loss is inherent in the very nature of the wage loss system. Acton II, supra. An award may appear inadequate and unfair, however, that does not render a statute unconstitutional. Mahoney v. Sears Roebuck & Company, 440 So. 2d 1285 (Fla. 1983). Respondents respectfully submit that the Workers' Compensation Law and ADA are not in conflict, and, therefore, can act simultaneously. Additionally, the Workers' Compensation Law, specifically Section 440.15(3)(b)(4).d., Fla. Stat. (1991), offers equal or greater protection and comports with

the requirement of Title I of the ADA.

The employer did not single out a particular disability or discreet group of disabilities or disability in general. Any unfair classification cannot be attributed to the employer as the employer is equally providing the benefit as prescribed by the Florida Legislature. Any "limit" (i.e. amount of weeks of wage loss) is applied equally to individuals with or without a disability, as defined under the ADA, as the amount of weeks are based upon an impairment rating. Thus, injured employees with the same impairment rating (regardless of whether they have a disability as defined under the ADA) are eligible for the same entitlement to benefits. Therefore, the employer provided all injured employees with the opportunity and eligibility to receive wage loss benefits. The employer did not violate the ADA and the claimant was entitled to the same opportunity to receive wage loss benefits as all other injured employees, whether disabled "as defined by the ADA" or not.

Contrary to Petitioner's assertion that requiring an impairment rating was implemented simply because it would be less expensive and expedient and that therefore it would discriminate, the history of the Workers' Compensation Act shows that the legislature, in 1990, found that the reasons for changing the Workers' Compensation Law included:

> Florida's reputation as a high cost workers' compensation state; the creation of a more attractive and competitive business climate for economic development; the need for a competitive business climate; the increasing transaction cost of workers' compensation

> insurance; a financial crisis in the workers' compensation insurance industry, causing severe economic problems; dramatic increases in the cost of workers' compensation insurance coverage; the present level of medical benefit payments...42% higher than the nationwide average level; indemnity benefit payments...31% higher than the nationwide average level; reductions in benefits...are necessary...; it is necessary to avoid the workers' compensation crisis, to maintain economic prosperity, and to protect the employees right to benefits if injured on the job; and, that there is an overpowing public necessity for reform...the reforms contained in this act are the only alternative available...

See Alpert, Florida Practice Handbook, Workers' Compensation §2-6.2 (1991)

The Legislature's reasons for implementing a change in the Workers' Compensation system goes beyond the need to spend less money and is rationale, based upon statistics and matters of public importance. Should this Honorable Court find that Workers' Compensation is subject to Title I of the ADA, Respondents respectfully submit that §440.15(3)(b)4.d., Fla. Stat. (1991) comports with the requirement of Title I.

Petitioner claims that the Workers' Compensation Law violates the intention of the ADA by limiting and denying benefits to disabled persons based on an arbitrary impairment rating. Thereafter, he states that claimants for Workers' Compensation benefits require an individualized assessment of all factors rendering a claimant disabled and in need of wage loss benefits. (Petitioner's brief 20). Petitioner then goes on to say that denying coverage without an analysis simply because it is less expensive to do so perpetuates societal barriers which the ADA was

conceived to eradicate.

There is a question as to whether the ADA has been established only to eliminate discrimination and segregation, as well as disparate impact or treatment of the disabled as compared to their non-disabled counterparts, or whether the ADA is also applicable in cases alleging discrimination between disabled individuals.

In Cramer v. State, 885 F.Supp. 1545 (M.D. Fla. 1995), the District Court of Appeal determined that the ADA did not apply to situations in which there was a claim of discrimination between disabled individuals.

In addition to Cramer, the Court in Spragens v. Shalala, 36 F.3d 947, (U.S. Sup. Ct. #94-1102, March 27, 1995), in a Social Security Disability case, stated that the differentiation between paraplegic and blind individuals was justifiable and did not violate the petitioner's claim of equal protection. Specifically, in Spragens the petitioner had a disease known as arthrogryposis and, according to the Social Security Disability Guidelines, if he earned higher than $300.00 a month he would no longer be eligible for Social Security Disability. Meanwhile, there was a separate regulation under the Social Security Disability provision which allowed blind persons to earn $650.00 per month before becoming ineligible for Social Security benefits. The Petitioner claimed that he was denied equal protection. The Court disagreed and stated that it was a rationale classification because it was reasonable to conclude that blind persons are in a less favorable position than other disabled people. The court specifically stated

that "...And the fact, if it is a fact, that Spragens may have more disability than some blind persons does not change the result. A classification scheme of this sort does not have to be perfect." Spragens, supra. Additionally, the Court stated that in enacting legislation a government does not deny equal protection merely because the classifications made by its laws are imperfect. Id. If the classification has some reasonable basis then it does not offend the Constitution simply because the classification is not made with mathematical nicety or, because in practice, it results in some inequality. Spragens at 950.

In Traynor v. Turnage, 485 U.S. 535, 108 S.Ct. 1372, 99 L. Ed. 2d 618 (1988), the court stated:

> the focus of federal disability discrimination statutes is to adjust discrimination in relation to non-disabled persons, rather than to eliminate all differences in levels of proportions of resources allocated and services provided to individuals with differing types of disabilities...if the ADA carried with it the mandate that plaintiffs would require, then the DMH, in providing any service for any group of the mentally disabled, would be required to provide the same services to other individuals with different mental disabilities.

Traynor v. Turnage, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988).

Nothing in the language of the ADA indicates that Congress intended that all services or benefits must be the same for individuals with different disabilities. This quote from Traynor has been construed with respect to the ADA in Williams v. Secretary of the Executive Office of Human Services, 414 Mass. 551, 559, 609 N.E. 2nd 447, 454 (Mass. 1993).

Both Traynor and Spragens, indicate that the central purpose of Section 504 of the Rehabilitation Act is to assure that handicapped individuals receive even handed treatment in relation to the non-handicapped. P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990). Additionally, even if the ADA is intended to protect against discrimination of one disabled person against another disabled person, the Workers' Compensation Law does not discriminate in such a fashion. Specifically, all injured employees, whether they are "disabled" as that term is defined under the ADA, are eligible for Workers' Compensation benefits and are given an individual assessment regarding their specific impairment rating.

Respondents respectfully submit that an impairment rating is not equivalent to a "disability" and, therefore, assigning such a rating does not single out a particular disability, a discreet group of disabilities, or disability in general. Under the Workers' Compensation system, the injured employee is entitled to benefits once he is injured on the job and suffers an impairment which leaves him with restrictions regarding his wage earning capacity. No benefits are being "capped" based upon a particular disability, a discreet group of disabilities, or disability in general, and therefore, there is no disability based on distinction. Additionally, under the Workers' Compensation system, the physical condition of the claimant can be any condition resulting from an industrial accident. Once an employee is injured as a result of an industrial accident, he is eligible for wage loss

benefits provided that he is assessed with an impairment rating and assigned physical restrictions caused by the industrial accident.

Although the claimant is limited in the amount of weeks in which he is entitled to receive benefits, the time limit is not discriminatory as each individual assigned with that specific impairment rating is eligible for benefits for that period of time.

Respondents respectfully submit that so long as the qualified individual is provided with meaningful access to the benefit, the benefit itself cannot be defined to effectively deny a qualified individual meaningful access to that entitlement. Alexander v. Choate, 465 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).

In Alexander v. Choate, the petitioner urged that a 14 day rule, or any limitation upon in-patient treatment denied meaningful access to health care benefits. The court ruled that the new limitation did not exclude the handicapped, that the reduction was neutral on its face as it did not distinguish between those whose coverage would be reduced and those who would not on the basis of any tests, judgment or trait that the handicapped as a class are less capable of meeting or less likely of having. Alexander, supra. The court then stated that there was nothing to indicate that the handicapped in Tennessee would be unable to benefit meaningfully from the coverage they would receive under the 14 day rule. Additionally, in a footnote, the court noted that the limitation did not apply to any particular condition and would take effect regardless of the particular cause of the hospitalization. Id. The reduction was found to have left both handicapped and non-

handicapped medicaid users with identical and effective hospital service. Both classes had full availability of use and were subject to the same durational limitation. Therefore, the limitation did not exclude the handicapped from, or deny them, benefits that the state had chosen to provide. The court stated that medicaid does not have to guarantee that each recipient will receive that level of health care precisely tailored to his particular need but, rather, it was a package of health care services aimed at assuring that individuals would receive necessary medical care.

Likewise, regarding Section 440.15(3)(b)4.d, Fla. Stat. (1991), the durational limitation is reasonable, it does not exclude disabled individuals, or non-disabled individuals, and the durational limitation is neutral on its face as it does not distinguish between those with or without disabilities. Like the medicaid system, in the Workers' Compensation system does not have to guarantee that each recipient will receive that level of wage loss benefits precisely tailored to his particular needs. Rather, it is a system which was implemented to provide the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer. §440.015, Fla. Stat.

The employer/carrier is not denying benefits to one class of persons as the class of persons under the Workers' Compensation system is any individual who has been injured in an industrial accident, is assigned an impairment rating with restrictions, and has their wage earning capacity diminished. No certain type of

injury is being discriminated against as all persons who suffer from an industrial accident with an impairment rating and restrictions receive benefits for a specific amount of time. The time limit is a method in which the individual is subsidized after he has reached maximum medical improvement and is tailored to aid the individual in re-entering the job market.

Respondents respectfully submit that there is no equal protection or violation of the ADA as all members of the class (those injured as a result of industrial accident) are eligible for wage loss benefits; all receive an amount based upon their own individual injury (as assessed by a physician who assigns an impairment rating); their restrictions; and their individual average weekly wage. The impairment rating is not limited to a certain "disability" and anyone who suffers an injury as a result of an industrial accident has the potential to be assigned the same impairment rating and is entitled to the same benefits based upon a static formula applied equally to everyone in that class. Therefore, there is no violation of the ADA as there is no "disability" based distinctions being applied.

Petitioner cites to the School Board of Nausau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L. Ed. 2d 307 (1987) at page 25 of their brief. In Arline, the case dealt with a contagious disease wherein an individual assessment was needed in order to determine whether the claimant was a qualified individual (under the ADA) and, if so, whether she could be provided with a reasonable accommodation so that she could continue in her

employment. The Court ruled that it could not have a blanket rule that all contagious diseases would prevent the individual from being a qualified individual under the ADA and that an individual assessment was needed in order to decide whether the plaintiff was a qualified individual and whether she would be a risk to the health of others if she continued in her employment. School Board of Nassau County v. Arline, supra. Respondents respectfully submit that the Arline case focused on the question as to whether the plaintiff was "otherwise qualified" and in determining whether a person is a qualified individual by providing an individual assessment. Under the Florida Workers' Compensation scheme, an individual assessment is provided, in terms of an impairment rating as previously argued.

Although the ADA was enacted after Traynor, Traynor is still viable and can be applied to cases involving questions regarding the ADA. The case of Helen L. v. DiDario, 46 F.3d 325 (3rd Cir. 1995) concerned in-patient and out-patient treatment and that eligible individuals should live in the least restrictive environment in order to prevent inappropriate institutionalization. The court's decision was basically based upon the compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Helen L. v. DiDario, supra. (emphasis added). Respondents respectfully submit the DiDario case, like Arline, focused on integrating disabled

individuals into social mainstream (with non-disabled individuals). Specifically, the cases dealt with segregating the individual as opposed to providing the individual with independent living and economic self-sufficiency. Additionally, when the court decided the DiDario case, the court examined the case of Williams v. Secretary of the Executive Office of Human Services, 414 Mass. 551, 609 N.E. 2nd 447 (1993) stating that they were troubled by difficulties in proof as the plaintiffs attempted to use statistical analysis to establish that disabled persons were more likely to be adversely effected by the State's policy than non-disabled person. The court rejected that argument and stated that the ADA does not mandate system wide percentages for allocations of community placements. The court stated that the plaintiffs did not show that their treatment was inappropriate or that they themselves were inappropriately placed in a segregating setting. Further, the court stated that a mere percentage, standing alone, does not establish a presumption of inappropriate placement. When considering DiDario, Traynor, and Williams, this court should take into account the purposes of the ADA, as well as the specific facts of the cases. DiDario, Williams, and Traynor differ from the case at bar in that in the case at bar there is no discrimination, there is equal eligibility for benefits, and all eligible individuals receive services consistent with human dignity and are not shunted aside, hidden, or ignored due to a disability. Further, the ADA does not require a fundamental change in the nature of a service or program. Therefore, since the Workers' Compensation Law provides

all injured employees, whether disabled or non-disabled, with the same eligibility for benefits, there is no discrimination and there is no requirement that the law be fundamentally changed in order to serve the purpose of the workers' compensation system.

The ADA does not require that any benefit extended to one category of "handicapped" persons must be extended to all other categories of handicapped persons. Under the 1991 Workers' Compensation Law there is no discrimination among the class as the class consists of all injured employees assigned an individual impairment rating by a physician with applicable restrictions. Therefore, in this situation, both Traynor and DiDario are on point for the contention that the Workers' Compensation Statute comports with the ADA's intent and is consistent with the ADA's mandate against discrimination of disabled persons.

Turning now to the question of whether the Petitioner is "disabled" and entitled to the protection of the ADA, Respondents respectfully submit that the Petitioner does not fall within the ambit of protection under the ADA. Although there is evidence that the Petitioner is disabled (as defined by the ADA) as one of his major life functions has been substantially limited, there is no evidence that Petitioner was a qualified individual able to perform the essential functions of the job, with or without reasonable accommodation. Although the determination as to whether the Petitioner is a qualified individual with a disability is a factual determination, the evidence shows (if Judge Willis' Order is accepted as more than dicta) that the Petitioner was prevented from

returning to work at Burdines and at other places of employment due to his physical inability to perform the work required by Burdines and because of his physical inability to do work at other places of employment. (App. 3) If this were the case, it would appear as if Mr. Barry were not a qualified individual as he was not able to perform the essential functions of his job, with or without reasonable accommodation. Additionally, the parties stipulated that the employer, Burdines, did indeed provide the Petitioner with reasonable accommodations and that the Petitioner left his employment with Burdines despite the reasonable accommodations provided by the employer.

Since there is no evidence that the Petitioner is a qualified individual with a disability, he is not entitled to the protections afforded by the ADA.

Notwithstanding the above, should this Honorable Court find that Petitioner is a qualified individual with a disability and is subject to the protections of the ADA, there has been no violation of the ADA by limiting Petitioner's wage loss benefits to 78 weeks based upon his 9% impairment rating.

One of the main arguments from Petitioner is that the 78 week limit within the Workers' Compensation Law violates the ADA. However, there are several cases wherein specific benefits are limited and such limitations do not violate the ADA. Respondents respectfully submit that as long as all injured employees have equal access to Workers' Compensation benefits, and such benefits are provided whether the injured employee has suffered a

"disability" or not, then there is no discrimination and a time limit for receipt of benefits is not a violation of the ADA. Specifically, when examining this issue in the health care industry, there can be limits under health insurance plans so long as the limits apply to all employees. These limits include limits on reimbursement for certain procedures or drugs, the number of paid sick leave days, and the number of days for in-patient treatment. See Alexander v. Choate, supra.

Respondents now respond to Petitioner's question as to whether the Florida Workers' Compensation Law violates the ADA as put forth in his Brief on pages 31-39. Specifically, Respondent wishes to analyze Petitioner's hypothetical example of Plaintiff's A, B, and C on pages 33-35 of his Brief.

Respondents respectfully submit that Florida Workers' Compensation benefits are not employer provided benefits but are benefits which are scheduled and determined by the Florida Legislature and Division of Workers' Compensation. Petitioner claims that Workers' Compensations falls within Title I of the ADA as it is considered a term, condition, or privilege of employment or, alternatively, a fringe benefit available by virtue of employment, whether or not administered by the covered entity. 29 C.F.R. §1630.4(i); 29 C.F.R. §1630.4(f). In the case at bar, there was no violation of the ADA. Assuming that the claimant was a disabled qualified individual under the ADA, there was no discrimination in regard to employment opportunities or benefits. The alleged benefit under the ADA, Florida Workers' Compensation

indemnity benefits, was available to the claimant and, in fact, the claimant received the full amount of benefits to which he was entitled under Florida Statute § 440. The employer did not discriminate against the claimant due to a disability as defined under the ADA. The employer provided Workers' Compensation coverage and did not classify or determine the standards, criteria or methods in determining the benefits the claimant could receive under the Florida Workers' Compensation Law. Any determinations as to the amount of indemnity benefits paid as a result of the claimant's loss of wage earning capacity is determined by the statute; which is determined by the Florida Legislature. The employer has no direct control over such classification and the benefits are made equally available to all workers, including those defined as disabled under the ADA and those injured employees who are not disabled under the ADA. Although the amount of benefits an injured worker may receive differs based upon an impairment rating, the amount of benefits received in most insurance plans differ.

Respondents respectfully submit that assigning an impairment rating to a claimant under the Workers' Compensation Law is not an arbitrary process but, rather, is based upon an individual assessment of the claimant's medical condition at the time when he has reached maximum medical improvement. A permanent impairment, under the Florida Workers' Compensation Act, means any anatomic or functional abnormality or loss, existing after the date of maximum medical improvement, which results from the injury. §440.02(11), Florida Statute (1991). Florida Workers' Compensation is not

"disability" based because eligibility for wage loss also applies to injured employees who do not have a "disability" as that term is defined under the ADA. Further, an impairment rating under Workers' Compensation is not equivalent to a disability rating. In fact, the Florida Impairment Rating Guide states that under no circumstance shall this guide be used to determine disability.

In order to be rated with an impairment rating, there must be an individual assessment of the injured employee's medical condition at the time that he reaches maximum medical improvement. Thereafter, based upon that impairment rating, the claimant is awarded compensation benefits based upon the claimant's percentage of impairment rating and his ability to work, not upon an injured employees "disability" as the term is defined under the ADA.

The Workers' Compensation system uses a disability schedule wherein a claimant is assigned a permanent partial disability rating. For purposes of the 1991 Statutes the Minnesota Guidelines were in effect. As such, Chapter 5223 of the Department of Labor & Industry Disability Schedule states under Section 5223.0010 that the purpose of the schedule is to assign specific percentages of disability of the whole body for specific permanent partial disabilities. Additionally, it states that only the categories in the schedules in this chapter may be used when rating the extent of a disability. §5223.0010, Chapter 5223 of the Department of Labor & Industry Disability Schedule.

The schedule lists conditions, definitions, and states that an examination and/or evaluation shall be the method for determining

the degree of the permanent partial disability. See Chapter 5223, Department of Labor & Industry Disability Schedules. Utilizing the schedule, the physician must take into account the particular condition of the injured employee and, based upon the outcome of the examination, the physician is then able to give the injured employee a disability rating. The injured employee is given an individual assessment as to whether the employee has suffered an impairment and whether they are eligible for benefits and, therefore there is no violation of the ADA's requirement of individual assessments. Additionally, all injured employees are entitled to such assessment and, therefore, whether the injured employee has a "disability", as defined under the ADA, or whether the injured employee does not have a "disability" all individuals are given the same opportunity and eligibility to receive an impairment rating which will determine the eligibility for benefits under the Workers' Compensation system.

The assessment of an impairment rating is not arbitrary as there is an initial evaluation conducted by a physician before the impairment rating is assigned. Additionally, once an impairment rating is assigned, eligibility for wage loss benefits begins and at that time the injured employee is aware of the amount (in terms of weeks) that he is eligible to receive benefits.

Respondents respectfully submit that an impairment rating is not equivalent to a "disability" and, therefore assigning such a rating does not single out a particular disability, a discrete group of disabilities, or disability in general.

A state does not violate equal protection merely because the classifications are imperfect. If the classification has some reasonable basis it does not offend the constitution simply because the classification is not mathematically perfect or that in practice it results in some inequality. Dandridge v. Williams, 397 U.S. 471, 485-86, 90 S. Ct. 1153, 1161-62, 25 L. Ed. 2nd 491 (1970), citing Lindsley v. Natural Carbonic Gas Company, at U.S. 78, S.Ct. 340.

Respondents respectfully submit that there is no pre-emption in this case as the Workers' Compensation Law is not subject to Title I of the ADA, as Workers' Compensation is not a "term, condition or privilege" of employment nor is a "fringe benefit". Additionally, the 1991 Workers' Compensation Law does not fall below the ADA's minimum standards. The Workers' Compensation Law and the ADA can work simultaneously since there is no conflict. Therefore, there is no reason for any pre-emption. Respondents respectfully submit that Workers' Compensation and the ADA can work together and an employer is liable under the Workers' Compensation Act and is also liable under the ADA to provide the mandates under Title I.

The fact that the ADA can work simultaneously with another law is shown in regards to how it relates to the Family & Medical Leave Act. In the Labor Department Rules for the Family Medical Leave Act the January 6 Federal Register (60 FR. 2180), it was determined that there was entitlement to benefits from either the Family & Medical Leave Act or the ADA, which ever law provided the greater

rights. The Family Medical Leave Act was not intended to modify or effect the ADA. If an employee is a qualified individual with a disability under the ADA, the employer must make a reasonable accommodation under that law while at the same time grant the employee with the applicable rights under the Family & Medical Leave Act. Respondents respectfully submit that this is instructive in that injured employees would be entitled to benefits under Workers' Compensation and such employees are also able to pursue a claim under the ADA if any of their rights under the ADA are violated.

Respondents now respond to Petitioner's question as to whether the Florida Workers' Compensation Law violates the ADA as put forth in his brief on pages 31-39. Specifically, Respondent wishes to analyze Petitioner's hypothetical example of Plaintiff's A, B, and C on pages 33-35 of his Brief.

Respondents respectfully submit that there is no discrimination by using an impairment rating and basing the duration of benefits on such a rating. In any system, there is some type of limitation on benefits and as long as that limitation is not done in a discriminatory manner, the limitation should survive. As an example, health insurance is considered a fringe benefit and is subject to the provisions of the ADA. However, health insurance is not mandatory but is voluntarily provided by the employer. Petitioner consistently argues that placing caps on certain illnesses is akin to the situation of providing a claimant with an impairment rating and limiting the time in which he is

entitled to benefits. This analogy, however, is inappropriate and misplaced under the Workers' Compensation system as the "illness" would be the industrial injury. Regardless of the injury, the individual is covered. For example, two people with back injuries may receive different impairment ratings and restrictions (according to their individual condition). Both are treated the same and both are eligible for benefits albeit for a differing length of time. Limiting the amount of time of benefits does not discriminate as everybody in the class (all employees injured in an industrial accident) are eligible for benefits under the Workers' Compensation system.

Under the 1991 Florida Workers' Compensation system, employees are afforded the same opportunities and eligibility for wage loss benefits. Injured employees have equal access to benefits, the statutory formula was not adopted for discriminatory purposes, and once the claimant is no longer entitled to benefits, he is entitled to seek further benefits in the form of permanent total disability (if he is eligible for such benefits); continue to work, with or without reasonable accommodations; to be re-evaluated at the end of the durational period to determine whether he has an additional or higher impairment rating; apply for Social Security Disability; or obtain benefits under some type of disability or health insurance plan. All of these options are available to both "disabled" and non-disabled persons. Additionally, non-disabled persons who were not injured as a result of an industrial accident also have the options of applying for disability under Social Security, short or

long term disability plans, or health plans. Therefore, all individuals, whether they are "disabled" or non-disabled, are eligible for the same benefits and access to such benefits.

Regarding Petitioner's hypothetical example of plaintiff's A, B, and C, Petitioner fails to take into account the fact that all three individuals are subsidized at the same percentage and that even though there may be a different amount in the amount of wages received, there is no discrimination. According to the wage loss aspect, there is no discrimination as the amount of wage loss is based upon the same formula for each individual and is based upon their pre and post earnings. Specifically, in viewing Petitioner's chart on page 34 of his Brief, the pre-injury wages could be viewed as the injured employee's average weekly wage. When looking at the claimant's weekly wage the statutory formula entitles all injured employees receiving wage loss to 80% of the difference between 80% of his pre-injury wages and his post injury earnings. §440, Fla. Stat. (1991) When calculating under this theory, Plaintiff A would receive $222.00 as his take home pay. This is based upon the fact that his average weekly wage ($300.00) would be multiplied by a factor of 80%, equalling $240.00. Since his post injury wages equal $150.00 this would be subtracted from the $240.00 producing a $90.00 difference. Thereafter, the $90.00 difference would then be multiplied by 80% to equal $72.00. Under the formula, the calculation would consist of taking the Plaintiff's post injury wages ($150.00) and adding the $72.00 (which acts as a subsidy for the amount that the claimant is now unable to earn due to an

industrial accident) resulting in a total amount of $222.00.

The mathematical equation for Plaintiff B renders a final take home earning of $232.00 [($300.00 x 80%) which equals $240.00 - $200.00 (post injury wages) which equals $40.00 x 80% (statutory formula) producing an outcome of $32.00.] Thereafter, the $32.00 would be added to the claimant's post injury wages ($200.00) resulting in an amount of $232.00. The claimant receives a $32.00 subsidy in order to compensate him for loss of wage earning capacity.

The calculation for Plaintiff C would be 0 as the injured employee's post injury wages equal his pre-injury wages and, therefore, he has not received any loss in his wage earning capacity.

Although the amounts that each individual may receive differs, all are entitled to 80% of the difference between 80% of the pre-injury wages and post-injury earnings. Therefore, there is no discrimination as the formula applies equally to every person and the formula is static. In other words, all injured employees are getting the same percentage and all are eligible to receive the same benefits. The formula is the same; therefore, there is an individualization based upon the injured employees average weekly wage and what he is able to earn.

Analyzing the Florida Workers' Compensation Law prior to July 1, 1990, one can see that there is a form of disparate treatment between injured employees. Although all injured employees were entitled to 525 weeks, regardless of their impairment rating, this

result was not fair to injured employees. The disparate treatment was reversed in that a person with a 1% impairment rating was entitled to 525 weeks, the same as was the person with a 19% impairment rating. Basically, the only difference between the pre 1991 Statute and the 1991 Statute is that there is a reversal of equity in that the person with the 1% impairment rating is receiving more benefits than the individual with a 19% impairment rating.

Respondents respectfully submit that Petitioner's analysis is flawed and that his statement that a lesser disabled individual with a higher impairment would be entitled to more benefits than the more disabled individual who is less impaired is not necessarily true. Additionally, his assertion that the person who receives an impairment rating with no disability would also be entitled to higher benefits. In relation to the individual who suffered no disability, the statement that he would receive benefits is false because there would be no loss of wage earning capacity. Therefore, he would be able to continue in his previous employment without a loss of wages and would not be entitled to benefits under the 1991 Workers' Compensation system.

All injured employees are eligible for the same benefits under the Workers' Compensation system. Therefore, there is no violation of the ADA. Additionally, the fact that an individual is given an impairment rating does not violate the ADA as such a rating is based upon an individual assessment of the injured employee, and each injured employee is afforded the opportunity and eligibility

for such assessment. Although the length of time that the benefits can be provided is based upon the impairment rating, this does not violate the ADA as benefits can be conditioned upon length of time.

Respondents respectfully submit that should this law be declared invalid, the law before 1991 could also be viewed as discriminatory as that law is inequitable in a reverse fashion. To declare Section 440.15(3)(b)4.d, Fla. Stat. (1991) invalid would make it virtually impossible to have any type of Workers' Compensation system as any system or form of subsidy has to have limitations. The limitations imposed under Section 440.15(3)(b)4.d, Fla. Stat. (1991) are not discriminatory, affords equal access to all injured employees, were not adopted for discriminatory purposes, are based upon a formula which is applied in all cases, and are individualized in terms of basing benefits upon the claimant's average weekly wage and his impairment rating, which is individually assessed by a physician.

Respondents respectfully submit that if there were no impairment ratings then there would be no eligibility for any subsidy because once the claimant would reach maximum medical improvement he would then either have to be released to full-time work or be declared permanently totally disabled. If the claimant was returned to work, he would be required to engage in the activities in which he was able and would not have access to any type of subsidy. The impairment rating provides the claimant with access to subsidy until he is able to return to his pre-injury wages. Therefore, using an impairment rating is not arbitrary and

is rational with the goal of providing an injured employee with subsidy for loss of wage earning capacity.

Respondents respectfully submit that Petitioners argument is flawed because he is equating an impairment rating with a "disability". Additionally, the class in question is not an individual with a specific impairment rating, but rather, a person within the class is an individual who is injured in a compensable industrial accident and who is entitled to benefits under the Florida Workers' Compensation system.

For the reasons stated above, the Workers' Compensation Law is not subject to Title I of the ADA; is not discriminatory; and, if it is subject to the ADA, it comports with Title I of the ADA. Therefore, §440.15(3)(b)4.d., Fla. Stat. (1991) must be upheld and declared valid.

Wherefore, Respondents respectfully submit that this Honorable Court find §440.15(3)(b)4.d., Fla. Stat. (1991) is not subject to, but comports with Title I of the ADA.

CONCLUSION

Respondents, Burdines and The Travelers, respectfully submit that the Workers' Compensation Law does not violate the ADA. There is an individualized assessment of the individual based upon an impairment rating and the individuals loss of wage earning capacity. An impairment rating is not arbitrary and a limit on the amount of benefits a claimant is entitled to under Workers' Compensation is not a violation of the ADA. Respondents request this Court deny a grant of declaratory relief pursuant to 42 U.S.C. 2000(e) and that this Court deny Petitioner any entitlement to benefits greater than are presently afforded under Florida Statute Section 440.15(3). Additionally, Respondents respectfully request this Court declare that Section 440.15(3)(b)4.d., Fla. Stat. (1991) comports with the requirements of Title I of the ADA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Amy L. Sergent, P. O. Drawer 4257, Sarasota, Florida 34230; Deborah L. Conley, P. O. Drawer 4157, Sarasota, Florida 34230; Edward A. Dion, Esq., 307 Hartman Building, 2012 Capital Circle, S.E., Tallahassee, Florida 32399-6583; Jerold Feuer, Esq., 402 N.E. 36th Street, Miami, Florida 33173-3913; Professor Fletcher Baldwin, University of Florida College of Law, 2500 S.W. Second Avenue, Gainesville, Florida 32611; Claire Matturo, Esq., 869 Cairo, Georgia 31728; and Alex Lancaster, P. O. Drawer 4257, Sarasota, Florida 34230, this 20th day of November, 1995.

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