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SUPREME COURT OF FLORIDA

Petitioner: EARL L. CRAMER

vs.

APPEAL NO. 86,709
FIRST DISTRICT COURT
OF APPEAL
NO. 95-1588

Respondents: FLORIDA EMPLOYERS
INSURANCE SERVICE CORPORATION

and

BROEDELL PLUMBING SUPPLY

**ANSWER BRIEF OF RESPONDENTS
FLORIDA EMPLOYERS INSURANCE SERVICE CORPORATION AND
BROEDELL PLUMBING SUPPLY**

ON APPEAL FROM:

FIRST DISTRICT COURT OF APPEAL

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INITIAL STATEMENT

References to the record, as contained in the Appendix submitted by Respondents, will be as follows: {A - (Page Number)}.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) and pursuant to the Florida Constitution, Article V, Section 3(b)(4).

QUESTION ON APPEAL

The following question was certified by the First District Court of 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?

STANDARD OF REVIEW

The issues of law before this Court involve the relationship between the ADA and the challenged provisions of Section 440.15(3), Florida Statutes. Because they are issues of law, de novo review is appropriate. International Union, United Mine Workers v. Jim Walter Resources, Inc., 6 F. 3d 722 (11th Cir. 1993).

Petitioner erroneously states that since the Petitioner's claim before Judge Willis was dismissed, any factual dispute must be resolved in favor of the Petitioner at this juncture citing Hishon v. King & Spalding, 467 U.S. 69, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). Petitioners have misread the holding in this case. In Hishon, Petitioner had filed a complaint under Title VII of the Civil Rights Act of 1964. The District Court dismissed her complaint on the grounds that her allegations were not covered by Title VII. The Court of Appeals affirmed. The Supreme Court held that she was entitled to her day in court

stating, "[a]t this stage of the litigation, we must accept Petitioner's allegations as true. A Court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegation." Hishon at 72. The Court held Petitioner was entitled to prove her allegations true as there was a cognizable claim under Title VII.

Here, Petitioners claim was dismissed due to lack of jurisdiction by the Judge of Compensation Claims. The holding in Hishon cannot be read as stating that any factual disputes must be resolved in Petitioner's favor.

Petitioner further asserts he is a member of a protected class, requiring an intermediate heightened standard of scrutiny by this Court. Petitioner cites Martin v. Voinovich, 840 F. Supp. 1175, 1209-10 (S.D. Ohio 1993) as support for this position. Martin, however, merely holds that "mental retardation" is a quasi-suspect classification entitled to a higher level of scrutiny. The Court stated that intermediate scrutiny is applied where the class of people in question have experienced a history of unequal treatment or have been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." Martin at 1175. Petitioner Cramer has suffered a back injury. This hardly meets the criteria has stated by the Martin Court. This Court instead should review the law based on a rational basis standard.

The Martin Court, citing Massachusetts Board of Retirement v. Murgin, 427 U.S. 307, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976) at 313:

> Where the individuals affected by a law have distinguishing characteristics relevant to interests the State has authority to implement, the courts have been reluctant...to closely scrutinize legislative choices as to whether, how,

> and to what extent those interests should be pursued. Such laws are subject only to the rational basis test: they will be upheld if they are rationally related to a legitimate state interest.

Petitioner Cramer is not a mentally handicapped person nor is he a "discrete and insular minority...subjected to a history of purposeful unequal treatment, and relegated to a position of powerlessness in our society" requiring a heightened standard of scrutiny. Martin at 1175.

RESPONDENTS' STATEMENT OF THE CASE AND FACTS

Respondents, Florida Employer Insurance Service Corporation (hereinafter "FEISCO") and Broedell Plumbing Supply, Inc. (hereinafter "Broedell") submit this statement of the case and facts to supplement and clarify the statement of the case and facts filed by Petitioner, Earl L. Cramer (hereinafter "Cramer").

Cramer was employed by Broedell as a warehouse foreman when he was injured on 11/22/93. (A-1) Broedell has workers' compensation coverage through FEISCO. (A-1) The accident was accepted as compensable and medical treatment was provided to Cramer. Cramer received temporary total benefits pursuant to Florida Statutes 440.15 from 2/1/94 until 8/29/94 (A20-24). Cramer was out of work approximately two weeks after his injury, and eventually returned to light-duty work with Broedell. On 2/1/94, Cramer was taken off work totally due to his injuries. On 6/27/94, Broedell terminated Cramer's employment. Cramer reached maximum medical improvement on 8/26/94 and was given a 9% impairment rating pursuant to the Impairment Rating Guide. (A-20) According to the legislatively mandated statutory rating scheme, Cramer is eligible for 78 weeks of wage loss benefits.

Cramer submitted the appropriate Request for Wage Loss/Temporary Partial Benefits, LES Form DWC-3 (1/91) and was paid his benefits by FEISCO in a timely manner (A2-19).

However, on 8/31/94, Cramer filed a Request for Assistance with the Employee Assistance and Ombudsman Office, Division of Workers' Compensation, pursuant to F.S.

440.191.(1994), requesting wage loss benefits in excess of the statutory mandated benefit schedule. (R-1) The Employee Assistance and Ombudsman Office is without jurisdiction to award wage loss benefits over and above statutory requirements and was correctly unable to award such benefits, finding that all benefits ripe, due, and owing had been paid to Cramer.

Cramer then filed a Petition for Benefits dated 10/3/94 demanding wage loss benefits in excess of statutory eligibility and challenging the constitutionality of the workers' compensation statutes as being violative of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. Sections 12112, et seq (R-3).

A Notice of Denial was filed by FEISCO stating that any reference to or issue regarding the ADA should be denied and objected to as irrelevant, because the Judge of Compensation Claims is without jurisdiction to resolve such disputes and further that all benefits ripe, due, and owing have been provided to Cramer in a timely manner. (A-2) The Respondents' Motion to Dismiss was heard on 2/27/95 before the Judge of Compensation Claims Joseph E. Willis. Judge Willis held that he was without jurisdiction to decide whether the Florida Workers' Compensation Law violates the ADA and further that he was without authority to certify the question to a higher Court. (R1-18)

Cramer was asked by Judge Willis to draft the order. Contrary to Petitioners' Supreme Court Brief and the footnote on page 1 of Judge Willis' order, Respondents did not agree or stipulate that Petitioner Cramer was a "qualified individual with a disability" as defined by the ADA. Respondents have however agreed that Cramer was an individual with a nine percent impairment rating, entitling him to seventy-eight weeks of wage loss as

provided by Florida Statutes.

Cramer appealed the order from the Judge of Compensation Claims to the First District Court of Appeal. The First District per curiam, affirmed and certified the same question as certified in the companion case of Barry v. Burdines and The Travelers, _____ So. 2d _____, (1st DCA 1995), 20 Fla. L. Weekly D 1923 (Fla. 1st DCA August 23, 1995).

SUMMARY TO LEGAL ARGUMENT

Florida Statutes, Section 440.15 (3)(b) 4.d. (1991) is not subject to and is not superseded by the Americans with Disabilities Act (ADA). The Petitioner argues that under this section persons with lesser impairment ratings are eligible for lower benefits than persons with higher impairment ratings. They further argue that this system is discriminatory and in violation of the ADA. The crux of the Petitioner's argument is that similar benefits must be extended to all categories of disabled persons. Respondents argue that the ADA does not require equal benefits for all disabled persons. This is supported by case law. Additionally, Respondents argue that the intent of the ADA was to address discrimination **between** disabled and non-disabled persons rather than **among** the disabled. It is Respondents position that the ADA is intended to address discrimination for those qualified disabled individuals who are able to work, but due to fear, prejudice or stereotype are prevented from doing so. The Florida Workers' Compensation Law, on the other hand, was to effectuate a completely different purpose - to provide medical and wage loss benefits for individuals who are unable to work due to injury. Further, these benefits are applied after an individual case by case determination is made.

Petitioners argue that EEOC regulations implicitly state that workers' compensation is a "term, condition or privilege" of employment. Respondents argue that the Court should follow its holding in O'Neil v. Department of Transportation, 468 So. 2d 904 (1985), when it explicitly stated that workers' compensation is not a "term, condition or privilege" of employment within the meaning of the Age Discrimination in Employment Act of 1967 (a

predecessor to the ADA). Contrary to Petitioner's assertion, this Court has not held that workers' compensation is a fringe benefit.

Finally, it is Respondents position that Petitioner Cramer is not a qualified individual with a disability within the meaning of the ADA. Therefore, he is not entitled to the protections of the ADA. Respondents agree with the Petitioner that a qualified workers' compensation claimant with a disability may have an ADA claim. However, the differential payment of benefits under Florida Statutes, Section 440.15 (3)(b) 4. d. to an injured worker who has suffered wage loss as a result of a compensable injury is not a violation of the ADA.

This issue has been previously addressed in Petitioner's federal case Cramer v. State of Florida, 885 F. Supp 1545 (M.D. Fla 1995) and by the First District Court in Cramer's companion case Barry v. Burdines, (supra) where both courts found that Section 440.15 (3)(b) 4.d. was not violative of the ADA, albeit with different reasonings. Respondents ask this Court to follow these rulings.

ARGUMENT

I. SECTION 440.15 (3)(B)4.D., FLORIDA STATUTES (1991) IS NOT SUBJECT TO AND DOES NOT HAVE TO COMPORT WITH TITLE I OF THE AMERICANS WITH DISABILITIES ACT.

Petitioner argues that the Florida's workers' compensation law violates the ADA in the administration and enforcement of Section 440.15 (1990), Florida Statutes, and Section 440.15 (1993), Florida Statutes. Specifically, the Petitioners contend that the Respondents have denied Petitioner his rights to have equal eligibility for "wage loss" and "impairment" benefits in a manner which is consistent with the ADA. In examining the two statutes, it is apparent that the purpose and effect of the two statutes are different but not contradictory.

The Americans With Disabilities Act (the ADA) is a remedial statute designed to eliminate discrimination against disabled persons in all facets of society. Kinney v. Yerusalim, 812 F.Supp. 547 (E.D. Pa. 1993). It is codified at Title 42 U.S.C. Section 12102 *et seq.* The ADA is divided into several parts, three of which are Titles I, II, and III. Title I of the ADA addresses discrimination against persons with disabilities in employment. Title II of the ADA addresses discrimination against persons with disabilities in the provision of Public Services. This subpart of the ADA may be found at Section 12131 *et seq.* Part A of this Title prohibits discrimination in the provision of services, programs, or activities by a public entity. Part B of this Title prohibits discrimination in public transportation. Title III of the ADA addresses discrimination in public accommodations and

services operated by private entities.

Title I of the ADA requires that persons with disabilities be given the same employment opportunities that are available to persons without disabilities. In appropriate circumstances, the ADA requires that an employer make "reasonable accommodations," 42 U.S.C. Section 12112(b)(5). However, the ADA does not require an employer to hire a person who, with or without reasonable accommodation, cannot perform the essential functions of a job. Such a person would not be a "qualified individual with a disability." 42 U.S.C. Section 12111(8). The ADA was designed to prohibit employment decisions made because of fear, prejudice, and stereotypes; to require employers to make individualized determinations as to an individual's qualifications; and to require the employer to consider an employee or job applicant's abilities, rather than his disabilities. EEOC Interpretive Guidance to Title I, Appendix to 29 C.F.R. 1630. The ADA and its implementing regulations requires that the terms and benefits of employment be afforded workers with disabilities that are afforded to workers without disabilities.

Workers' compensation, by contrast, was designed to protect workers and their dependents against the hardships that result from a workers' injury or death arising out of, and occurring during, employment. McCoy v. Florida Power & Light Co., 87 So. 2d 809 (1956). The Florida workers' Compensation Law is intended to benefit the injured employee and the employer alike. Grice v. Suwannee Lumber Manufacturing Co., 113 So. 2d 742 (Fla. 1st DCA 1959). Under workers' compensation, an injured employee receives timely benefits in exchange for forfeiting a common law right to sue for the injury. The employer benefits by receiving immunity from common law tort actions in exchange for

accepting liability that is limited and determinate regardless of fault. McLean v. Mundy, 81 So. 2d 501 (Fla. 1955). The Florida Legislature has also indicated that the statute is "based on mutual renunciation of common law rights and defenses" in order to establish a scheme to "assure the quick and efficient delivery of disability and medical benefits." Section 440.015, Fla. Stats. (1993).

When Florida's workers' compensation statutes are properly understood, it is clear that its fundamental purpose is to provide a benefit to compensate injured workers who, by reason of their injuries, are either physically incapable of performing their jobs or are limited in the duration in which they are capable of performing them. The benefits structure thus seeks to compensate specifically for the claimant's lost ability to work.

The ADA, however, protects those individuals who have some permanent or chronic disability, who are able and have the desire to work, but due to stereotype, fear, misconception, or medical history would otherwise needlessly be prevented from working. The purposes of these two statutory schemes are neither contradictory nor overlapping. Instead, they are complementary. Taken together, they provide an umbrella of protection to persons injured during employment to insure that they are given due consideration for employment to the extent they are employable, and benefits to the extent that they are not. Workers' compensation is thus a benefit given to workers in addition to the rights afforded individuals under the ADA, because it protects workers precisely when they are not protected by the ADA -- when they are unable to work or to maintain full or appropriate employment.

Language within the ADA specifically addresses its impact on laws that provide protections or benefits to persons in addition to those provided by the ADA. Section 501(b) of the ADA provides in pertinent part:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.

42 U.S.C. Section 12201(b).

The foregoing provision demonstrates that the ADA was never intended to impact a statutory scheme, like Chapter 440, which provides additional benefits to persons with disabilities. As the legislative history of the ADA indicates, Congress did not intend to displace "any of the rights or remedies available under other federal or state laws (including state common law) which provide greater or equal protection to individuals with disabilities." H.R. Report 101-485(II) at 257.

The Code of Federal Regulations also affirms that the protection afforded individuals unable to work due to either permanent or temporary disabilities under the workers' compensation law or any other federal, state or local law was never intended to be affected by the ADA, its implementation or its enforcement. See 29 C.F.R. Section 1630.1(c)(2). For example, the ADA does not restrict an individual with a disability from pursuing a claim under another law or statute, in addition to a charge brought under the ADA. Interpretive Guidance to Section 1630.1(b) and (c).

Petitioners contend that merely because the workers' compensation statute provides benefits to persons with injuries who fit within the statutory definition of persons with

disabilities, that somehow the workers' compensation statute runs afoul of the prohibitions of the ADA. This myopic assertion is based on the fallacy that the specific nondiscrimination principles contained in 42 U.S.C. Section 12112(b) are somehow transferable in global fashion to prohibit any law which classifies persons with different disabilities or impairments even when the law provides additional benefits not applicable to non-disabled persons. Congress anticipated that the ADA would not be applied in a vacuum, and laid out its intent -- clear to all but the Petitioner -- that the ADA has no such purpose.

The ADA determines who or what is a covered entity. At 29 C.F.R 1630.2(b) a covered entity is defined as an Employer, Employment Agency, Labor Organization, or Joint Labor Management Committee. Further, at 29 C.F.R. 1630.2(e) an Employer is more narrowly defined as follows:

> (e) Employer. -- (1) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

Petitioners fail to show that either Respondent Broedell or Respondent FEISCO fall under the Statutory definition of Employer as contained in the ADA or that the mandates of the ADA apply to Respondent Broedell.

II. OTHER COURTS DETERMINATIONS THAT FLORIDA STATUTES, SECTION 440.15 (3)(b) 4. d DOES NOT VIOLATE THE ADA.

This was the holding by the First District Court in the companion case to Cramer in Barry v. Burdines (supra). The facts in Barry are identical to the case before the Court today in Cramer. Both Claimants were given a nine percent rating and were entitled to 78 weeks of wage loss. In holding that Barry had not shown an ADA violation, the First District Court relied on O'Neil (supra) and Cramer (supra).

In O'Neil, this court held that the Workers' Compensation Law was not subject to the Age Discrimination in Employment Act, 29 USC section 621, et seq because the "provisions of the Workers' Compensation law do not constitute 'compensation, terms, conditions, or privileges of employment." Barry at 1924. According to the First District Court in Barry, the ADA contains the same essential language thereby possibly preventing the Workers' Compensation Law from being controlled by Title I of the ADA.

Further, the 1st District relied on Petitioner Cramer's federal counterpart, Cramer vs. State. Like the present case, Cramer had alleged discrimination in violation of the ADA because the Workers' Compensation Statute Section 440.15 uses the concept of impairment ratings in determining wage loss. The court stated,

> Plaintiff's theory necessarily assumes that the ADA is violated when there is "discrimination" between two disabled persons by favoring one disabled person over another. The Court finds, however, that the ADA does not apply to this scenario. Rather, in light of the differing purposes of the ADA and workers' compensation, together with Supreme Court precedent in analogous cases, the Court finds that the ADA applies only to discrimination against disabled person compared to non-disabled persons.

Cramer at 1550.

The Court correctly recognized that the ADA was designed to prevent discrimination against those individuals who are disabled and are able to work but are prevented due to the fear or misconception of others. On the other hand, Workers' Compensation Laws were designed to compensate partially or totally injured workers in the event they are unable to work due to injury.

The Court in Cramer relied heavily on the Rehabilitation Act cases, especially Traynor vs. Turnage, 485 U.S. 535, 99 L.Ed.2d 618, 108 S.Ct. 1372 (1988), and Alexander vs. Choate, 469 U.S. 287, 83 L.Ed.2d 661, 105 S.Ct. 712 (1985), as Rehabilitation Act cases are generally regarded as authorities for interpreting the ADA. Cramer at 1550, note 1. The Court stated the plaintiffs in Alexander and Traynor were similar to Cramer in that they had challenged federal statutes which did not provide identical benefits to all classes of disabled individuals.

The Court stated, based on Traynor, that the

> [w]orkers' 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. The provisions....here do not make any distinction between individuals with a disability and non-disabled and, as the purposes and effect of the workers compensation system demonstrates, workers' compensation provides different and complementary protection to injured workers.

Cramer at 1553.

The Cramer court did not rely on O'Neil in its holding, however it is clear that the Florida Workers' Compensation Statute does not violate the ADA. This result is reached whether the Court uses the reasoning in O'Neil that workers' compensation is not a "term,

condition or privilege of employment" under Title I of the ADA or under the Traynor analysis which states Workers' Compensation Statute 440.15 does not violate the ADA because it does not discriminate between disabled persons and non-disabled persons. Therefore, Respondents ask the Court to uphold the reasoning in Traynor, Barry and Cramer.

III. FLORIDA'S WORKERS' COMPENSATION STATUTE IS NOT PREEMPTED BY THE ADA.

Petitioner raised the issue of federal scrutiny of state workers' compensation laws based on the ADA. The essence of Petitioner's position is that various provisions of Florida workers' compensation law (to wit: Section 440.15(3), Florida Statutes (Supp. 1990); and Section 44015(3), Florida Statutes (1993)) are "preempted" by or in conflict with the ADA. As noted by the Eleventh Circuit Court of Appeals:

> The laws of the United States are the supreme law of the land, any state constitution of law notwithstanding. U.S. Constitution, Article VI, Cl. 2. Thus, state law may not override or interfere with Federal laws. That is the core premise of preemption doctrine. On the other hand, "(i)n the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a Federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. Thus, preemption will not lie unless it is 'the clear and manifest purpose of Congress.' " (Emphasis added.)

Myrick v. Freuhauf Corp., 13 F.3d 1516, 1519 (11th Cir. 1994), *rehearing en banc denied*, 24 F.3d 256.

In Myrick, the Court further noted that:

> ". . . the Supreme Court has instructed us that state law is preempted by Federal law in three circumstances:
> First, Congress can define explicitly the extent to which its enactments preempt state law. . .

> Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to copy extensively. Such an intent may be inferred from a "scheme of Federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for States to supplement it" . . . Finally, state law is preempted to the extent that it actually conflicts with Federal law. Thus, the Court has found preemption where it is impossible for a private party to comply with both state and Federal requirements." (Citations omitted)

Myrick, 13 F.3d, at 1519.

In the instant case, Petitioner argues that the third test for preemption is present and that the challenged statutes conflict with the ADA. The specified provisions of Chapter 440, Florida Statutes, and the referenced provisions of the ADA do not conflict. Rather, the two statutory schemes are designed to effect two very different ends.

The ADA is designed to eliminate discrimination in employment, based on a disability, when the applicant or employee is "otherwise qualified." Title 42 U.S.C. Section 12112. In contrast, the permanent partial impairment provisions of the Florida workers' compensation law are designed to provide a method for compensating injured workers, who, because of their impairment, are unable to work at the same job and earn the same wages after their injuries. See Chapter 440, Florida Statute. Like the Appellants in the instant case, the injured workers that are provided benefits under the workers' compensation law are generally no longer qualified or able to perform the same tasks which they performed prior to their on-the-job injury. Workers' compensation laws are designed to provide wage loss and medical benefits to injured workers who may, in some instances, be disabled, as well.

Petitioner argues in his Brief that Congress intended for the ADA to be a minimum "base line" for all other state or federal laws. He argues further that the Florida workers' compensation statute falls below the "base line" and is therefore preempted by the ADA. The fallacy of this argument is that Title I of the ADA applies to discrimination against disabled persons in employment opportunities and does not apply to differential benefits provided to disabled persons in a non-work setting.

Petitioner states that ADA requirements supersede any conflicting state workers' compensation laws. This statement is contained at Page IX-6, Section 9.6(b) of the EEOC promulgated Americans with Disabilities Act, A Technical Assistance Manual on the Employment Provisions (Title I). However a reading of the full text of Section 9.6 reveals the true intent of this section.

> 9.6 Compliance with State and Federal Workers' Compensation Laws
>
> a. Federal Laws
> It may be a defense to a charge of discrimination under the ADA that a challenged action is required by another Federal law or regulation, or that another Federal law prohibits an action that otherwise would be required by the ADA. This defense is not valid, however, if the Federal standard does not require the discriminatory action, or if there is a way that an employer can comply with both legal requirements.
>
> b. State Laws
> ADA requirements supersede any **conflicting** state workers' compensation laws.
>
> For example: Some state workers' compensation statutes make an employer liable for paying additional benefits if an injury occurs because the employer assigned a person to a position likely to jeopardize the person's health or safety, or exacerbate an earlier workers' compensation injury. Some of these laws may permit or require an employer to exclude a disabled individual from employment in cases where the ADA

> takes precedence over the state law. An employer could not assert, as a valid defense to a charge of discrimination, that it failed to hire or return to work an individual with a disability because doing so would violate a state workers' compensation law that required exclusion of this individual.

From the foregoing example contained in 9.6b above, it is obvious that these limitations by way of example demonstrate that the intent of Title I is to apply only to workplace situations wherein a disabled but otherwise qualified person might suffer discrimination on the job. Title I does not apply to a differential in post-injury benefits among disabled persons as the Petitioners contend.

Petitioners cite Acosta v. Kraco, 471 So. 2d 24 (1985) and Sasso v. Ram, 452 So. 2d 932 (1984) as standing for the proposition that this Court recognized Workers' Compensation as a fringe benefit. Petitioners however have misconstrued these cases. A careful reading of Acosta and Sasso reveals the courts true intent. In these cases, this Court upheld the District Courts decision that Florida Statute Section 440.15 did not violate the claimant's constitutional equal protection rights as the statute was rationally related to three legitimate state interests:

1. To reduce fringe benefits to reflect a productivity decline with age;
2. To induce older workers to retire to allow younger workers to advance; and
3. To reduce the cost of workers' compensation premiums.

The Court in no way stated workers' compensation benefits are a fringe benefit. In fact, it is obvious the Court did not consider them to be by stating there were three separate, legitimate state objectives.

Further, Petitioners state that Workers' Compensation is within the control of the ADA as insurance under Title III citing 42 U.S.C. Sections 12181 (7)(F), 12182 (2). Section 12181 (7)(F) states:

> Public Accommodation. The following private entities are considered public accommodations....if the operations of such entities affect commerce....a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital or other service establishment;

However, under 42 U.S.C. 12201 (C)(1) insurance is excluded from Titles I through IV of the ADA as these titles "shall not be construed to prohibit or restrict an insurer....from underwriting risks, or administering such risks that are based on or not inconsistent with State law...". this concept is upheld in Carparts Dist. Ctr. v. Automotive Wholesalers 37 F. 3d 12 (1st Cir. 1994).

Further, FEISCO is not subject to Title I as it is not an employer of Cramer. As stated by the Court in Carparts,

> If defendants had the authority to determine the level of benefits, they would be acting as an employer who exercises control over this aspect of the employment relationship. In contrast, insurance companies which merely sell a product to an employer but do not exercise control over the level of benefits provided to employees could not be deemed "employers" under this rationale.

Carparts at 16.

The Carrier, FEISCO, has no discretionary control when it provides benefits to an injured workers' compensation claimant. Rather, the benefit structure is mandated by the Florida Law at Chapter 440. A carrier may not unilaterally adjust levels of benefits. It must follow statutory scheme or face censure from the Florida Department of Labor and

Employment Security and the Florida Department of Insurance as well as from the Courts of this State.

IV. PETITIONER IS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY.

Petitioners, in their brief state Respondents stipulated that Petitioner Cramer was a "qualified individual with a disability" citing the last sentence of footnote 1, page 1 in the final order issued by Judge Willis but drafted by Petitioners. Respondents did not agree, stipulate or otherwise state that Claimant was a "qualified individual with a disability." Respondents did, however, agree Claimant was an individual with an "impairment", a nine percent impairment. Respondents acknowledged Claimant had a nine percent impairment and was therefore entitled to seventy eight weeks of wage loss which Respondents have paid to Petitioner Cramer.

Petitioners argue that the Florida Workers' Compensation Law directly translates impairment into disability and this somehow is a violation of the ADA. However, the workers' compensation law properly defines the two terms separately and uses a hybrid of the two concepts in determining wage loss.

Petitioner is confusing disability with impairment. Disability is defined 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." F.S. 440.02(11) (1990). Impairment is defined as "any anatomic or functional abnormality or loss, existing after the date of maximum medical improvement, which results from the injury." F.S. 440.02(19) (1990).

Florida Statute 440.15(3)(b) (1990) states "each injured worker who suffers a permanent impairment ... may be entitled to wage loss benefits under this subsection, provided that such permanent impairment results in a work-related physical restriction which affects such employee's ability to perform the activities of his usual or other appropriate employment."

An individual who meets the definition of disability ordinarily cannot "perform the essential functions" of his old job. He is thus not a "qualified individual with a disability" and cannot be the object of discrimination within the scope of 42 U.S.C. SS 12112. He is not employable within the goal of the ADA. Eligibility for workers' compensation benefits requires a finding of partial or complete inability to work and the benefits are designed to compensate specifically for lost ability to work. Cramer at 1550. As Cramer is seeking more wage loss benefits under the Workers' Compensation Law, he cannot be a "qualified individual with a disability" as this necessarily presumes he is unable to work.

Petitioners argue Respondents are estopped from asserting Petitioner Cramer is not a "qualified individual with a disability."

> The doctrine of estoppel against inconsistent positions states "where a party to a suit has assumed an attitude on a former appeal, and has carried the case to an appellate adjudication on a particular theory asserted by the record on that appeal, he is estopped to assume in a pleading filed in a later phase of that same case, or another appeal, any other or inconsistent position toward the same parties and subject matter."

Kaufman v. Lassiter, 616 So. 2d 491, 493 (Fla. 4th DCA 1993) citing Palm Beach Co. v. Palm Beach Estates, 110 Fla. 77, 148 So. 544, 548 (1933).

In Respondents brief to the First District Court of Appeals, it was Respondents position that Petitioner Cramer was not a "qualified individual with a disability" within the meaning of the ADA but was an individual with a *nine percent impairment*. This is supported by every document ever filed by Respondent and is consistent with the Respondents position before this court today. Clearly the doctrine of estoppel against inconsistent positions is not violated.

Further, Respondents' position is supported by **Petitioner's brief** filed with the District Court at page 1, note 1 in which Petitioner states "At the hearing..., the Claimant was not permitted to present evidence that he is entitled to the protections of the Americans with Disabilities Act - i.e., to demonstrate that he is "disabled" and that he is a "qualified individual with a disability." As shown by this statement, no stipulation was ever entered into that Petitioner Cramer was a "qualified individual with a disability." At all times Respondents have maintained this position.

Although Petitioner Cramer realizes he is not a "qualified individual with a disability", he nevertheless argues that he is entitled to the protections of the ADA simply by the fact that he was an employee of Respondent Broedell Plumbing at the time his claim for wage loss first arose. Petitioner cites 42 U.S.C. SS 12112 (b)(2) which states:

> Construction. As used in subsection (a), (which uses the term "qualified individual with a disability"), the term discriminate includes participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's **qualified applicant or employee** with a disability to the discrimination prohibited by this title...

In his brief Petitioner states that this legislation speaks of a "qualified applicant or employee with a disability". Petitioner believes that the word "or" signals alternative

choices of a (1) qualified applicant, or (2) employee with a disability, but not both.

Obviously, the Statute addresses discrimination against qualified applicants with a disability and qualified employees with a disability. Under Petitioners reading, an applicant could be qualified but does not need to have a disability and an employee could be disabled but not be qualified and could still be protected by the ADA. This stilted reasoning results in an absurdity. The definition under Section 101 shows that a person must be both qualified and disabled. Petitioner does not fit the definition contained in the statute and is trying unsuccessfully to bend other parts of the statute to fit him.

V. THE FLORIDA WORKERS' COMPENSATION LAW IS NOT APPLIED DISCRIMINATORILY. RATHER, IT IS APPLIED ON A CASE BY CASE BASIS.

Petitioner states that the Florida Workers' Compensation law is discriminatory because injured workers are given disability ratings and receive benefits on a scheduled basis according to that disability. Further, Petitioner argues that benefits should be determined on an individual, case by case basis. What Petitioners fail to see, however, is that individual determination is exactly what happens under the system. An injured worker's primary treating physician gives an impairment rating based on the individual injured worker's afflictions. The numerical percentage of the impairment rating then makes the injured worker **eligible** for a certain number of weeks of wage loss benefits. Such benefits are to be based on the injured workers **actual wage loss**. If the injured worker returns to an employment position and does not suffer any loss of wages, the worker is not entitled to wage loss benefits, although he is still eligible in the event his work related

restrictions cause him wage loss in the future. It is a case by case, individual, factual determination which is not in conflict with any ADA mandate.

Under the 1990 Statute which governs the Petitioner's case substantively, an injured worker is eligible for 78 weeks of wage loss if his impairment rating is six to nine percent. Petitioners would have this court believe that this is discriminatory because a blind man and a deaf man would each receive the same eligibility of wage loss for a nine percent rating. However, the flaw in Petitioners' argument is that not every blind man would receive a nine percent rating. Rather each blind man would be individually rated and be assigned a greater, equal, or lesser impairment rating depending on that person's severity of afflictions or injuries.

Petitioner asserts that using impairment ratings as a measure of paying benefits violates the ADA. This very issue was considered by the Supreme Court of Texas in Texas Workers' Compensation Commission v. Garcia, 893 S.W. 2d 504 (Tex. 1995). The court compared the similarities of Florida workers' compensation law with the Texas workers' compensation law. The court held "...there is nothing in the open courts guarantee that requires the Legislature to base compensation benefits solely on wage loss or disability. Although debated on among experts, physical impairment is one accepted criteria for measuring benefits, and it was within the Legislature's discretion to utilize this standard." Clearly, the Appellant's argument is without merit as physical impairment ratings are a rational basis for providing benefits and furthering the legitimate state objective of mitigating the workers' compensation crisis in Florida.

Further, in Petitioners District court brief at page 17, a hypothetical example is given regarding three individuals substantively governed by different statutes depending on the date of injury. This hypothetical is irrelevant as Petitioner Cramer was injured on November 22, 1993 and is therefore, governed substantively by the 1990 Florida Statutes. Analysis of prior or subsequent years workers' compensation law is not helpful in determining an ADA violation in the case presently before the Court.

VI. THE ADA IS NOT DESIGNED TO ADDRESS DIFFERENCES ACCORDED IMPAIRED PERSONS AS COMPARED TO OTHER IMPAIRED PERSONS; RATHER IT IS DESIGNED TO REACH DISCRIMINATION BETWEEN IMPAIRED AND NONIMPAIRED PERSONS.

In Traynor v. Turnage (supra), the Supreme Court examined the issue of differential benefits in detail regarding a challenge to the Veterans' Readjustment Benefit Act of 1966 under the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (Rehabilitation Act"). The educational benefits at issue were required to be used within a ten (10) year period unless the individual was prevented from using his benefits earlier because of a "physical or mental disability which was not the result of [his] own willful misconduct."

The petitioners in Traynor were honorably discharged veterans who had not used their educational benefits during the decade following their military service and sought to receive an extension beyond the ten (10) year period on the grounds that they had been disabled by alcoholism during the ten-year period. The Veterans' Administration determined that alcoholism constituted "willful misconduct" and that the petitioners were thus not entitled to an extension. The petitioners challenged the denial of the extension

under the Rehabilitation Act, alleging that they were being excluded from obtaining an extension because of their specific handicap, which other handicapped veterans were entitled to receive.

The Court in Traynor held that the unequal treatment of handicapped individuals under the same federal program did not violate the Rehabilitation Act. Specifically, the Traynor court as at page 1302 stated,

> ... the central purpose of Section 504, ... is to assure that handicapped individuals receive 'evenhanded treatment' in relation to non-handicapped individuals. This litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than non-handicapped persons. (emphasis added).
>
> [t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons.

Also, See Easley v. Snider, 36 F.3rd 297, 305 (3rd Cir. 1994) ("[c]ases interpreting the Rehabilitation Act have stated that their main thrust is to assure handicapped individuals receive the same benefits as the non-disabled"). A review of the ADA legislative history establishes that Congress intended the case law interpreting the provisions of the Rehabilitation Act to be generally applicable to the ADA. 1990 U.S.C.C.A.N. Legislative History P.L. 101-336 267, at 337-366.

Other courts have followed the reasoning in Traynor. In P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990), a mildly retarded man challenged a state program because he was denied meaningful access to the benefits provided to other handicapped individuals. Considering that law had been clearly established for the purposes of evaluating a defense of qualified immunity, the Second Circuit held that

> the law governing section 504 did not clearly establish an obligation to meet [the plaintiff's] particular needs vis-vis the needs of other handicapped individuals, but mandated only that services provided nonhandicapped individuals not be denied [the plaintiff] because he is handicapped.
>
> * * * * *
>
> [t]he 'clearly established' law concerning Section 504 indicates that its central purpose is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped. The Act does not require that all handicapped persons to be provided with identical benefits.

Id. at 1041. The court not only rejected the plaintiff's contention that clearly established law favored a claim for discrimination among classes of handicapped person, but concluded precisely the opposite.

This issue in Traynor reappeared before a district court in late 1994. In Modderno v. King 871 F. Supp. 40 (D.C. 1994) a plaintiff brought a claim under Section 504 of the Rehabilitation Act alleging that the Foreign Services Benefit Plan administered by the Office of Personnel Management ("OPM") discriminated against the plaintiff and all other mentally disabled participants by "allot[ing] benefits for mental illness that are unequal to benefits for any other illness." The court, in granting the defendant's motion to dismiss, held that it could not ignore Traynor and found that the "mere disparity" in benefits received by different classes of handicapped persons under the plan did not create a cognizable claim under Section 504. In Modderno at page 1760, the court held that to allow a claim under these circumstances

> would be accept the 'boundless notion' already rejected by the high court [in Traynor], and to invite challenges to virtually every exercise

of OPM's discretion with respect to the allocation of benefits amongst an encyclopedia of illnesses.

Since the ADA was modeled after the Rehabilitation Act, and Congress intended Rehabilitation Act cases to be used to interpret the ADA, this reasoning has also been applied to cases brought under the ADA. In Easley, supra, a group of disabled persons brought an action under the ADA to challenge a requirement that they be mentally alert in order to participate in a state funded attendant care program. The plaintiffs alleged that the state discriminated against them, by not allowing them to participate in the program that they would otherwise qualify for, because of an additional mental disability. The Third Circuit pointed out that the ADA (and the Rehabilitation Act) permit programs, like the one in Easley, to reach groups of disabled individuals without incurring obligations to other groups of handicapped persons. Easley at 305. The court thus concluded that the plaintiffs did not state a claim under the ADA.

Other circuit and district courts have examined this issue under either the Rehabilitation Act or the ADA and have reached the same conclusion. See Wolford v. Lewis, 860 F. Supp. 1123, 1135 (S.D. W.Va. 1994) ("there is no requirement [under the Rehabilitation Act or the ADA] that all disabled persons be provide the same benefits as long as they receive 'evenhanded treatment' in relation to the nondisabled"); Fowler v. Frank, 702 F. Supp. 143 (E.D. Mich. 1988) (Rehabilitation Act); Williams v. Secretary of the Executive Office of Human Services, 609 N.E. 2d 447, 454 (Mass. 1993) ("[t]he focus of Federal disability discrimination statutes [both the Rehabilitation Act and the ADA] is to address discrimination in relation to nondisabled persons, rather than to eliminate all

differences in levels or proportions of resources allocated and services provided to individuals with differing types of disabilities"). Cf., Alexander v. Choate at 304 (the "Rehabilitation Act does not guarantee equality of results"); Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) (the purpose of the Rehabilitation Act is to assure that handicapped individuals receive the same treatment as those without disabilities); Concerned Parents To Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994) (the ADA does not require any particular level of services for persons with disabilities in an absolute sense, but it does require that any benefits provided to nondisabled persons must be equally made available for disabled persons).

Petitioner alleges that Traynor is no longer applicable to an ADA analysis. As a preface, it will be helpful to review the major sections of the ADA.

The American with Disabilities Act is a remedial statute designed to eliminate discrimination against disabled persons. Kinney (supra). The ADA codified at Title 42 U.S.C. Section 12102 et seq. is divided into several parts, three of which are Titles I, II, and III.

Title I of the ADA addresses discrimination against persons with disabilities in employment. Title II addresses discrimination against persons with disabilities in the provision of public services. Part A of Title II prohibits discrimination in the provision of services, programs or activities by a public entity. Part B of Title II prohibits discrimination in public transportation. Title III of the ADA addresses discrimination in public accommodations and services operated by private entities.

Petitioner at pages 38 to 47 of his brief argues the Traynor's application to ADA analysis had been rejected in Helen L. v. Didario 46 F. 3d 325 and Martin v. Voinovich (supra). A careful review of Helen L. and Martin reveals that both cases are clearly distinguishable from this case, both factually and legally.

The plaintiffs, Helen L. from Pennsylvania and Nancy Martin from Ohio, were persons with severe mental retardation and developmental disabilities. In both cases, the plaintiffs filed suit claiming that their respective state welfare agencies were discriminating against plaintiffs because the agencies were denying the plaintiffs access to attendant care programs and community housing opportunities, respectively. Plaintiff Nancy Martin was described by the court as follows:

> Ms. Martin has intelligence within the moderate range of mental retardation. Ms. Martin is confined to an electric wheelchair due to cerebral palsy with spastic quadriplegia. She has functional use of only her right hand and arm and moves herself with the use of an electric wheelchair. She has limited ability to speak and usually communicates with her word book, electronic communicator, facial expressions, gestures, verbalizations, pointing, and nodding.
>
> In May 1993, Ms. Martin had surgery to insert a Peg Tube. The peg tube is used to administer liquids and medications into her stomach. A Peg Tube became necessary due to increased problems with swallowing, caused by Ms. Martin's physical disabilities. Because of her Peg Tube, Ms. Martin needed twenty four hour nursing staff availability.....

Martin 840 F. Supp at 1181

Petitioner's argument that Traynor is not applicable to ADA analysis falls apart in light of the fact that Helen L. and Martin are ADA Title II cases in which the plaintiffs were seeking access to state Medicaid benefits rather than a Title I case as we have here. In this case we do not have the same class of plaintiff, as in Helen L. or Martin. Rather, the

petitioner, with a 9% impairment rating, is seeking an increased monetary award by attacking the validity of Section 440.15 (3)(b) 4.d.

Title I of the ADA established a logical system which employers must follow in situations involving otherwise qualified employees or job applicants who may be disabled. To paraphrase Title I Sections 101-108 and the accompanying regulations at 29 CFR 1630 et seq., an employer must do the following:

1. Determine the essential functions of a particular job.
2. Make reasonable accommodations to enable an otherwise qualified, but disabled person to perform the essential job functions.

To meet these requirements the employer may, consistent with the statute and regulations, make acceptable inquiries as to the ability of the person to perform the essential functions, may require a medical exam, may inform supervisors of functional restrictions in addition to taking other appropriate actions. Implicit in this statutory scheme is the concept that an employer must consider the otherwise qualified, but disabled person's needs on an individual basis to tailor a reasonable accommodation. Petitioner states at page 26 of his brief that:

> "The ADA's legislative history is replete with references to the need for an individual, case by case, factual determination..."

Petitioner would have this Court strike down Section 440.15 (3)(b) 4.d. of the Florida Workers' Compensation Law because it allegedly lacks a case by case analysis. After a careful reading of the Americans with Disabilities Act and its accompanying regulations, it is apparent that the concept of case by case analysis contained in the ADA exists only

for the purpose of facilitating employer compliance with Title I. Nowhere in the ADA is there a requirement that statutorily mandated benefits be determined pursuant to a case by case analysis.

In an attempt to waltz around the mandatory nature of the Florida Workers' Compensation Law, Petitioner at page 34 of his brief cites a portion of EEOC Interpretative Guidance on Title I of the Americans with Disabilities Act. This guidance is contained at page I-22 of the Americans with Disabilities Handbook (EEOC 1991) as:

> An employer allegedly in violation of this part [Title I] cannot successfully defend its actions by relying on the obligation to comply with the requirements of any State or local law that imposes prohibitions or limitations on the eligibility of qualified individuals with disabilities to practice any occupation or profession.

Based on the foregoing, Petitioner states that Respondents may not defend themselves by relying on compliance with state law. It appears that Petitioner would have Respondents invade the province of the courts and the legislature by picking and choosing which statutes to obey.

Petitioner, at pages 31-36 of his brief, discussed the concept that health insurance policies which discriminate based on disability may be in violation of the ADA and that the 78 week wage loss limit at issue here is analogous to a cap on payment for certain conditions in health insurance coverage. Petitioner then boldly concludes that both are a violation of the ADA.

Underlying the Petitioners attempted analogy between the 78 week wage loss limit and a health insurance policy cap is the concept that workers' compensation is a fringe benefit. Respondents addressed the fringe benefit issue earlier. Many of the cases cited

by Petitioner are those in which employers or carriers, at their discretion, reduced or eliminated AIDS related benefits, see Mason Tenders District Council Welfare Fund v. Donaghey No 93 Civ. 1154 (S.D. N.Y. November 19, 1993), Estate of Mark Kadinger v. International Bd. of Elec. Workers, Local 110, CIV No 3-93-152 (C.D. Minn. 4th. Div. 1993). Cases such as these very appropriately condemn a course of conduct that is clearly discriminatory. However, the facts and circumstances of the case at hand are totally different from the examples cited.

Petitioner presents no evidence that Respondents exercised any discretion whatsoever in determining the level of benefits payable to Petitioner. The wage loss benefit structure contained in Section 440.15 (3)(b) 4.d. Florida Statutes (1991) governs the conduct of employers and insurance carriers alike.

Attached hereto in Appendix (p. 25) is a copy of a Workers' Compensation and Employers' Liability Insurance Policy. This policy was created by the National Council on Compensation Insurance and has been approved for use in Florida by the Florida Department of Insurance for all insurance carriers. The policy has only one reference to workers' compensation benefits. On page 1 at Part One B, the policy addresses benefits with the following language:

> B. We (the insurance carrier) Will Pay
>
> We will pay promptly when due the benefits required of you (the employer) by the workers' compensation law.

The employers obligation to provide benefits is addressed at Section 440.09 (1) Florida Statutes (1991), with the following language:

> The employer shall pay compensation or furnish benefits required by this Chapter (440)...

As can be seen from the foregoing, neither the insurance carrier nor the employer exercise any discretion whatsoever in determining the appropriate benefit structure. Petitioner alleges that both the employer and the insurance carrier are in violation of the ADA because they failed to pay more benefits than are allowable pursuant to Section 440.15 Florida Statutes (1991).

The ADA at Title V. c. states the following:

> (c) Insurance. Titles I through IV of this Act shall not be construed to prohibit or restrict:
>
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based an or not inconsistent with State law; or
>
> (3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

A thoughtful review of the language contained in Section (c) of Title V in conjunction with the foregoing can only logically lead to the conclusion that neither the Respondent insurance carrier nor the Respondent employer violated any section of the ADA. The benefit structure for workers' compensation is mandated by statute. Underwriting by the insurance carrier is a normal occurrence. However, the workers' compensation

underwriting process considers the overall insurability of the employer, that is: whether the employer is an acceptable risk. The underwriting process does not address the health or disability of any employee. In most cases the insurance carrier has no idea as to who the employees are. The premium is based on the accident history of the employer and not on the impact of any one employee's health or disability status.

CONCLUSION

For the reasons discussed above, the Respondents ask this Court to answer the certified question by the First District Court of Appeal in the negative:

Section 440.15 (3)(B) 4. D, Florida Statutes (1991) is not subject to and therefore does not have to comport with the requirements of Title I of the Americans with Disabilities Act.

In the alternative, Respondents ask that this Court find that Section 440.15 (3)(B) 4. D does not violate the ADA as it provides greater or equal protection as mandated by the ADA.

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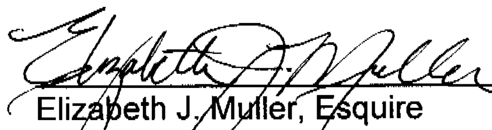
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to **Claire Hamner Matturro**, 869 Lee Road, Cairo, GA 31728; **Alex Lancaster and Amy Sergent, Lancaster and Eure, P.A.**, Post Office Drawer 4257, Sarasota, Florida, 34230; **David M. Mitchell**, 219 S. Orange Avenue, Sarasota, Florida, 34236-6801; and to **Edward A. Dion**, 307 Harman Bldg., 2021 Capital Circle, S.E., Tallahassee, Florida, 32399, this 8th day of December 1995.



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