SUPREME COURT OF FLORIDA

EARL L. CRAMER,

Petitioner

v.

BROEDELL PLUMBING SUPPLY, ET AL,

Respondents.

CASE NO. 86,709

District Court of Appeal,
First District
No. 95-1588

APPEAL FROM THE COMPENSATION ORDER
DATED APRIL 24, 1995
BY THE HONORABLE JOSEPH E. WILLIS
JUDCE OF COMPENSATION CLAIMS
and
APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER EARL L . CRAMER

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PREFACE

For purposes of this brief, Petitioner/Claimant Earl L. Cramer will be referred to as Petitioner. The Respondents/Employer/Carrier, Broedell Plumbing Supply and FEISCO, will be referred as Respondents.

References to the record on appeal will be to the following:

References to the Request for Assistance dated August 31, 1994, will be in the form of (R. __);

References to the Petition/Claim for Benefits dated October 3, 1994, and the accompanying cover letter will be in the form of (P. __);

References to the Docketing Order dated October 18, 1994, will be in the form of (D. __); and

Referentes to the Order of the Judge of Compensation Claims dated April 15, 1995 (the order on appeal) and founä in the appendix to this brief, will be in the form (App. I, p. ___).

All emphasis has been added by the authors of this brief unless otherwise noted in the text.

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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 Constitute, Article V, Section 3.

QUESTION ON APPEAL

The Question on Appeal as phrased by 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?

Standard of Review

As this appeal presents primarily issues of pure law, this Court's standard of review is de novo. ***See Operation Rescue v. Women's Health Center, Inc.,*** 626 ***So.*** 2d 664, 670 (Fla. 1993)(recognizing issues of "purely legal matters" are subject to de novo review), ***affirmed in*** part, ***reversed*** in ***part*** (on other grounds), ***sub nom. Madsen v. Women's Health Center, Inc.,*** ___ **U.S.** __, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

Further, as this **case** comes before this Court upon a dismissal of Petitioner's claim before the judge of compensation claims, any factual disputes must be resolved in favor of Petitioner at this juncture. ***See, e.g., Hishon v. King*** & ***Spalding,*** 467 *U.S.* 69, 104 S.Ct. 2229, 81 L.Ed. 2d 59 (1984).

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner/Claimant, Earl L. Cramer (hereafter Petitioner), who suffered a compensable injury in the scope af his employment, was initially antitled to seventy-eight (78) weeks of wage loss benefits under the terms of section **440.15** (3)(b), Florida Statute. (App. **1, p.** 1). Petitioner asserted he was entitled to wage loss and disability benefits and eligibility for benefits exceeding the 78 week award provided for in section **440.15.** (Id.)

In keeping with that assertion, Petitioner, on or about August 31, 1994, filed a Request for Assistance seeking wage loss benefits greater than the amount payable under section 440.15 on the grounds **that the *payment of wage*** loss ***benefits*** based **strictly** upon impairment classifications under the relevant statute was unconstitutional and in violation of the Americans with Disabilities Act (ADA). (R. 1; **App.** 1, p. **1-2)**

When the Employee Assistance Office failed to respond to this Request, and more than thirty (30) days had elapsed, Petitioner filed a Petition/Claim for Benefits. (P. 1, 2; App. 1, p. 1) The Employer/Carrier (hereafter Respondents) controverted and denied the claim. (App. 1, p. 2). By the terms of the Docketing Order dated October 18, **1994,** the matter **was** referred to the judge of compensation claims for further review and consideration. (D. 1)

The matter came before Judge of Compensation Claim Joseph Willis on Respondents' Motion to Dismiss the Request for Assistance and the Claim for Benefits. (App. **1,** p. 1) Petitioner asserted that the payment to him of only 78 weeks of benefits in

accordance the impairment schedule set forth in section 440.15 violated his rights under the ADA, 42 U.S.C. § 12112 et *seq* (P. 2; App. 1, p. 1-3). He further asserted that limiting payment of wage loss to 78 weeks violated his rights under the state and federal constitutions. (*Id.*)

Respondents claimed it had not violated Petitioner's rights under the ADA or under the state os federal constitutions. Further, Responäents argued the judge of compensation claims lacked jurisdiction to resolved the issues. (Id.)

After hearing argument of counsel, the Honorable Joseph E. Willis, Judge **af** Compensation Claims for the Florida Department of Labor and Employment Security, entered a detailed Final Order, found at Appendix I to this brief. The judge found in the order that the parties had agreed Petitioner was a "qualified individual under Title I of the ADA." **(App.** 1, p.2, n. 2) Judge Willis also found that:

> Their [disabled and impaired workers] entitlement to disability benefits is a condition of their employrnent required by law and is lirnited, segregated and classified based upon numerical irnpairment ratings. While there may be some instances where disabled workers are entitled to or eligible for the **same** benefits, clearly the eligibility for these benefits in Florida is based strictly on an impairment rating after July, 1990.
>
> The plan for the 1990 and 1993 Workers' Compensation laws was to "schedule" all injuries based upon irnpairment. **...**In scheduled benefits, the basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, baseä on observed probabilities in many cases, instead of a specifically proven one based on the individual's actual wage loss experience.
>
> ***

> With all of this being said, I must find that it is not within my province to rule upon any of these issues as a non-constitutional judge of compensation claims;...
>
> ***
>
> I feel that a swift determination of these issues is necessary to the proper administration of justice, for the benefit not only of this court, but before the circuit courts, federal courts anä other courts in this state, who will be hearing the same issues. If swift action is not taken, I fear that the courts will become virtually bogged down with hearings,...

(App. 1, p. 7,9,10)

Accordingly, Judge Willis dismissed Petitioner's claim. (Id. at 10).

Petitioner, in a timely manner, appealed the dismissal to the First District Court of Appeal. The First District, on October 5, 1995, affirmed the dismissal of Petitioner's claim and certified the same question as certified in *Barry v.* ***Burdines,*** ___ ***So.*** 2d ___, 20 Fla. L. Weekly D1923 (Fla. 1st DCA August 23, 1995).

INTRODUCTION TO LEGAL ARGUMENT

Petitioner asserts Respondents have violated Title I of the Americans with Disabilities Act **(ADA)** by discriminating against him in the "terms, conditions and privileges" of his employment by using methods of administration and "limiting, segregating and classifying" him in a way that "adversely affected" his status because of his disability. *See* 42 **U.S.C.** § 12112(a) & (b)(1). Further, Petitioner asserts that Respondents violated section 12112(b)(2) of the **ADA** by "participating in a contractual arrangement...that has the effect of subjecting a covered entity's qualified applicant *or* employee *with a* disability to the discrimination prohibited by this subchapter." See **42** U.S.C. **§** 12112 (b)(2). Use of discriminatory "qualification standards" are also precluded under section 12112 (b)(6)--Respondents run afoul of this provision too. Further, Respondents may **also** have violated section 12181(7)(F) and Title III by discriminating agaknst him with regard to workers' compensation insurance. These are legal issues according this Court de novo review.

The ADA protects Petitioner from such discriminatory actions as Petitioner is disabled within the meaning of the ADA; he is a "qualified individual" within the meaning of the **ADA** and was an "employee" at the time his claim under the **ADA** first arose. These are factual issues which this Court must resolve in favor of Petitioner at this junctuse of the case as the appeal comes before this Court upon dismissal of Petitioner's claims below.

Petitioner is a member of a protected class. **As** a disabled

individual under the ADA, he is--constitutionally speaking--within at least a "quasi-suspect" class which triggers a heightened scrunity standard of analysis. Hence, in reviewing this appeal, this Court should apply a heightened scrutiny in determining if Petitioner--who was denied the chance to present any factual evidence on his continuing need for wage loss benefits--was accorded his fundamental constitutional rights. *See Martin v. Voinovich*, 840 F. Supp. 1175, 1209-10 (S.D. Ohio 1993)(finding 42 U.S.C. § 12101(a)(7)'s discriptian of the disabled as a "discrete and insular minority...subject to a history of unequal treatment" created "at least" a quasi-suspect class subject to an "intermediate heightend scrunity).

SUMMARY OF THE ARGUMENT

Under the ADA, classifications which create disparate impacts among the disabied are unlawful. Under the ADA, denying a disabled person rights without a factual determination is unlawful. Yet Petitioner was denied his claim for further wage loss benefits due to a discriminatory classification which denied him an opportunity for a factual determination of his claim.

To dodge the repercussions of this conflict, the First District in a prior, related case found that workers' compensation benefits are not within the scope of the ADA. Yet the Equal Employment Opportunity Commission--the very agency charged by Congress with implementing the ADA--stated with impeccable clarity: "ADA requirements supersede any conflicting

state workers' compensation law." ***See Americans*** with ***Disabilitiec Act of 1990: EEOC Technica1 Assistance*** *Manual* ***and Resource Directory*** § 9.6.b. (EEOC **1992).** Further, the **ADA** states that state laws which provide equal or greater protection are not preempted by the ADA; conversely, those state laws which do conflict with the **ADA** are superseded by the **ADA.** The Florida wage loss statute challenged here conflicts with the terms, the intent, and the spirit of the **ADA** and **does** not provide "equal or greater protection" than the **ADA.** Simply put, under the **ADA,** Petitioner could ***not*** be denied a factual determination of his claim based upon a classification which creates a disparate impact among the disabled; he could *not* be conclusively presumed ineligible for further benefits due to a classification system based upon presumptions.

This very Court has twice recognized that workers' compensation benefits are "fringe benefits." The ADA applies to employee "fringe benefits." Thus, the precedent of this Court, when viewed in light of the **ADA,** requires a finding that workers' compensation laws are within the purview of the **ADA.**

Florida provides wage loss benefits in a disparate manner according to a rigid statutory classification system--the classifications are based upon the claimant's impairment ratings. Because of Petitioner's classification under subsection (III), his wage loss benefits were terminated at 78 weeks without regard to any actual factual findings that this was appropriate. Had Petitioner's classification fallen under a different subsection, he would have received different benefits. § 440.15(3)(b)4.d.

(111-V), Fla. Stat. (1991). Hence, Florida uses classifications which "adversely affect'' the benefits provided Petitioner. The ADA, again with impeccable clarity, states: Using standards, criteria or methods of administration that have the effect of discrimination on the basis of disability is unlawful under the ADA; classifying an employee in a manner which adversely affects the opportunities or status of the employee is unlawful discrimination under the ADA. 42 U.S.C. § 12112(b)(3)(A)-(B). Instead of the discriminatory classifications an individual, factual determination is required under the ADA. Petitioner was denied this factual determination.

Discrimination among OF against a class of the disabled as well **as** discrimination against all disabled persons are both unlawful under the ADA. The terms of the ADA, its legislative history and the EEOC actions and edicts all establish that discrimination amongthe disabled is unlawful under the ADA. *E.g., Helen L. v. DiDario,* 46 F.3d 325, 335-339 **(3d** Cir. 1995)(holding discrimination among the disabled is just as unlawful under the ADA as **a** blanket discrimination against all the disabled). **The** EEOC's vigorous pursuit of cases involving discrimination among the disabled in terms of health insurance also show discrimination amongthe disabled is unlawful under the ADA--contrary to Respondents' view discrimination *among* the disabled is somehow acceptable under the ADA.

Accordingly, Petitioner respectfully requests this Court to find that Florida's workers' compensation wage loss scheme is superseded by the ADA and to reinstate his claim.

ARGUMENT

I. SECTION 440.15(3)(b)4.d., FLORIDA STATTJTES (1991), IS SUBJECT TO AND SUPERSEDED BY THE REQUIREMENTS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT (ADA) BECAUSE IT USES DISCRIMINATORY CLASSIFICATIONS IN CONFLICT WITH THE DIRECTIVES OF THE ADA.

The Certified Question raised by the First District is closely akin to a preemption question--whether sectian 440.15(3)(b)4.d., Florida Statutes (1991), which limits wage loss compensation to employees according to fixed statutory classifications, is within the control of the Americans with Disability Act **(ADA)**, which prohibits discrimination against disabled employees in their "compensation," and "other terms, conditions, and privileges of employment," including "fringe benefits." The Equal Employment Opportunity Commission--the very agency charged by Congress with the responsibility of implementing the ADA--proclaimed specifically that the ADA supersedes any conflicting state workers' compensation laws. Further, the ADA, both in its very terms and in its legislative history, established a Congressional intent that the **ADA** supersede any conflicting state law. The ADA precludes discriminatory classifications based upon disability; its legislative history repeatedly stressed the need for individual, case by **case**, factual determinations as well as condemned discrimination *among* persons of the same class. Yet, Petitioner's wage loss was terminated at 78 weeks due to a classification based upon his impairment rating; if he had been labeled with a different impairment, he would have been classified differently and received different benefits. As such, Florida's wage loss

scheme is superseded by the **ADA** for the most basic reason: Florida's statutory scheme provides wage loss benefits in a disparate manner according to a rigid classification--not an individual factual determination--and therefore discriminates among and against disabled workers in conflict with the **ADA.**

A. Section 440.15(3)(b)4.d., Florida Statutes (1991), is subject to the control of the ADA because the stated Congressional intent is that the federal law control over conflicting state law; further, the EEOC has recognized conflicting state workers' compensation laws are superseded by the **ADA.**

(i) Florida's workers' compensatian wage loss scheme is preempted by the ADA as Congress explicitly stated its intent for federal law to control and, implicitly, the wage loss scheme stands as an obstacle to the accomplishment of the full purpose of the ADA.

When Congress enacted the comprehensive ADA, one of its stated goals was to "ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities." 42 U.S.C. § 12101 (b)(3); ***See*** also House Report No. 101-485(II) 1, 22-23, 101st Cong. 2d Sess.; ***reprinted*** in 1990 U.S. Cong. and Admin. N. 394 (hereafter House Report No. 101-485(II)) This Congressional emphasis on federal enforcement came after a Congressional finding that: "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing." House Report No. 101-485(II) at 47. ***See*** also id., at 29 (finding, after hearing testimony and reviewing reports, that state laws were inadequate to protect the disabled).

In determining whether a federal law controls over a state law, Congressional intent is the key factor. ***See generally, e.g.,***

Adams Fruit Co. v. Barrett, **494 U.S. 638, 642,** 110 S.Ct. **1384, 1387,** 108 L.Ed.2d **585** (1990)(holding that whether a federal statute preempts a state law "turns on the language of the statute and, where the language is not dîspositive, on the intent of Congress as revealed in the history and purposes of the statutory scheme" and holding the exclusive remedy provision of the state workers' compensation law was preempted under the federal Migrant and Seasonal Agricultural Workers' Protection Act); ***Wood v. County of Alameda,*** **875** F.Supp. **659** (N.D.Cal. 1995)(discussing role of Congressional intent in holding the exclusive remedy provision of California's workers' compensation law is preempted by the **ADA).** Thus, given the ADA's statement that the federal government, not the state, should enforce standards on behalf of the disabled, the presumption must be that the **ADA** controls over Florida's Workers' Compensation law.

While not a traditional preemption question, this certified question nonetheless triggers essentially the same analysis as a preemption question. See ***Wood v.*** *County* of Alameda, **875** F.Supp. at **661.** The preemption doctrine is rooted in the Supremeacy Clause (Article VI of the U.S. Constitution), which invalidates state laws that "interfere with, or are contrary to to, the laws of Congress." ***Gibbons v. Ogden, 22*** **U.S.** ***(9*** Wheat.) 1, 211, 6 L.Ed. 2d **23 (1824) A** state law is preempted "to the extent it actually conflicts with federal law..., or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." ***Silkwood v. Kerr-McGee Corp.,*** **464 U.S. 238, 248, 104** S.Ct. **615, 621, 78** L.Ed.2d **443 (1984).**

Preemption may be found either upon an explicit statement by Congress or through an implicit finding that compliance with both federal and state laaws is a physical impossibility. ***Calfiornia Federal Savings & Loan Ass'n v. Querra,*** 479 U.S. 272, 280-81, 93 L.Ed. 2d 613, 107 S.Ct. **683** (1987). The **ADA** explicitly preernpts only conflicting state law. 42 U.S.C. § 12201(b); ***See also*** House Report No. 101-485(II), ***supra,*** at 1, 22-**3**, 29, 47. **As** further discussed under section B, Florida's wage loss formula is conflicting with the **ADA.** For example, Florida's wage loss scheme uses arbitrary classifications which terminated Petitioner's wage loss compensation at 78 weeks *solely* because of the fixed statutory classification of Petitioner. Yet the **ADA** forbids discriminatory classifications based upon disability and mandates instead individual, factual, determinations. Further, Florida's scheme discriminates against and among classes of the disabled in contradiction of the **ADA's** legislative intent and history. Thus, given this conflict, the **ADA** explicitly preempts Florida's workers' compensation wage loss scheme.

Further, under the Silkwoad analysis, Florida's wage loss scheme surely "stands *as* an obstacle to the accomplishment of the full purpose and objectives" of the **ADA,** id., **464 U.S.** at 248, as the ADA seeks to end discriminatory classifications and to end discrimination amongthe classes of the disabled. The **ADA** implicitly preempts the wage loss scheme at issue as it would be a "physical impossibility" to apply the discriminatory classifications in section 440.15, Florida Statutes and still honor the **ADA's** prohibition against discriminatory

classifications. This Court should find both an expicit preemption and an implicit preemption by the **ADA** of the challenged wage loss scheme.

In ***Wood,*** the federal district court, when faced with an analogous question to the one raised in this appeal, wrote:

> In light of the clear and numerous indications that the express purpose of the enactment of the **ADA** was to guarantee individuals with dísabilities a baseline of protection through the establishment and enforcement of federal standards, defendant fights a very difficult uphill battle in claiming that Congress intended the ADA to "defer" to state [workers' compensation] statutes in any manner whatsoever. (original emphasis)

Wood *v. County* of *Alameda,* 875 F.Supp. at ***663***. Ultimately, the ***Wood*** Court held that the exclusive remedy provision of the California workers' compensation law **was** superseded by the **ADA.** "(T)he Court finds that Congress did not intend the **ADA** to defer to the California workers' compensation law at issue here. **...** Where such (state) provisions are incompatible with the federal statute, they must be denied effect." ***Id.*** at 664. As shown below under section B, the relevant law challenged here is "incompatible" with the **ADA** and, therefore, under the ***Wood*** analysis "must be denied effect."

(ii) Both the Equal Employment Opportunity Commission (EEOC) and the prevailing view among legal scholars recognize conflicting workers' compensation statutes are superseded by the ADA and that workers' compensation benefits are a "term" of employment and a "fringe" benefit subject to the ADA

Just as this Court should defer to the Congressional intent, this Court should also defer to the views of the enforcing federal agency that workers' compensation is within the control

of the ADA. The Equal Employment Opportunity Commission (EEOC)--the agency charged with implementing the ADA (42 U.S.C. s 12116-17)--concluded that workers' compensation laws *are* within the scope of the ADA. The EEOC's Technical Assistance Manual states: "ADA requirements supersede any conflicting state workers' compensation law." ***See Americans** with **Disabilities Act of 1990: EEUC Technica1 Assistance Manual and Resource** Directory* § 9.6.b. (EEOC 1992)(hereafter EEOC *Manual*); ***See also*** Carla Walworth, Lisa Damon, and Carole F. Wilder, ***Walking a Fine Line: Managing The Conflicting Obligations of the ADA and Workers' Compensation** Laws,* 19 Employee Relations L. J. 221, 224 (1993)(workers' compensation laws within the purview of the ADA). Implicit within the EEOC's determination is a finding that workers' compensation benefits are "compensation" or "other tesms, conditions and privileges of employment" or "fringe benefits" under Title 42 U.S.C. section 12112. While not technically controlling, these EEOC guidelines "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." ***Meritor Savings Bank, FSE. v. Vinson,*** 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986); ***See also Carparts Distri. Ctr. v. Automotive Wholesalers,*** 37 F.3d 12, 16 (1st Cir. 1994)(applying definition of "employer" from the EEOC interpretive guidelines to reach its holding). Thus, this Court owes great deference to the EEOC's determination that state workers' compensation statutes are within the control of the ADA.

Like the EEOC's determination that workers' compensation laws are within the scope of the ADA, a multitude af legal

scholars concluded that the ADA does impact and control state workers' compensation law. One such expert stated:

> Many state workers' compensation statutes distinguish among types of work-related injury or illness in defining benefit levels. At least some of these distinctions arguably discriminate based upon disability. Because Title II of the ADA applies to state and local governments generally, such disability discrimination is a prima facie violation of Title 11.

Henry H. Perritt, Jr., ***Americans with Disabilities Act Handbook,*** **1995** Cumulative Supplement No. I, § 5.12A. (2d Ed. Wiley Law Publications 1995) ***See also*** Christopher Bell, ***The Workers' Compensation-ADA Connection, in 1993 Amexicans with Disabilities Act Compliance Manual*** § 11 (National Employment Law Institute Publication 1993)(noting inherent philosophical conflict between ADA and workers' compensation)..

The authors of ***Americans with Disabilities Act: Employee Rights and Employer Obligations,*** in discussing the impact of the ADA on workers' compensation, noted:

> [T]here will be many workers who are injured on the job whose injuries will be more than merely temporary and who will sustain a substantial long-term or permanent physical or mental impairment. In such circumstances, these injured workers would be considered to be individuals with disabilities covered by the ADA and entitled to reasonable accommodations.

Ogletree, Deakins, Nash Smoak and Stewart, ***Americans With Disabilities Act: Employee Rights*** & ***Employer Obligations*** § 6.03(7) (Matthew Bender & Co., Inc. **1995**). ***See also*** Martin W. Aron and Richard M. DeAgazio, ***The*** Four ***Headed Monster: ADA, FMLA, OSHA, and Workers' Compensation,*** **46** Labor L. J. **48**, 53 (January 1995) ("When an employee sustains a work-related injury or

disease, the employee may **also** have a "disability" under the ADA....); Scott **A.** Carlson, ***The ADA and the Illinois Workers' Compensation Act: Can*** Two ***"Rights" Make a*** *"Wrong"?,* 19 **S.** 111. U. **L. J. 567, 590** (Spring **1995)("Both** the **ADA,** and the Workers' Compensation Act address in part the same problems of compensating disabled persons. The addition of the ADA as **a** remedy places employers in a position of 'dual liability.'")

"[F]or several reasons, the ADA is, in fact, likely to affect the administration of state workers' compensation acts." Alison Steiner, ***The Americans*** *With* ***Disabilities Act of 1990 and Workers Compensation: The Employees' Perspective,*** **17** Workers' Compensation **L.** Rev. **3 (1995).** Further, the author notes:

> (B)ecause most workers' compensation employers are also covered by the ADA, the enactment of the ADA could have a direct impact on state law as well. Where employer's actions concerning workers' compensation transgress the ADA, workers are afforded an independent federal remedy against those employers.

Id., at 5-6. Thus, scholars join the EEOC in the prevailing view: workers' compensation laws are subject to the terms of the ADA.

Despite this prevailing view that worker's compensation laws are within the reach of the ADA, the First District erroneously found to the contrary in the companion case of *Barry* ***v. Burdines,*** ***___So.*** 2d ___, 20 Fla. L. Weekly D1923 (Fla. **1st DCA** August 23, 1995). In reliance upon ***O'Neil v. Department*** **of** *Transportation,* **468 So.** 2d **904** (Fla.), ***cert. denied,*** **474 U.S.** 861, 106 S.Ct. **174, 88** L.Ed.2d **144 (1985),** the First District found that compensation benefits were not "compensation" or "terms, conditions, or privileges of employment" under section 12112(a) of the **ADA.** ***See Barry v. Burdines, 20*** **Fla. L.** Weekly at

D1924. However, ***O'Neil*** was not decided under the ADA; with all due respect to this Court, *O'Neil* should not be deemed applicable to this case in light of the Congressional intent behind the ADA.

Congressional intent in enacting Title 1 of the ADA was to protect disabled individuals from the full range of actual and potential employment related discrimination, which logically must include workers' compensation as it is an integral part of an employee's employment picture. *Cf. Byrd v.* ***Richardson-Greenshields Securities, 552 So.*** 2d 1099, 1102 (Fla. 1989) (finding terms of employment include "entire spectrum of disparate treatment" of men and women (cites omitted)). By analogy, terms of employment include the "entire spectrum" of disparate treatment of the disabled. ***See*** *also* House Report 101-485(II) at 54 (stating section 12112 "is intended to include the range of employment decisions" including changes to "any" form of compensation and "fringe benefits").

"Fringe benefits" are within Title I of the ADA. The ADA defines discrimination as including contsactual relations with an entity that discriminates in "providing fringe benefits to an employee." 42 U.S.C. § 12112(b)(2). The EEOC regulations include "[r]ates of pay ***or any other form of compensation*** *and* ***changes in compensation"*** as well as "[f]ringe benefits available by virtue of employment." 29 C.F.R. § 1630.4(c),(f); Cf EEOC *Manual* at § 9.6.b.(finding conflicting workers' compensation laws are superseded by the ADA and thereby indicating by logical implication that workers' compensation is a "term, condition, and privilege" of employment under section 12112(a)). Further, it is

unlawful to discriminate against a disabled person with regard to any "fringe benefits available by virtue of employment, whether or not administered by the covered entity." **29** C.F.R. **§1630.4(f).**

Thus, "fringe benefits" are unequivocally within the scope of Title I of the ADA. This Court has previously recognized the plain truth: Workers' compensation benefits are "fringe benefits." See ***Sasso v. Ram Property Management,*** **452** ***So.*** 2d **932, 934** n3 (Fla. **1984)** (adopting the rational of the First District that "reducing fringe benefits (the workers' compensation benefits at issue) to reflect a productivity decline with age" was an acceptable reason for ending workers compensation benefits at age ***65); Acosta v. Kraco, Inc.,*** 471 ***So.*** 2d **24,** 25 (Fla. **1984)("We** approved the district court's finding that this (workers' compensation) section was rationally related to the legitimate state objectives of reducing fringe ***benefits*** to reflect productivity declines associated with age...."), cert. ***denied,*** **474 U.S. 1022, 106** S.Ct. **576, 88** L.Ed.2d **559 (1985).** Thus, this Court has twice recognized the undeniable fact that workers' compensation benefits are a "fringe benefit."

"Fringe benefits" are "side benefits which accompany or are in addition to a person's employment such as paid insurance, ..." ***Black's Law Dictionary*** 601 (5th Ed.) Workers' compensation in general, and certainly here, is insurance provided by the employer for the benefit of an employee who is injured on the job. In this case, the insurer is Respondent FEISCO. Unless an employer is self-insured, workers' compensation benefits are paid by an insurer. ***See*** **§ 440.38,** Fla. Stat. **(1991).** In fact, the

stated legislative intent of Chapter 440 is to provide "disability and medical benefits to an injured worker at a reasonable cost to the employer." § 440.015, Fla. Stat. (1991). In other words, workers' compensation is a special form of medical and disability insurance provided by the employer for the benefit of the employee--certainly a concept within the definition of "fringe benefits." Thus, this Court correctly found in ***Sasso*** and ***Acocta*** that workers' compensation benefits are, at the very least, fringe benefits. As fringe benefits, workers' compensation benefits come within the scope of the ADA. ***See*** *29* C.F.R. § 1630.4(f); House Report 101-485 (11) at 54. Accordingly, *O'Neil* is simply not applicable to this case.

Further, *O'Neil* was correctly distinguished in the Final Order on appeal. The judge of compensation claim found:

> In [*O'Neil*] the Florida Supreme Court was called upon to decide if the prohibitions of the federal Age Discrimination in Employment Act extended to the state workers' compensation laws. The Court affirmed the District Court's holding that the Workers' Compensation law would not fall within the prohibitions of the Age Discrimination Employment Act because workers' compensation benefits were not "terms, conditions, or privileges of employment." The Supreme Court accepted the DCA;s reasoning that the title of § 623(a), "Employer practices," implied that Congress had intended the prohibitions of that part to reach only those matters over which employers have control. Since employers have no control over the state workers' compensation law, the court reasoned, Congress must not have intended it to be encompassed by the ADEA. In upholding the **state** statute, **the** court also found it significant that the Department of Labor's interpetation of the federal statute, contained in 29 **C.F.R.** § 860.1 *et* ***seq.*** (1983), supported the finding that ADEA only applied to those matters over which the employers have control, because subsection 860.120(e) specifically recognized that the availability of government benefits, such as Medicare, may be based upon age. In other words, the court noted the distinctions in the law dealing with

employer vs. government-provided benefits.

> The claimant herein argues that the Age Discrimination in Employment Act is quite distinguishable from the Americans with Disabilities Act. The mare recent ADA enactment does not make any distinction between government and employer acts, and has no "Employer Practices" designation. Instead, the ADA makes a broad, inclusive and categoric title of "Discrimination Prohibited." Furthermore, the preemption clause of the ADA, contained in [42 U.S.C. § 12201 (b)] states that although the ADA does not preempt any state law that grants disabled individuals greater protection than the ADA, state laws which go below the ADA's minimum standards would violate the federal statute. This is significantly different from the preemption clause af the ADEA, found at 29 C.F.R. § 860.120(9). That section specifically indicates that the ADEA does not preempt state age discrimination in employment laws.

(App. I, p. 3-4) *O'Neil* was decided in part upon the basis that the respondent followed state law; following state law is *not* **a** defense under the ADA. ***See Interpretative Guidance on Title I of the Americans with Disabilities Act,*** app. to **29** C.F.R. § 1630 (b)&(c), ***infra)*** Unlike the petitioner in ***O'Neil,*** Petitioner here is not entitled to social security upon termination of wage loss.

Additionally, again with all due respect to this Court, Justice Shaw's wel1 reasoned and well supported dissent in ***O'Neil*** is far more consistent with the legislative intent behind the ADA than the majority opinion. Justice Shaw wrote:

> Wage loss benefits,..., are paid solely and directly by the employer/carrier to the employee. (cites omitted) **...**
>
> ***
>
> ...(E)mployers bear the entire cost of the system and provide all the benefits.
>
> ***
>
> In my view wage loss is an employer-provided benefit which cannot be totally denied an employee on the basis of age when the practica1

> effect of the denial is to place an older employee in a less favored position than a younger employee.

O'Neil v. Dept. of Transportation, 468 *So.* 2d at 906-08 (J. Shaw, dissenting) As this view is consistent with the Congressional intent of the **ADA** and with both the EEOC's regulations and its technica1 assistance manual, this Court should adopt Justice Shaw's dissent and apply it to this case. Hence, "wage loss is an employer provided benefit which cannot be totally denied to an employee on the basis of (a statutory classification) when the practica1 effect of the denial is to place (one disabled employee) in a less favored position than (other employees.)" Id.

Not only is workers' compensation a fringe benefit directly within Title **I** of the **ADA, but** workers' compensation is also insurance provided by the employer to the employee. ***See §*** 440.38, Fla. Stat. **As** such, this "insurance" is within the **ADA** which addresses insurance both in its text and its legislative history.

Title III of the **ADA** expressly forbids denial of participation, ***inequality in participation, or provision of separate benefits to a person on account of disability.*** 42 U.S.C. s 12182(2). This might well apply to any insurance whether or not the insurance is deemed a "fringe benefit." ***See*** 42 U.S.C. 12181(7)(F); Cf ***Carparts Dist. Ctr. v. Automotive Wholesalerc,*** 37 F.3d at 19-20 (recognizing, but not holding, plaintiff might also have a claim for discrimination in insurance benefits under **Title III as well as a claim under Title I for discrimination of** AIDs claims under an employer provided insurance policy). See Monica McFadden, ***The Americans with Disabilities Act: Fighting***

Discrimination, 31 Trial *67,* 68 (September 1995)("The ADA's legislative history supports directly applying the statute to *a11 insurance and employee benefits cases."*)

As such, workers' compensation insurance is directly within the scope of the ADA as a fringe benefits and as a terms af employment under Title I; alternatively (ar additionally), it is within the control of the ADA as insurance under Title III. Under either, or both, views, the wage loss scheme at hand must be viewed under the edicts of the ADA and the EEOC regulations.

The ADA specifically does not preempt other federal or state laws which "provide greater or equal protection for the rights af individuals with disabilities that are afforded by this legislation. In other words, al1 of the rights, remedies and procedures that are available to people with disabilities under other federal laws or other state laws (...) are not preempted by this Act." House Report 101-485(11) at 135. ***See also*** 42 U.S.C. § 12201(b)(no preemption of state laws which offer "greater or equal" protection); ***Wood v. County of Alameda, 875*** F. Supp. at 663-4 (holding section 12201(b) "is to maximize the options available to plaintiffs by ensuring that federal statutes provide a 'floor' for a plaintiff's rights and remedies while guaranteeing that such statutes never serve as a 'ceiling'..."). As established below in section B, the provisions of Florida's workers' compensation law challenged in this appeal do, in fact, conflict with the ADA and do not offer greater or even equal protection. The ADA must not be a "ceiling" against Petitioner's claim for fair, non-discrirninatory treatment.

(iii) Petitioner is both a disabled person and a "qualified individual" under the *ADA* because he suffers a physical disability, but, with or without reasonable accommodations, he can still perform the essential functions of employment; further, he is entitled *to* the protection of the ADA by virtue of being an "employee" at the time his claim first arose.

To qualify for protection under the ADA, Petitioner must show first that he is "disabled" within the meaning of the ADA. To further qualify for protection under Title I, Petitioner must also show that either he is a "qualified individual" under section 12111(8) or that he was an "employee" under section 12111 (4). ***See*** 42 U.S.C. § 12111 (4)(8) and § 12112 (b)(2). Without dispute, Petitioner is a disabled person under the ADA.

A "qualified individual" is a person with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position. 42 U.S.C. s 12111 (8). This is **a** question of fact. E.g., Hogue *v. MQS Inspection, Inc.,* 875 **F. Supp.** 714, 719 (D.C.Colo. 1995).

The final order on appeal stated: "The parties agree that the claimant (Petitioner) herein meets the definition of a qualified individual with a disability." (App. 1, p.2, n 2). Hence this issue is settled by stipulation and Respondents are estopped from raising it. *Cf. Kaufman v. Lassiter,* 616 So. 2d 491, 493 (Fla. 4th DCA 1993) ***pet.*** for ***rev. denied*** 624 So. 2d 267 (Fla. 1994)(holding a party may *not* maintain inconsistent positions in a lawsukt under the doctrine of estoppel against inconsistent positions). Notwithstanding their agreement before the judge of compensation claims, Respondents in their First District brief argued that Petitioner was not a "qualified

individual." Since this case arrived before this Court upon a dismissal of Petitioner's claim, all factual issues must (for now) be resolved in his favor and viewed in the light most favorable to him. ***See, e.g., Schever v. Rhodes,*** **416 U.S.** 232, **94** S.Ct. **1683, 40** L.Ed.2d **90 (1974).** Petitioner asserts he is a qualified individual and this must be accepted as true at this juncture of the case. ***See, e.g., Hishon v. King & Spalding,*** **467 U.S. 69, 104** S.Ct. 2229, **81 L.Ed.2d 59 (1984).** Because the judge of compensation claims dismissed the claim without giving Petitioner the opportunity to present evidence on this factual issue, this Court can not resolve it against Petitioner. See, ***e.g.*** id. Accordingly, for purposes of this Court's analysis, Petitioner is a qualified individual under the ADA.

He is also entitled to the protection the ADA simply because he was an "employee" at the time his claim for wage loss first arose. (If he had not been an "employee" when he first claimed wage loss, he would not have received any **wage** loss benefits in the first place.) His claim for wage loss and his claims under the ADA arose at the same time--the operative time--as it is the method of administration of the wage loss benefits that gives rise to Petitioner's ADA claim.

The heart of Petitioner's claims arises from section 12112 **(b)(1),** which precludes classifying an "employee in a way that adversely affects the opportunities or status of such applicant or *employee,"* and from section **12112 (b)(2),** which precludes participating in a contractual arrangement that has the "effect of subjecting a covered entity's qualified applicant ***or*** employee

with a disabilityto the discrimination prohibited by this chapter." 42 U.S.C. § 12112 (b)(1),(2). Petitioner asserts: 1) that Respondents discriminated against him by classification according to a statutory formula under section 12112 (b)(1); and 2) that Respondents further discriminated against him by participating in a contractual arrangement for workers' compensation insurance which discriminated against him under section 12112 (b)(2). As such, Petitioner need only show he was an "employee" at the time his claim under the **ADA** arose. **As** previously indicated, no one can dispute Petitioner was an "employee" of Broedell at the time his claim for wage loss first arose. **As** his claim under the **ADA** arose from the method of administration and classifications under the wage loss system, his ADA claim arose simultaneously with his wage loss claim.

With regard to section 12112 (b)(2), the use of the term "**or**" particularly supports Petitioner's assertion that he is entitled to the protection of section 12112 of the ADA simply by virtue of the fact he was an employee with a disability at the operative time. The legislation speaks of a "qualified applicant ***or employee with a disability.***" 42 U.S.C. § 12111(b)(2). "Or" is a conjunctive term signaling alternatives choices: Petitioner need be only 1) a qualified applicant "**or**" 2) an "employee with a disability, but he need *not* be both. **As** such, Petitioner is entitled to the protection of section 12112 simply by virtue of his status as an employee.

As Petitioner is within the scope of the **ADA's** protective reach, this Court should resolve this case upon the legal issues.

B. Section 440.15(3)(b)4.d., Florida Statutes (1991), utilizes arbitrary classifications based upon impairment which conflict with the ADA because the ADA requires an individual, case by case, factual determination and precludes discriminatory classifications; further, Florida's scheme discriminates among a class of the disabled in violation of the ADA's stated intent.

The ADA's language, its legislative history and the EEOC regulations all show that the Florida scheme constitutes unlawful discrimination because it involves a rigid classification or method of administration which terminates benefits in a discriminatory manner. The **ADA** condemns classifications based upon disability which have a discriminatory impact; the wage loss scheme challenged here classifies claimants in a manner that discriminates against Petitioner and similar individuals. The **ADA's** Legislative history is replete with references to the need for an individual, case by case, factual determination of benefits--not the arbitrary classification in effect in Florida for employees who become disabled on the job. Florida reduced workers' compensation benefits in 1990 with the stated intent to reduce the cost of workers' compensation premiums to the employers. Yet the EEOC specifically stated that discriminatory practices to reduce workers' compensation premiums are unlawful under the **ADA.** Further, the wage loss scheme discriminates against **and** amongthe class of the disabled in contravention of the legislative intent to prohibit discrimination among persons of the same class.

(i) Florida's wage loss scheme is **unlawful under the ADA because it utilizes classifications based upon impairments** which **have a discriminatory impact on the disabled.**

Discrimination is defined to include "utilizing standards, criteria, or methods of administration- (A) that have the effect

of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control;..." 42 U.S.C.§ 12112(b)(3)(A)-(B). Further, "classifying" an employee in a manner which "adversely affects the opportunities or status of such...employee because the disability of such...employee" is also unlawful discrimination. 42 U.S.C. § 12112(b)(1). Participation in a contract with "an organization providing fringe benefits to an employee" where the organization discriminates against the employee is also forbidden discrimination. 42 U.S.C. § 12112(b)(2); see 29 C.F.R. §§ 1630.6(b), 1630.5 and 1630.7 (addressing unlawful, discriminatory classifications according to disability). *See also* House Report 101-485(II) at 58 and at 61 (precluding classifications, standards, criteria or methods of administration which discriminate on the basis of disability).

Without question, the Florida wage law statutes uses "standards, criteria or methods of administration" with a discriminatory impact. The judge of compensation claims in the order on appeal as much as admitted this. (App. 1, p. 7-9)

Under section 440.15(3)(b)4.d.(III), Petitioner's wage loss benefits were terminated at 78 weeks solely because: 1) his injury occurred after June 30, 1990; and 2) his impairment rating fell within the rigid classification of six to nine percent set out in that section. ***See*** § 440.15(3)(b)4.d.(III), Fla. Stat. (1991). That section sets out a classificatian or "method of administration" based on impairment--an employee's benefits are strictly limited according to a narrowly drawn formula based upon

impairment ratings. Thus, on its very face, this statute conflicts with the ADA which precludes classifications or "methods of administration" which create disparate impact based upon disability. ***E.g.***, 42 U.S.C. § 12112(b)(1). ***See also*** Perrit, ***Americans with Disabilities Act Handbook, supra,*** at Cumulative Supplement No. 1, § 5.12A (stating workers' compensation statutes which distinguish among types of work related injuries might discriminate based upon disability).

The judge of compensation claims aptly illustrated the discriminatory impact of Florida's wage loss scheme by detailing the disparate, and wholly inconsistent, results of three hypothetical claimants. (App. I, p. 6-7). Petitioner directs this Court's attention to that hypothetical and adopts it as an illustration of the disparate impact on Petitioner and similar claimants under section 440.15, Florida Statutes.

"Impairment," as used in Chapter 440, refers to "an alteration of an individual's health status that is assessed by medica1 means," as compared to disability, which is "an assessment by non-medica1 means of an alteration of an individual's capacity to meet personal, social or occupational demands, or statutory regulatory requirments." American Medica1 Association's ***Guides to the Evalualation*** of ***Permanent Impairment,*** (4th Ed.) In other words, impairment is what is wrong with the body and its functioning; disability is the gap between what the individual can do and what the individual needs or wants to do.

The AMA guidelines also point out that an individual who is "impaired" is not necessarily "disabled" and that impairment

gives rise to disability only when the medical condition limits the individual's capacity to meet the demands of life's activities. Thus, it is entirely probable that some claimants with an impairment rating receiving wage loss benefits are not disabled; as such section 440.15 also discriminates against the disabled in favor of the non-disabled as well as amongthe disabled. Although a key facet of this case is Petitioner's claim he has suffered from impermissible discrimination among the disabled, discrimination also occurs when non-disabled persons with impairment ratings are favored over disabled persons with little or no impairment ratings. Under section 440.15, persons who are not disabled, but nonetheless have an impairment rating, will receive disability compensation based upon their impairment rating. Disabled persons with little or no impairment ratings can actually receive less wage loss than non-disabled persons with a large impairment rating. The cure for these defects is found in the ADA's insistence upon an individual, factual determination.

Further, as noted in the Order on appeal, the plan for the 1990 and 1993 Workers' Compensation laws was to "schedule" all injuries based upon impairments, similar to the prior provisions based upon "scheduled injuries," separate from whole body injuries. ***See*** *Magic* City Bottle & Supply Co. *v.* Robinson, 116 So. 2d 240 (Fla. 1959)(recognizing the underlying principle of compensation law is that benefits relate to loss of earning capacity and not to physical injury). This theory remains essentially the same for scheduled benefits; the only difference is that the impact on earning capacity is conclusively presumed

now, based upon observed probabilities instead of a specifically proven one based upon the claimant's own factual situation. *Magic City* was decided prior to the ADA; nonetheless, it is noteworthy that the distinction between disability and impairment has long been recognized. Again, the cure to the discrimination created by the wage loss scheme at issue is the individual, factual determinations required by the ADA--not the conclusively presumed determinations based upon classification of impairment.

Instead of rigid classifications, the ADA stresses the need for individual, case by case factual determinations. ***See generally, Pandazides v. Va. Bd.*** of ***Education,*** 946 F.2d 345, 349 (4th Cir. 1991) stressing the need for "individualized inquiry and appropriate findings of fact" and holding: "Accordingly, defendants can not merely mechanically invoke any set of requirements and pronounce the handicapped applicant...not otherwise qualified. The District Court must look behind the qualifications. To do otherwise reduces the term "otherwise qualified' and any arbitrary set of requirements to a tautology." ***See generally Hogue v MQS Inspection, Inc.,*** 875 F. Supp. at 721 (and cases cited therein)(recognizing need for "fact specific inquiries" in ADA wrongful discharge cases). Congressional intent was to preclude classifications based upon "presumptions" and to require employers to "make employment decisions based on facts applicable to individual applicants or employees." House Report No. 101-485(II) at 58. Specifically, Congress stated: "This legislation requires individualized assessments...." ***Id.*** Addressing the "fears" of safety or absenteeism, which are based

upon "averages and group-based predictions," the House Report states: "This legislation requires individual assessments which are incompatible with such an approach." House Report 101-485(II) at 58. "Group based predictions" such as those reflected in section 440.15(3)(b)4.d. must defer to "individual assessments."

Yet, in contrast to this clear "case by case" factual inquiry required by the **ADA**, Petitioner was subjected to "presumptions" that he no longer needed wage loss benefits after 78 weeks because of his classification under Florida's wage loss scheme. Such "presumptions" are clearly precluded by the **ADA.** *E.g.*, House Report No. 101-485(II) at 58. As noted by the judge of compensation claims: "In scheduled benefits, the basic theory remains the same; the only difference is that the effect on earning capacity is a *conclusively presumed one, based on observed probabilities in many similar cases, instead of a specifically proven one based on the individual's actual wage loss experience."* (App. 1, p. 7-8) This "conclusively presumed" form of classification based on "observed probabilities" is precisely what Congress ruled out in stating that classifications based upon "averages and group-based predictions" are precluded in favor of "individual assessments." *See* House Report 101-485(II) at 58. Thus, Florida's wage loss scheme, which uses discriminatory classifications to determine the benefits a disabled worker receives, is suspect; such a rigid classification, by its very nature, precludes the "fact specific, case by case" approach required by the **ADA.**

The provision at issue, subsection 4.d., was added to

Chapter 440 in 1990 as part of a statutory revision to boost "economic development" in Florida. Chap. 90-201, 1990 Laws of Florida 894, 939. In the preface to that act, the Legislative intent in reducing workers' compensation is spelled out:

> WHEREAS, the Legislature finds that there is a financial crisis in the workers' compensation *insurance* industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state, and...
>
> ***
>
> WHEREAS, the *reduction* in benefits provided in this act are necessary to ensure (insurance) rates that allow employers to continue to comply with (Chapter 440), ...

Chap. 90-201, 1990 Laws of Florida at 899.

Thus, the legislative intent is beyond debate: The legislature reduced workers' compensation benefits in 1990 to boost business by cutting workers' compensation *insurance* rates. Yet the reductions are not uniform in impact, but affect employees in a disparate manner according to the classification of their impairment. Disparate reductions alone due to classifications are not permissible under the ADA. *See* 42 U.S.C. § 12112(b)(1)-(3); 29 C.F.R. § 1630.5. *See, cf., Helen L. v. DiDario,* 46 F.3d 325 (3rd Cir. 1995) and *Terrence Donaghey, Jr. v. Mason Tenders District Council Trust Fund,* charge no. 160-93-0419 (January 28, 1993)(both discussed, *infra.)* But disparate reductions *due to classifications to save money on insurance are most certainly forbidden by the ADA.*

Saving money on workers' compensation insurance premiums is *not* a defense under Title I of the ADA; to the contrary, the EEOC has specifically stated reducing insurance costs is not a

permissible reason to discriminate against the disabled.

> The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums *or workers' compensation costs* to increase, would *not* be a legitimate nondiscriminatory reason justifying disparate treatment of an individual with a disability. ... House Labor Report at 136.

The Interpretative Guidance on Title I of the Americans with Disabilities Act, § 1630.15, App., *in* Appendix to 29 C.F.R. § 1630 (July 1, 1995 Revised 29 C.F.R. at 420).

The House Report of the Education and Labor Committee, referred to in the above quote from the EEOC, stated: "For example, an employer could *not* deny a qualified applicant a job because the employer's current insurance plan does not cover the person's disability or because of the increased costs of insurance." House Report 101-485(II) at 136. *See also Helen L. v. DiDario,* 46 F.3d at 337 (rejecting a defense that the state lacked the necessary funding to meet the plaintiff's request and finding a violation of the ADA in spite of the state's lack of funding to cure the violation). "*The fact that it* ***is*** *more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services* under Section 504 of the Rehabilitation Act, or under [Title II of the ADA]."(emphasis added by the Third Circuit) *Helen L. v. DiDario,* 46 F.3d at 338, quoting House Report 485(III), 101st Cong.2d Sess. 50, *reprinted in* 1990 U.S. Cong. and Admin. N. at 473.

Both the EEOC--the agency charged with enforcing the ADA--and Congress have plainly stated that discrimination to save

money on insurance costs is unlawful under the ADA. The Florida Legislature equally plainly has stated it reduced workers' compensation benefits to save money on insurance rates. As both Congressional intent and the EEOC's rulings are due great deference by this Court, *see, e.g., Adams Fruit Co. v. Barrett,* 494 U.S. at 642, and *Meritor Savings Bank, FSB. v. Vinson,* 477 U.S. at 65, this Court should find that the challenged statutory classification is unlawful under the ADA.

Further, Respondents may *not* defend themselves by asserting they merely followed Florida law. The EEOC, in its appendix to the governing regulations, stated:

> 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.

Interpretative Guidance on Title I of the American with Disabilities Act, appendix to 29 C.F.R. § 1630(b)&(c).

The 78 week limit on wage loss at issue here is analogous to a cap on certain conditions in health insurance coverage. For example, terminating wage loss at 78 weeks solely because of a particular impairment classification is akin to a health insurance policy which places a $5,000 cap on a particular disease, but not on other diseases. In both situations, benefits are limited by classifications based upon particular conditions. Yet such caps in health insurance are a violation of the ADA.

> Under these [EEOC] guidelines, certain (insurance) cases are easy to prove.... Examples are those cases, ..., where caps are placed on benefits for HIV or AIDS-related cases while other illnesses continue to

> be provided higher levels of coverage. The EEOC has vigorously pursued these cases and has argued successfully that they are per se discrimination.

McFadden, *The Americans with Disabilities Act: Fighting Discrimination, supra,* at 69, citing *e.g., Mason Tenders District Council Welfare Fund v. Donaghey,* No. 93 Civ. 1154 (S.D.N.Y. Nov. 19, 1993). *See also* Ronald Bayer, *ADA Limits Employers' Caps on AIDs-Related Health Benefits,* April 1995 Law and Policy Rptr. 49 (1995)(citing *Mason Tenders* and others for same principles).

In *Mason Tenders,* the New York District office of the EEOC issued a determination that the Mason Tenders District Council Trust Fund violated the ADA by changing its health insurance plan on July 1, 1991, to explicitly exclude payment for expenses arising from AIDS or ARC. *Terrence Donaghey, Jr. v. Mason Tenders District Council Trust Fund,* charge No. 160-93-0419 (January 28, 1993) *reprinted in* 25 Daily Lab. Rep. D-1 Full Text Section (Feb. 9, 1993). The Trust Fund moved for summary judgment against the EEOC and its motion was denied. *Mason Tenders District Council Welfare Fund v. Donaghey,* No. 93 Civ. 1154 (S.D.N.Y. Nov. 19, 1994) *discussed at* 2 Health L. Rptr. 1565 (BNA 1994)

In similar cases, the EEOC has maintained its stance that reductions in AIDs-related insurance coverage is a prohibited discriminatory practice under the ADA. *See Estate of Mark Kadinger v. International Bd. of Elec. Workers, Local 110,* Civ. No. 3-93-159 (C.D. Minn. 4th Div. 1993)(Complaint filed March 17, 1993, Consent Agreement, filed December 21, 1993); *EEOC v. Connecticut Refining Co.,* EEOC Charge No. 161-93-0253 and 161-93-0254, Conciliation Agreement, March 7, 1994)(Company eliminated

its $10,000 cap on AIDS-related insurance coverage, paid claimant compensatory damages and provided ADA training.); and ***EEOC v. Tarrant Distributors, Inc.,*** Civ.A. No. H-94-3001 (S.D. Tex. Oct. 11 1994)(approving consent order in which respondent company ended its practice of limiting AIDs-related insurance benefits when other illnesses were not similarly limited). These cases are discussed in Bayer, ***ADA Limits Employers' Caps on AIDS-related Health Benefits, supra,*** at 50-51.

These EEOC actions show that limiting health insurance coverage according to the type of illness is a violation of the ADA; by analogy, limiting wage loss benefits according to the type of impairment would also be a violation of the ADA.

The underlying support for this position is found in the EEOC's own language and examples. As the agency charged with implementing the ADA, the EEOC indicated that plans which seek exclusions of "a particular disability, discrete group of disabilities, or disability in general" are objectionable under the ADA. The EEOC in its interim guide EEOC No. N-915.002, wrote:

> (H)owever, health-related insurance distinctions that are based on disability may violate the ADA. A term or provision is "disability based" if it singles out a particular disability (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g. cancers, muscular dystrophies, kidney diseases), or disability in genera1 (e.g., non-coverage of all conditions that substantially limit a major life activity).

EEOC Interim Enforcement Guidance: Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance 7 (EEOC Notice No. N-915.002) (6-8-93), ***reprinted in Americans with Disabilities Act: Employee***

Rights and Employer Obligations, supra, Appendix E-7 (Matthew Bender 1995) (hereafter EEOC No. N-915.002)

Stressing that it is the respondent employer/insurer who bears the burden of proof, EEOC No. N-915.002 cited two examples of insurance plans which presumptively violate the ADA. In one, the insurer caps benefits for all physical conditions, except AIDS, at $100,000 per year, but caps AIDs benefits at $5,000. In the other example, the insurer excludes treatment of blood disorders for a period of 18 months, but does not exclude coverage of other conditions. In the first example, the EEOC noted the cap on AIDS was a disability-based distinction; in the second example, the exclusion of blood related diseases was a disability based distinction of a discrete group of related disabilities--hemophilia, leukemia, for example. ***Id.*** at 7-8.

Employers/insurers must then prove such plans are "bona fide" and not a "subterfuge" to avoid the ADA but rest upon "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." ***Id.; see also*** **42** U.S.C. **§** 12201(c). Whether the disability based distinction is a subterfuge will be determined on a "case by case basis, considering the totality of the circumstances." EEOC No. N-915.002, ***supra,*** at 10. While this EEOC Notice concerned health insurance, it nonetheless offers "informed judgment to which courts and litigants may properly resort for guidance." ***See Meritor Savings Bank, FSB. v. Vinson,*** 477 U.S. at 65.

By analogy, EEOC No. N-915.002 supports Petitioner's view that a classification based solely upon the type of impairment is

an impermissible disability-based distinction. Under this rationale, if cutting off benefits to one class of persons (those with AIDS in both Ms. McFadden's and the EEOC's examples) is a violation of the ADA because it discriminates against a certain type of disability, then cutting off Claimant's benefits at 78 weeks because of the type of impairment he suffers is equally a violation of the ADA.

(ii) The wage loss scheme at issue discriminates among the disabled which is unlawful under the ADA as the ADA's language and intent preclude discrimination among classes of the disabled as well as against the disabled as a class.

The Congressional intent behind the ADA included an intent to prohibit discrimination *among* classes of the disabled as well as against the disabled as a class. Congress stated:

> Virtually all States prohibit unfair discrimination *among* persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination. Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

House Report 101-485(II) at 136. Since the Congressional purpose included prohibiting discrimination "among persons of the same class," and persons disabled on the job would constitute a class, then it logically follows that discrimination against those with a certain classification of impairment in favor of those with another kind of impairment would be a prohibited discrimination "among persons of the same class."

Discrimination in Title I is defined to include

qualification standards that screen out, or tend to screen out, "an individual with a disability or *a cïass* of *individuals with disabilities.*" 42 U.S.C. § 12112(b)(6). Title III also speaks of discrimination against "an individual or class of individuals on the basis of a disability of such individual or class." 42 U.S.C. § 12182(b)(1)(A)(i). The EEOC states: "Disparate impact means, with respect to Title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on *a cïass* of *individuals with disabilities." See The Interpretative Guidance on Title I, supra,* at § 1630.15(b)&(c), App. Thus, the ADA and the EEOC recognize that it is unlawful discrimination to negatively target "a" class of the disabled (such as Petitioner and others within the 78 week wage loss category) within "the" class of the disabled as a whole (such as all disabled workers). It is just as unlawful to discriminate amongthe disabled as it is to discriminate against the disabled as a whole class. *Id.; Helen L. v. DiDario,* 46 F.3d 325 (3d Cir.1995) and *Martin v. Voinovich,* 840 F. Supp. at 1192(and cases cited therein)(*infra).*

In a rather offhanded way, the First District in the related case of *Barry v. Burdines* relied upon *Cramer v. State,* 885 F. Supp. 1545 (M.D. Fla. 1995) (appeal pending). *Cramer* erroneously found that discrimination *among* classes of the disabled is permissible under the ADA. In other words, according to the *Cramer* opinion, a disabled worker with a back injury could receive discriminatory treatment in contrast to a disabled worker with a hip injury and no violation of the ADA occurs. *See Cramer,*

885 F. Supp. at 1553. However, in reaching this decision, the Middle District Court does not appear to have reviewed either the legislative history of the ADA which stated "discrimination ***among*** persons of the same class" was precluded, ***see*** House Report 101-485(II) at 136, or the ADA and EEOC definitions of discrimination including a negative impact among "a" class of the disabled, *EEOC* ***Interpretative Guidance, supra.;*** 42 U.S.C. § 12112(b)(6)

That discrimination is ***not*** allowed among the classes of the disabled is not only supported by ***Helen L.*** and ***Martin, infra***, but also supported by EEOC No. N-915.002; the EEOC's position in the ***Mason Tenders*** case; and by Ms. McFadden's analysis, all discussed above. The fact that the EEOC "vigorously pursued" cases placing caps only on certain illnesses without similar caps on all illness establishes that within the whole class of persons with illnesses, insurers may not discriminate ***among*** the different types of illnesses.

Assume a person with AIDS has a *$5,000* cap on benefits while a person with muscular dystrophy (MD) has a $1 million cap (as do other covered conditions). Both the person with AIDS and the person with MD are within the whole class of disabled persons under the ADA. Discrimination against the person with AIDS, but not in the case of the person with MD, is discrimination "among" the disabled. That is, it is discrimination against "a" class of persons with AIDS in favor of "a" class of persons with MD.

This example is not a case of discrimination against the disabled versus the non-disabled as the non-disabled person and the disabled person with MD both have the same potential coverage

of $1 million, that is, they are both offered the same insurance coverage; only the AIDs sufferer is discriminated against by being offered less insurance coverage. Hence it is discrimination *among* the disabled that the EEOC has "vigorously pursued." If as Respondents (and *Cramer)* argue, discrimination *among* the disabled is perfectly acceptable under the ADA, why would the EEOC "vigorously" pursue cases in which the discrimination is so clearly only discrimination *among* the disabled--that is discrimination against AIDs sufferers in favor of other disabilities? Thus, discrimination *among* the disabled is *not* permissible under the ADA. *Cf.* EEOC No. N-915.002, *supra; Terrence Donaghey, Jr. v. Mason Tenders District Council* ***Trust*** *Fund, supra. See* ***also*** McFadden, *The Americans with Disabilities Act: Fighting Discrimination, supra,* at 69.

Further, the Middle District in *Cramer* erroneously relied upon the distinguishable case of *Traynor* ***v.*** *Turnage,* 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988) in finding that discrimination *among* the disabled is permissible. *Traynor* concerned a challenge to a Veterans Administration regulation which denied extensions of time to use educational benefits where the petitioner was an alcoholic and where the regulation treated primary alcoholism as willful misconduct. One primary distinction between *Traynor* and this case is that in *Traynor,* the individuals were not discriminated against by classification, but were denied benefits due to their own "willful misconduct." *See Martin* ***v.*** *Voinovich,* 840 F. Supp. at 1191 (holding the "petitioners in *Traynor* were ultimately denied benefits not solely because of

their disability, but because of their willful misconduct). While the willful misconduct/alcoholism issue in that case *might arguably* be analogous to the illegal drug and alcohol provisions of the ADA, *see* 42 U.S.C. § 12114, neither illegal drugs or alcoholism have any bearing on this case. As such, even a casual reading of *Traynor* shows it is not applicable to this case.

The judge in *Cramer* implicitly accepted that the Florida wage loss scheme is within the scope of the ADA and does discriminate among classes of the disabled; however the judge found this permissible based upon *Traynor--a* case decided two years before the far reaching ADA was even signed into law. Not only is *Traynor* not an ADA case, it does not directly address the issue of whether discriminatory classifications *among* the disabled is acceptable. *Traynor* set forth the dispositive issue in that case as: "Accordingly, petitioners can prevail under their Rehabilitation Act claim *only* if the 1978 legislation can be deemed to have implicitly repealed the 'willful misconduct' provision of the 1977 legislation or forbade the Veterans' Administration to classify primary alcoholism as willful misconduct." *Traynor v. Turnage*, 485 *U.S.* at 547.

Traynor's application to ADA analysis has been firmly rejected by the Third Circuit, which held discrimination *among* the disabled is a violation of the ADA. *Helen L. v. DiDario*, 46 F.3d 325, 335-339 (3d Cir. 1995). In *DiDario*, the petitioner--like Petitioner here--alleged she was discriminated against under the ADA in part because she was treated differently than other persons with similar disabilities to her own. Defendants in

DiDario--as Respondents here--raised Traynor for the notion that any discrimination against her was merely discrimination among the disabled and therefore acceptable. The Third Circuit flatly rejected such a legal specter and held discrimination amongthe disabled was unlawful under the ADA.

In rejecting the very argument advanced in *Cramer,* the Third Circuit distinguished Traynor as "not germane to our analysis" and "easily distinguishable." Helen *L. v. DiDario,* 46 F.3d at 335-6. After stating that Traynor was limited to an issue of "repeal by implication" of the willful misconduct statutory language, *DiDario,* 46 F.3d at 335-6, the Third Circuit stated that Traynor did note the Rehabilitation Act did not require that any benefit extended to one category of handicapped persons must also be extended to all other categories of handicapped persons. In other words, seeing eye dogs need not be provided to the deaf just because they are provided to the blind. *Cf.* Easley *v.* Snider, 36 F.3d 297, 303, 306 (3d Cir. 1994)(excluding disabled persons from program for which they were not sufficiently mentally alert is not violation of the ADA as the services, in effect, would be wasted). Easleyheld: "This is not a case of state discrimination against a subgroup of the people who are physically disabled. On the contrary, this is a case where an additional handicap, a severe degree of mental disability, renders participation in the program *ineffectual."* Id. at 306. But this case does not raise that type of "ineffectual" claim. Providing Petitioner with a chance to prove he is entitled to further wage loss benefits is not giving a seeing eye dog to a

deaf man, but is providing the opportunity for a seeing eye dog to a blind man. And if seeing eye dogs are provided for some of the blind, then they must be provided for all of the blind. *Cf. Helen L. v. DiDario*, 46 F.3d at 336.

A comparison between *Easley* and *Helen L.* (both Third Circuit cases and presumed consistent) illustrates that *Traynor* does not stand for the idea that discrimination among the disabled is allowed. *Traynor* only stands acknowledges that benefits provided to one group do not have to be provided to another group when: 1) to do so would be "ineffectual" as in *Easley*, or 2) would reward persons for their willful misconduct as in *Traynor*. As Peitioner does not fit into either category, *Traynor* does not protect Respondents.

DiDario rejected the idea that such a statement in *Traynor* stood for the notion that the ADA would sanction discrimination among classes of the disabled. *DiDario* held:

> As noted above, Congress has stated that "discrimination against individuals with disabilities persists in such critica1 areas as ... institutionalization." 42 U.S.C § 12101(3). If Congress were only concerned about disparate treatment of the disabled as compared to their nondisabled counterparts, this statement would be a non sequitur as only disabled persons are institutionalized.

Helen L. v. DiDario, 46 F.3d at 336.

Martin v. Voinovich also rejected the idea *Traynor* permits discrimination *among* the disabled. After noting the well settled rule that cases under section 504 of the Rehabilitation Act, *29* U.S.C. § 794, apply to the ADA, *Martin* held:

> [A]s a matter of statutory construction, nothing in the language of § 504 suggests it can never apply between persons with different handicaps. Rather the language of § 504 evinces an intent to eliminate handicap-based discrimination and segregation. A strict rule that § 504 can never apply between persons with different disabilities would thwart that goal. Such a rule would, in effect, allow discrimination on the basis of disability.

Id. 1192 and similar cases cited therein.

As Helen *L.*, a federal appellate court's decision, and Martin are on point, are consistent with the ADA's intent and consistent with the EEOC's language and actions, Petitioner requests this Court adopt Helen *L.* and Martin as governing law and find discrimination amongthe disabled is precluded under the ADA. As the reliance on *Traynor* in *Cramer* is wholly inconsistent with the controlling intent, language and actions of the ADA and the EEOC, Petitioner asks this Court to reject it.

Turning again to the Congressional intent as evidenced by "the language of the statute and, where the language is not dispositive, on the intent of Congress as revealed in the history and purposes of the statutory scheme," see Adams Fruit Co. *v.* Barrett, 494 U.S. 642, we find the ADA, the EEOC regulations, and the legislative history replete with evidence that discrimination amongthe disabled is unlawful under the ADA. Permitting such discrimination among the disabled would be an anathema to the stated goals of the ADA. ***See*** 42 U.S.C. § 12101 (findings and purposes). Such a view as Responäents anä *Cramer* would have this Court adopt would be wholly inconsistent with the legislative history which specifically condemns discrimination among the disabled. See House Report 101-485(II) at 136. And finding that discrimination amongthe disabled is acceptable under the ADA

would ignore the legislative scheme which discusses unlawful discrimination in the institutionalized as only the disabled are institutionalized; *See Helen L. v. DiDario,* 46 F.3d at **336.** Beyond that, permitting discrimination among the disabled is at odds with the EEOC's view of the ADA. *See* McFadden, *The Americans with Disabilities Act: Fighting Discrimination, supra,* at 69; EEOC No. N-915.002, *supra; Terrence Donaghey, Jr. v. Mason Tenders District Council Trust Fund, supra.*

Not least of all, such a restrictive view of the ADA--that one can discriminate among the classes of the disabled with impunity--flies in the face of logic and fairness. Congress intended that the ADA cure a national history of wrongs committed against the disabled. Surely such wrongs include discrimination amongthe disabled as well as against the disabled as a whole.

"The Congress finds that...the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiable famous." 42 U.S.C. § 12101(9). To the end of the "elimination of discrimination against individuals with disabilities," Congress invoked "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101 (b)(1)(4). In light of such language, this Court should find that Florida's workers' compensation wage loss scheme is superseded by the ADA as its

wage loss provisions discriminate by virtue of an arbitrary classification based upon disability with a discriminatory impact among the disabled.

CONCLUSION

The ADA supersedes conflicting workers' compensation law.

Accordingly, Florida's wage loss scheme is within the purview of the ADA and is superseded by it as it conflicts with the ADA and stands as an obstacle to the accomplishment of the full purpose and objectives of Congress. Florida's wage loss classifications afford a claimant less protection than the ADA. Under the ADA, a claimant could not be discriminated against by a classification that resulted in disparate impact against the claimant; under section 440.15, a claimant is discriminated against because of classifications. Under the ADA, compensation for a class of persons suffering from a certain disability could not be cut off after 78 week due to some arbitrary classification; under section 440.15, a claimant's benefits can be cut off at 78 weeks due to an arbitrary classification. Under the ADA, insurance coverage can not discriminate "among" a class; under section 440.15, workers compensation insurance can discriminate "among" classes of claimants. Under the ADA, discriminatory classifications designed to save money on workers' compensation or other insurance premiums are precluded; under section 440.15, the disparate reduction in workers' compensation benefits was done to save money on workers' compensation costs.

Accordingly, Petitioner requests that this Court reverse the First District and find that Florida's wage loss scheme is superseded by the ADA and to remand Petitioner's claim for workers' compensation claims back to the judge of compensation claims for a factual determination based upon evidence.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been provided to the following counsel by U. S. Mail on this 21 day of November, 1995: to David M. Mitchell, 219 S. Orange Avenue, Sarasota, Florida, 34236-6801, counsel for Respondents; Jim Trope and Beth Muller, counsel for Respondents, 2601 Cattleman Road, Sarasota, Florida, 34232-6249; and to Edward A. Dion, 307 Hartman Bldg, 2021 Capita1 Circle, S.E., Tallahassee, Florida, 32399, counsel for Amicus Curiae.

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