IN THE SUPREME COURT OF FLORIDA

EMMA MURRAY,	)	
	)	
Petitioner,	)	**Case No. SC07-244**
	)	
v.	)	**Lower Tribunal No.: 1D06-475**
	)	
MARINER HEALTH / ACE USA	)	
	)	
Respondents.	)	
	)	

JOINT BRIEF OF ASSOCIATED INDUSTRIES OF FLORIDA, INC.

And FLORIDA INSURANCE COUNCIL

AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

CASES

Statutes

Other Authorities

INTEREST OF THE AMICI

Associated Industries of Florida ("AIF") is a non-profit corporation organized and existing under the laws of Florida. AIF is the largest association of business, trade, commercial and professional organizations in the State of Florida. It represents the interests of over 10,000 corporations, professional associations, partnerships and proprietorships. AIF has appeared as amicus curiae in numerous appeals filed within Florida and represents its members in critical matters before the Florida Legislature, the executive branch, regulatory agencies and courts in Florida.

The members of AIF have a significant interest in the issues before this Court. The industries and businesses AIF represents are employers which can and do have workers compensation claims. The members of AIF have an interest in cases interpreting the attorney fee statute, such that the statute does not promote unnecessary and protracted litigation, and its members' due process rights are protected.

The Florida Insurance Council ("FIC") is a non-profit corporation organized and existing under the laws of Florida. FIC is the largest not for profit insurance trade association in the State of Florida. It represents the interests of forty-two insurance groups consisting of 245 insurance companies which

write over $20 billion in insurance coverage in all lines of insurance.

FIC is a group which has a significant interest in the outcome of this litigation. The insurance company members of FIC include many domestic and national companies that write workers compensation coverage in Florida and thus are significantly affected by this litigation.

PRELIMINARY STATEMENT

Emma Murray will be referred to as "Petitioner" or "Claimant." Mariner Health and ACE/American Insurance Co. will be referred to as "Respondents" or "Employer/Carrier." Judge Dan F. Turnbull will be referred to as "Judge Turnbull" or "JCC."

Associated Industries of Florida, Inc. will be referred to as "AIF," the Florida Insurance Council will be referred to as "FIC" and they both will be jointly referred to as "Amici."

SUMMARY OF ARGUMENT

The Florida Legislature adopted section 440.34, Florida Statutes (2003) to define a "reasonable" attorneys fee by use of a statutory fee percentage. See Wood and Lundy, infra. The statute does not violate a claimant's access to courts, equal protection, due process rights, or constitute a violation of separation of powers.

Sliding scale percentage contingent fees have been upheld in other areas, and neither the Petitioner nor her attorney have established they are entitled to special constitutional status.

There is no evidence the statute is unconstitutional "as applied" to her because she received benefits with the assistance of counsel. Data collected since 2003 does not support the statue "as applied" to other claimants have are denied them due process or access to counsel solely by virtue of the statute.

Section 440.34 Florida Statutes (2003) should be upheld by this Court as being constitutional and construed in a manner consistent with the express language of the statute. Judge Turnbull's application of the statute and the First District Court of Appeals affirmance should be upheld by this Court.

ISSUE

I

SECTION 440.34 FLA. STAT. (2003) IS CONSTITUTIONAL AND DOES NOT VIOLATE EQUAL PROTECTION, DUE PROCESS, ACCESS TO COURTS OR SEPARATION OF POWERS.

a. Preface

As *Amicus Curiae*, neither Associated Industries of Florida ("AIF"), nor the Florida Insurance Council ("FIC") seek to reargue points of law and arguments asserted by the Respondents. However, AIF and FIC fully concur with the Respondents that no statutory or legal basis exists to reverse the trial judge's ruling, or the attorney fee amount awarded to Petitioner's counsel.

b. Standard Of Review

The standard of review is de novo since the appeal concerns various constitutional challenges to the statute. See, Dixon v. City of Jacksonville, 774 So. 2d 763 (Fla. 1st DCA 2000). However, the level of scrutiny to be applied in determining the validity of the statute is whether it meets the "rational basis" test. Harrell v. Florida Construction Specialists, 834 So. 2d 352 (Fla. 1st DCA 2003).

"[I]n the absence of an impingement upon constitutional rights. . . an act of the legislature is presumed to be constitutional. The burden is on the challenger to demonstrate

that the law does not bear a reasonable relationship to a proper state objective." State v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985). See also Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448,452 (Fla. 1993).

C. Analysis

The statute under challenge has been held to be clear and unambiguous, and attorney's fees paid to claimant's counsel are "no longer based on **SERVICES RENDERED**, but instead is based on the value of the **BENEFITS SECURED** on behalf of the claimant." Wood v. Florida Rock Industries, 929 So. 2d 542, 543 (Fla. 1st DCA 2006), rev. den. 935 So. 2d 1221 (Fla. 2006).

The statute's facial constitutionality was upheld in Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506 (Fla. 1st DCA 2006). In so ruling, the First District stated:

> The legislature did not encroach upon the powers of the judiciary by amending section 440.34(1) to restrict the payment of fees to a percentage of the benefits secured. Workers' compensation is a creature of statute governed by the provisions of chapter 440, Florida Statutes. ***Globe Sec. v. Pringle***, 559 So. 2d 720, 722 (Fla. 1st DCA 1990). The legislature may limit the amount of fees that a claimant's attorney may charge because the state has a legitimate interest in regulating attorney's fees in workers' compensation cases. ***Samaha v. State***, 389 So.2d 639, 640 (Fla. 1980). Furthermore, the legislature is charged with setting forth the criteria it deems will further the purpose of worker's compensation law and will result in a reasonable fee. ***See id.; see also Schick v. Dep't of Agric. &***

> *Consumer Servs.*, 599 So. 2d 641, 644 (Fla. 1992). Therefore, section 440.34(1) does not violate the separation of powers doctrine.
>
> Nor does section 440.34(1) violate the equal protection clause or the due process clause, which, *inter alia*, protects the right to be represented by counsel. In limiting fees to a percentage of the benefits secured, section 440.34(1) bears a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant. *See Samaha*, 389 So.2d at 640. Section 440.34(1) is not discriminatory, arbitrary or oppressive because it applies to all claimants in a workers' compensation proceeding, and sets forth a definite formula for determining attorney's fees so as to protect the claimant's interest in retaining a substantial portion of the benefits secured. Therefore, section 440.34(1) does not deny a claimant equal protection, due process, or the right to be represented by counsel.

Id. at 509-510.

d. Access To Courts

A party alleging denial of access to courts must demonstrate the Legislature abolished a prior common law right without providing a reasonable alternative. See, Kluger v. White, 281 So. 2d 1 (Fla. 1973). Neither the Petitioner nor her attorney had a common law right to obtain an attorney's fee based upon any specific method prior to adoption of the workers compensation statute in 1935.

As noted by this Court in Hardware Mut. Cas. Co., v. Carlton, 9 So. 2d 359, 360 (Fla. 1942), an injured employee was

solely responsible for paying his or her attorney until the Florida Legislature amended the attorney fee statute in 1941 to allow recovery of an attorney's fee from an employer/carrier in limited circumstances.

There is no authority for an attorney fee award from an employer/carrier except pursuant to the statute. Florida Department of Labor v. Boise Cascade Corp., 790 So. 2d 1092, 1093 (Fla. 2001); Great American Indemnity Co. v. Smith, 24 So. 2d 42, 44-45 (Fla. 1945); McArthur Farms v. Peterson, 586 So. 2d 1273, 1276 (Fla. 1st DCA 1991); Peck v. Palm Beach County Board of County Commissioners, 442 So. 2d 1050, 1053 (Fla. 1st DCA 1983) (per curiam); Ship Shape v. Taylor, 397 So. 2d 1199, 1200-1201 (Fla. 1st DCA 1981) and Colonial Restaurant Corp. v. State Department of Commerce, 248 So. 2d 494, 499-500 (Fla. 4th DCA 1971).

e. Equal Protection

Since workers compensation claimants do not constitute a suspect classification, "the statute need only bear a reasonable relationship to a legitimate state interest. Some irregularity or imprecision will not render a statute invalid." Acton v. Ft. Lauderdale Hosp., 440 So. 2d 1282, 1284 (Fla. 1983). The party challenging the statute must prove there is **no rational basis whatsoever for the statutory classification**. See Florida High Sch. Activities Ass'n, Inc. v. Thomas, 434 So. 2d 306 (Fla.

1983). It is "constitutionally irrelevant" whether the plausible reason in fact supports the legislative decision, B & B Steel Erectors v. Burnsed, 591 So. 2d 644, 647-648 (Fla. 1st DCA 1994).

A claimant's attorney being limited to a fee based solely on a percentage of the "benefits secured" is neither novel nor unprecedented. In at least two other areas, the amount of an attorney's fee is limited to a percentage of the recovery. See Ingraham v. Dade Co. School Board, 450 So. 2d 847, 849 (Fla. 1984) (Section 768.28(8) Florida Statutes (2003)) and Seminole County v. Coral Gables Fed. Savings & Loan Assoc., 691 So. 2d 614, 615 (Fla. 5th DCA 1997) (Section 73.092(1) Florida Statutes (2003)). See also, Howell v. Florida Construction Specialists, 834 So. 2d 352 (Fla. 1st DCA 2003), rev. den., 851 So.2d 728 (Fla. 2003), cert. den., Myers v. City of N. Miami, 540 U.S. 1089 (2003).

f. Due Process

A due process challenge is considered in the context of whether the party was offered a meaningful, full and fair opportunity to be heard and present evidence and testimony. Rucker v. City of Ocala, 684 So. 2d 836, 841 (Fla. 1st DCA 1997). It is the complete denial of the right to present evidence that violates due, process, not the fact a party might not be able to present all the evidence it desires. See, e.g., Department of Law Enf. v. Real Property, 588 So. 2d 957 (Fla. 1991).

In the instant matter, the Petitioner's due process rights have not been violated by the JCC's application of the statute. The Petitioner retained counsel, proceeded with her claims, and resolved the disputed indemnity and medical issues.

g. Makemsom v. Martin County

Makemsom v. Martin County, 491 So. 2d 1109 (Fla. 1986) is cited by Petitioner as authority for awarding attorneys fees in excess of the statutory percentage. In doing so, Petitioner fails to cite any express constitutional authority for such a result and ignores the constitutional basis for the Makemsom decision.

In Makemsom, this Court upheld the facial constitutionality of a maximum fee statute for attorneys appointed to represent indigent defendants in death penalty cases. This Court noted the statute might be unconstitutional if applied "in such a manner as to curtail the court's inherent power to ensure **adequate representation of the criminally accused**." (Emphasis added) Id at 1112. The concern was a criminal defendant's Sixth Amendment right to effective counsel could be jeopardized if the trial court could not exceed the statutory fee schedule "in extraordinary and unusual cases . . . to ensure that an **attorney who has served the public by defending the accused** is not compensated at an amount which is confiscatory of his or her time, energy and talents." (Emphasis added) Id. at 1115.

The Makemsom ruling has been expanded, but in every instance, **the courts recognized the existence of a constitutional or statutory right to court-appointed counsel that needed to be protected**. See, Remeta v. State, 559 So. 2d 1132, 1135(Fla. 1990) (court-appointed counsel in clemency proceedings); Olive v. Maas, 811 So. 2d 644, 653-654 (Fla. 2002) (court-appointed counsel for death-row defendants in postconviction proceedings); Florida Dept. of Financial Services v. Freeman, 921 So. 2d 598 (Fla. 2006), (court-appointed counsel in capital collateral cases); and Board of County Commissioners of Hillsborough County v. Scruggs, 545 So. 2d 910, 912 (Fla. 2nd DCA 1989)(court-appointed counsel in parental termination cases under the Due Process Clauses of the United States and Florida Constitutions).

Unlike the defendant in Makemsom, a workers compensation claimant has no constitutional right to counsel. See, Bova v. State, 410 So. 2d 1343, 1346 (Fla. 1982) and McDermott v. Miami-Dade County, 753 So. 2d 729, 731 (Fla. 1st DCA 2000). None of the effective assistance of counsel concerns in Makemsom have been shown to exist in this case.

h. Separation of Powers

The Petitioner cites Irwin v. Surdyk's Liquor, 599 N.W. 2d 132, 141-142 (Minn. 1999) for her contention the statute violates the separation of powers clause of the Florida

Constitution. However, the Minnesota Supreme Court's expansive view of its ability to regulate attorneys fees does not mandate the same result here.

The Florida Supreme Court's exclusive jurisdiction to regulate lawyers is set forth in Article V, Section 15, Florida Constitution (1972). That constitutional provision has never been interpreted as creating in this Court plenary power over the fees attorneys are entitled to receive. Statutory fee schedules in civil matters do not infringe upon its authority to regulate the admission and discipline of attorneys. See, Schick v. Dept. of Agriculture, 599 So. 2d 641, 644 (Fla. 1992); Ingraham v. Dade County School Board, 450 So. 2d 847, 849 (Fla. 1984); and Lundy, at 509, supra.

A graduated attorneys fee statute was challenged in Injured Workers of Kansas v. Franklin, 942 P.2d 591 (Kan. 1997). The statute limited lawyers representing claimants to a specific contingent fee but attorneys for employer/carrier were not limited.

The court held the statute's limitations did not interfere with its inherent power to regulate the practice of law. Id at 616. The statute also did not create any equal protection issues because claimants and employer/carriers were clearly distinguishable. Differing treatment was not unconstitutional, because the statute:

> . . . clearly treats the class of injured workers in workers compensation cases differently than it treats the class of employers in workers compensation cases-by applying the graduated contingency fee rates only to lawyers hired by employees and not to lawyers hired by employers. Thus, the question to ask is whether these two classes of people, who are treated differently by the statute, are arguably indistinguishable.
>
> Clearly, these two classes of people are not arguably indistinguishable. We are dealing with apples and oranges. Employers are not able to win an award in defense of a workers compensation case. There is no recovery of a sum of money at the end of a case from which an employer could pay out a contingent fee. Employees, on the other hand, often do not have the money to pay an attorney by the hour to pursue a workers compensation claim. Should the attorney win the case, the employee will be awarded a sum of money at the end of the proceedings, out of which the employee could pay the attorney. Thus, employees almost always compensate the attorneys they hire to represent them in a workers compensation case on a contingent fee basis. In this way, the two classes of people are not indistinguishable-one class compensates attorneys on a contingent fee basis and one class compensates attorneys on an hourly basis. Thus, . . . does not implicate equal protection because it does not treat two arguably indistinguishable classes differently.

Id at 617.

In Smith v. McKee Foods, _____ S.W.3d _____, 2000 WL 177602 (Ark. App. Feb. 9, 2000), a claimant challenged the constitutionality of a statute which limited an attorney's fee to thirty percent (30%) of the benefits secured, of which one-

half was to be paid by the employer/carrier and one-half by the claimant. Because the dispute was for medical benefits, the claimant did not have to pay his counsel. The claimant's attorney only received a fee equal to fifteen percent of benefits, or a fee of $16.20.

In upholding the statute, the court stated:

> While we are sympathetic to appellant's argument, we are unable to remedy the situation. The statute at issue is clear. It establishes a maximum attorney's fee which can be awarded in controverted claims before the Arkansas Workers' Compensation Commission. Although we agree that attorneys should be compensated for the time spent in defending the rights of their clients, the legislature has spoken in this matter. Where the intention of the Legislature is clear from the words used, there is no room for construction and no excuse for adding to or changing the meaning of the language employed. Bishop v. Linkway Stores, Inc., 280 Ark. 106, 655 S.W.2d 426 (1983); Call v. Wharton, 204 Ark. 544, 162 S .W.2d 916 (1942); Reynolds v. Holland, 35 Ark. 56 (1879). " If we change it, we thereby encroach upon the peculiar function of the sovereign power lodged in a coordinate branch of the government." Caldarera v. McCarroll, Commr. of Rev., 198 Ark. 584, 587, 129 S.W.2d 615, 616 (1939) (quoting Arkansas Valley Trust Co. v. Young, 128 Ark. 42, 195 S.W. 36 (1917)). Appellant's remedy is with the legislature. We cannot alter the clear meaning of the statute.

Neither the Petitioner nor Amicus Curiae have identified any constitutional basis upon which injured employees may argue their attorneys are entitled to obtain fees beyond those

mandated by the statute passed by the Florida Legislature and upheld by the First District Court of Appeals in Wood, Lundy, and other decisions affirming the validity of section 440.34 Florida Statutes (2003).

ISSUE

II

ABSENT A CONSTITUTIONAL RIGHT TO COUNSEL, THERE IS NO LEGAL BASIS FOR REVERSAL OF THE FEE AWARDED.

a. Standard of Review

The standard of review is de novo since the appeal concerns the construction of a statute. See Dixon v. City of Jacksonville, 774 So. 2d 763, 765 (Fla. 1st DCA 2000).

b. Discussion

The Petitioner appears to be asserting both "facial" and "as-applied" challenges. However, the record appears to be completely devoid of any evidence how the statute unconstitutionally deprived her of any benefit. A person who is not injured by a statute may not challenge its constitutionality as applied to some other person. State v. Hunter, 586 So. 2d 319, 322 (Fla. 1991); State v. Benitez, 395 So. 2d 514 (Fla. 1981); and Sandstrom v. Leader, 370 So. 2d 3,4 (Fla. 1979).

The arguments presented by the Petitioner and various Amici in her support were rejected by this Court in Sheppard & White

v. City of Jacksonville, 827 So. 2d 925 (Fla. 2002) because there was absolutely no evidence the statutory fee was confiscatory, materially impaired lawyers from representing their clients, or deprived indigent defendants of counsel in death penalty cases.

In Sheppard the attorney contended the statutory fee was nothing more than "token compensation" and he should be paid an hourly rate equal or close to the prevailing rate. This Court held the Makemsom decision did not require attorneys receive the prevailing hourly rate because there was no evidence the established rate deprived other defendants of effective representation. The attorney voluntarily accepted the case with full knowledge of the fee statute. Furthermore, the fact the established rate would not allow him to make a profit was not sufficient justification to conclude effective assistance of counsel was negatively affected on that basis alone. Id. at 931.

The Petitioner also cites United States Department of Labor v. Triplett, 494 U.S. 715 (1990) to support her assertion a fee can be awarded which exceeds the statute. In Triplett, the attorney wanted to charge his clients a contingent fee in "Black Lung" cases, even though such fees were prohibited. The West Virginia Supreme Court of Appeals ruled the statute was

unconstitutional because claimants were effectively denied access to counsel. Id. at 719.

On review, the United States Supreme Court upheld the validity of the attorneys fee provision and required the challengers to make an extraordinarily strong showing of two component parts: (1) claimants could not obtain representation, and (2) this unavailability of attorneys was attributable to the fee statute. Id. at 722.

Assertions that "fewer qualified attorneys are accepting . . . claims"; more claimants were proceeding pro se; and other attorneys would not handle such cases did not constitute sufficient proof. The Court stated:

> This will not do. We made clear in *Walters* that this sort of anecdotal evidence will not overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled. 473 U.S., at 324, n. 11, 105 S.Ct., at 3190, n. 11. The impressions of three lawyers that the current system has produced "few" lawyers, or "fewer qualified attorneys" (whatever that means), and that "many" have left the field, are blatantly insufficient to meet respondent's burden of proof, even if entirely unrebutted.
>
> *****
>
> Even if respondent had demonstrated an unavailability of attorneys, he would have been obliged further to show that its cause was the regulation of fees. He did not do so.

Id. at 723-724.

The West Virginia court's conclusion that lawyers were unwilling to represent claimants appeared to be based on the suggestion fees were inadequate. However, the Court stated:

> The evidence to support this economic assessment is similar to that for the unavailability of attorneys: small in volume, anecdotal in character, and self-interested in motivation . . . .

Id. at 725.

If a presumptively and facially constitutional statute is going to be declared unconstitutional the "necessary causality" must be established by more than the "conclusory impressions of interested lawyers as to the effect of the . . . fee on the availability of attorneys." Id. at 726.

Since the Petitioner presented no proof claimants are being denied counsel, she has failed to meet the burden imposed by Makemsom or Triplett, supra and the Petitioner's challenge should be denied.

ISSUE

III

THRE IS NO EVIDENCE OR DATA WHICH ESTABLISHES CLAIMANTS CANNOT OBTAIN COUNSEL SOLELY BY VIRTUE OF SECTION 440.34 FLORIDA STATUTES (2004).

The Petitioner failed to present any evidence below attorneys fees based solely on "benefits secured" has resulted

in injured workers being deprived of counsel to represent them for accidents after 2003. In fact, the data establishes no such deprivation exists.

The Office of the Judge of Compensation Claims in the Division of Administrative Hearings ("OJCC") prepares an Annual Report on Florida's Workers' Compensation System pursuant to section 440.45(5) Florida Statutes (2007). Relevant portions of the 2007 Annual Report are attached as Appendix A to this brief.

The OJCC's report reflects the Petition For Benefits ("PFB") volume has decreased at an approximate rate of fifteen percent (15.21% to 15.9%) each year since the 2003 reforms became effective. (A-10) However, the decrease was approximately nine percent (9.21%) for the 2006-2007 fiscal year ("FY"). (A-10) Opponents of the 2003 attorney fee reform point to the overall decrease in PFB filings between 2003 and 2006 of approximately forty five percent (45.22%) as proving the attorney fee statute has deprived injured employees of counsel. A careful analysis of the data establishes just the opposite.

The PFB filings in 2002-2003 FY was the highest ever at 151,021. (A-11) The PFBs filed in that year reflected a thirty percent (30.2%) increase over the prior year alone. The OJCC's report shows PFB filings increased over sixty-three percent (63.47%) between 1998-1999 FY and 2002-2003 FY. The decrease in PFBs filings means a return to levels that existed prior to the

2002-2003 FY. The PFB filings for 2006-2007 FY exceeded the filings for the 1997-1998 FY. (A-11) That means more PFBs were filed in 2006-2007 FY than in a year when claimant's attorneys were able to obtain attorney fees based upon hourly rates. Therefore, the decrease in filings cannot be solely related to the attorney's fee statute.

"New cases" are defined in the OJCC's report as those in which a PFB has been filed for the first time. Such "new cases" are more indicative of the rate injured employees are litigating their injuries than the raw number of PFBs being filed in any given year, because multiple petitions can be filed on behalf of a claimant. (A-11)

It has been alleged the attorney fee statute is denying injured workers access to the system because lawyers will not represent them by filing PFBs. Once again, the statistics reflect just the opposite. "New cases" rose over sixty six percent (66.73%) between 2001-2002 FY and 2002-2003 FY. While the number of "new cases" has decreased since 2003, the number of "new cases" filed in 2006-2007 FY still exceeded those filed in 2001-2002 FY, (A-11) prior to the reforms becoming effective. Likewise, the percentage of all PFBs filed which are "new cases" has continued to increase each year since 2001-2002. That percentage is increasing at an increasing rate each year, with

about forty four percent (43.87%) of all PFBs filed in 2006-2007 FY being “new cases”. (A-12)

The OJCC report does not support another common assertion that employees injured after 2003 “cannot get attorneys.” While the exact number of claimants filing pro-se petitions cannot be specifically determined, the percentage of pro-se claimants as a percentage of PFBs in the system has decreased from over eight percent (8.26%) prior to 2003 to over six percent (6.30%) in FY 2006-2007. The pro-se claimant population has not increased significantly because of the 2003 fee statute, and it appears fewer workers are representing themselves. (A-12 & 13)

The National Council on Compensation Insurance Inc. (“NCCI”) made a presentation at an Advisory Forum on September 14, 2007. Portions are attached as Appendix B. The data compiled by NCCI reflects country-wide lost-time injury frequency has decreased by a cumulative forty nine percent (48.9%) between 1991 and 2005. (B-3) Florida’s lost-time frequency has decreased almost thirty percent (29.2%) between 1999 and 2006. The NCCI noted no post-2003 decline in the percentage of lost-time cases with attorney involvement, which was twenty percent (20%). Even so, Florida’s percentage of attorney involvement continued to exceed the country-wide average of sixteen percent (16%). (B-6) It appears that while there are fewer lost-time injuries, more claims are being filed

relative to the number of lost-time injuries. It also refutes the allegation that injured claimants after 2003 are not getting representation or having their claims being pursued by attorneys.

The Petitioner has and Amicus have argued limiting fees to "benefits secured" will produce inadequate fees. Based upon the figures compiled by the OJCC office, attorneys are not receiving fees which are so low as to deprive injured employees of the ability to retain counsel for accidents after 2003.

According to the OJCC report, the **total** attorney fees paid to claimant's counsel in FY 2006-2007 ($191,108,005) was only nine percent (9.2%) less than the **total** fees paid in FY 2002-2003, (A-25) when hourly fees and upward deviations from the fee schedule were allowed. Attorney fees approved in a given year do not relate solely to accidents which arose in that year. However, when the total fees approved in FY 2006-2007 are analyzed, $100,157,570 was attributable to dates of accidents between 2003 and 2006, (2007 not mature) when fees were limited to "benefits secured". (A-27) In other words, fifty two percent (52%) of the total fees were for only four years of the forty six years listed. If one reviews the three years after the reform became effective (2004-2006), the total fees approved equaled $73,995,024 (A-27) which means almost forty percent of

the fees were related to three years in which the fees were limited to “benefits secured”.

These figures refute any allegation the 2003 statute has effectively denied injured employees access to counsel or access to the workers compensation system in Florida.

CONCLUSION

Based upon the foregoing citation of authorities and arguments, Amicus respectfully requests this Court reject the various arguments advanced by the Petitioner to avoid the application of the express statutory language of Section 440.34 Fla. Stat. (2004). Amicus also requests this Court affirm Judge Turnbull’s ruling as to the amount of an attorney’s fee to be awarded in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January, 2008, an original and seven copies of the foregoing has been furnished via U.S. mail, and a copy submitted by electronic filing to the Florida Supreme Court, Clerk's Office, 500 South Duval Street, Tallahassee, FL, 32399 and a true and correct of the foregoing Amicus Brief has been served by U.S. Mail to:

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