IN THE SUPREME COURT OF FLORIDA

Case No. SC07-244

Lower Tribunal Case Number: 1D06-0475

EMMA MURRAY,	)
	)
Petitioner,	)
	)
v.	)
	)
MARINER HEALTH/ACE, USA	)
	)
Respondents.	)
	)
	/

AMICUS BRIEF OF FLORIDA HOSPITALITY MUTUAL INSURANCE COMPANY IN SUPPORT OF RESPONDENTS

George D. Gabel, Jr., Esq.
Florida Bar No. 027220
Holland & Knight LLP
50 N. Laura St., Suite 3900
Jacksonville, FL 32202-3622

Carol M. Folsom, Esq.
Florida Bar No. 0472735
Holland & Knight LLP
50 N. Laura St., Suite 3900
Jacksonville, FL 32202-3622

Counsel for Florida Hospitality
Mutual Insurance Company

TABLE OF CONTENTS

TABLE OF CITATIONS ..... ii, iii, iv, and v

STATEMENT OF IDENTITY AND INTEREST OF AMICUS vi

SUMMARY OF ARGUMENT 1

POINTS OF ARGUMENT 4

POINT I 5
THE JCC AND THE FIRST DISTRICT COURT OF APPEAL CORRECTLY HELD, AS A MATTER OF LAW, THAT THE JCC MUST APPLY THE STATUTORY CAP ON A CLAIMANT'S ATTORNEY'S FEE, AS REQUIRED BY § 440.34(1), FLA. STAT. (2003).

POINT II 9
IN LIMITING THE FEES OF CLAIMANTS' ATTORNEYS TO A STATUTORY GUIDELINE, § 440.34(1), FLA. STAT. (2003), DOES NOT VIOLATE A CLAIMANT'S RIGHT TO EQUAL PROTECTION AS SET FORTH IN ART. I, § 2, FLA. CONST., AND ART. XIV, § 1, U.S. CONST.

POINT III 13
SECTION 440.34(1) FLA. STAT. (2203), DOES NOT VIOLATE A CLAIMANT'S DUE PROCESS RIGHTS UNDER ART. I, § 9, FLA. CONST., AND ART. XIV, § 1, U. S. CONST.

POINT IV 16
A CLAIMANT'S RIGHT OF ACCESS TO THE COURTS, AS GUARANTEED BY ART. I, § 21, FLA. CONST., IS NOT UNCONSTITUTIONALLY IMPAIRED BY THE AMENDMENT TO § 440.34(1), FLA. STAT. (2003).

CONCLUSION 20

TABLE OF CITATIONS

FEDERAL CASES

Fleischmann Distilling Corp. v. Maier Brewing Co.,
386 U.S. 714 (1967) 5

Schweiker v. Wilson,
450 U.S. 221 (1981) 12

U.S. Dept. of Labor v. Triplett,
494 U.S. 715 (1990) 16

Walters v. National Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 15, 16

STATE CASES

Acton v. Fort Lauderdale Hosp.,
440 So. 2d 1282 (Fla. 1983) 10, 14

Amendments to the Florida Rules of Workers' Compensation Procedure,
891 So. 2d 474 (Fla. 2004) 18

B&B Steel Erectors v. Burnsed,
591 So. 2d 644 (Fla. lst DCA 1991) 11

Barry v. Burdines,
675 So. 2d 587 (Fla. 1996), cert. den., 519 U.S. 966 (1996) 14

Board of County Comm'rs of Hillsborough County v. Scruggs,
545 So. 2d 910 (Fla. 2d DCA 1989) 9

Buitrago v. Landry's,
949 So. 2d 1046 (Fla. lst DCA 2006), reh. den., March 5, 2000 13

Campbell v. Aramark,
933 So. 2d 1255 (Fla. lst DCA 2006), rev. den., 944 So. 2d 986 (Fla. 2006) 13

Carlile v. Game & Fresh Water Fish Comm'n,
354 So. 2d 362 (Fla. 1977) 7

Daniels v. Florida Dept. of Health,
898 So. 2d 61 (Fla. 2005) 5, 7

De Ayala v. Florida Farm Bureau Cas. Ins. Co.,
543 So. 2d 204 (Fla. 1989).....11

Eller v. Shova,
630 So. 2d 537 (Fla. 1993).....17

In re Greenberg's Estate,
390 So. 2d 40 (Fla. 1980).....9

Jones v. Chiles,
638 So. 2d 48 (Fla. 1994).....18

Khoury v. Carvel Homes South, Inc., 403 So. 2d 1043 (Fla. 1st DCA
1981).....10

La Petite Academy v. Duprey,
948 So. 2d 868 (Fla. lst DCA 2007), rev. den., 963 So. 2d 227 (Fla. 2007) 13

Lee Eng'g & Const. Co. v. Fellows,
209 So. 2d 454 (Fla. 1968).....5, 6

Lundy v. Four Seasons Ocean Grand Palm Beach,
932 So. 2d 506 (Fla. lst DCA 2006), rev. den., 939 So. 2d 93 (Fla. 2006) 12, 13

Makemson v. Martin County,
491 So. 2d 1109 (Fla. 1986).....8

Marion County v. Johnson,
586 So. 2d 1163 (Fla. 5th DCA 1991) 9

McDermott v. Miami Dade County,
753 So. 2d 729 (Fla. lst DCA 2000) 8

McElrath v. Burley,
707 So. 2d 836 (Fla. 1st DCA 1998) 10, 11

Newton vs. McCotter Motors, Inc.,
475 So. 2d 230 (Fla. 1985), cert. den., 475 U.S. 1021 (1986) 13, 14

North Florida Women's Health and Counseling Servs., Inc., v. State of Florida,
866 So. 2d 612 (Fla. 2003).....11

Olive v. Mass,
811 So. 2d 644 (Fla. 2002).....8

Radney v. Edwards,
424 So. 2d 956 (Fla. lst DCA 1983) 14

Rivera v. Deauville Hotel,
277 So. 2d 265 (Fla. 1973).....5

Rodriguez v. Prestress Decking Corp.,
611 So. 2d 59 (Fla. lst DCA 1992) 14

Rucker v. City of Ocala,
684 So. 2d 836 (Fla. 1st DCA 1997) 17

Samaha v. State,
389 So. 2d 639 (Fla. 1980).....12

Schick v. Dept. of Agric. and Consumer Servs.,
599 So. 2d 641 (Fla. 1992).....8

Scholastic Sys., Inc. v. LeLoup and State of Florida Indus. Relations Commission,
307 So. 2d 166 (Fla. 1975).....17

Smith v. Smith,
964 So. 2d 217 (Fla. 2d DCA 2007) 13

Sunshine Towing, Inc. v. Fonseca,
933 So. 2d 594 (Fla. lst DCA 2006) 7

Taylor v. School Bd. of Brevard County,
888 So. 2d 1 (Fla. 2004).....12

Times Publ'g Co. v. Burke,
375 So. 2d 297 (Fla. 2d DCA 1979) 13

Wagner v. AGW Consultants,
114 P.3d 1050 (N.M. 2005) 10

White v. Board of County Comm'rs of Pinellas County,
537 So. 2d 1376 (Fla. 1989).....8

Winn Dixie v. Resnikoff,
659 So. 2d 1297 (Fla. lst DCA 1995) 14

Wood v. Florida Rock Indus. & Crawford & Co.,
929 So. 2d 542 (Fla. lst DCA 2006), rev. den., 935 So. 2d 1221 (Fla. 2006) 13

Zurla v. City of Daytona Beach,
876 So. 2d 34 (Fla. lst DCA 2004) 10

STATUTES

38 U.S.C. § 3404(c) 15, 16

§ 440.15(3), Fla. Stat. 14

§ 440.191, Fla. Stat. 14

§ 440.25, Fla. Stat. 14

§ 440.25(3), Fla. Stat. 14

§ 440.25(3)(b), Fla. Stat. 14

§ 440.29(1), Fla. Stat. 15

§ 440.29(4), Fla. Stat. 15

§ 440.33, Fla. Stat. 15

§ 440.34, Fla. Stat. 1, 2, 3, 19

§ 440.34(1), Fla. Stat. 1, 4, 9, 12, 19

§ 440.34(4), Fla. Stat. 12

OTHER

Art. I, § 2, Fla. Const. 4, 9

Art. I, § 9¸ Fla. Const. 4, 13

Art. I, § 21, Fla. Const. 2, 4, 16

Art. II, § 3, Fla. Const. 18

Art. V, § 15, Fla. Const. 18

Art. XIV, § 1, U. S. Const. 4, 9, 13

Senate Staff Analysis and Economic Impact Statement, S. B. 50A, Special Sess.
(Fla. 2003) 6, 7

STATEMENT OF IDENTITY AND INTEREST OF AMICUS

Florida Hospitality Mutual Insurance Company (hereinafter "FHM") files this brief as amicus curiae in support of the Employer/Carrier, in accordance with Fla.R. App. P. 9.370.

FHM is a single line insurance carrier which writes workers' compensation insurance for 855 employers in Florida. FHM's policyholders include restaurants, hotels, resorts and other service industries (among others, 1000 McDonald's restaurant locations) ranging in size from 15 to 1500 employees. FHM and its policyholders have a significant interest in this litigation in that the cost of workers' compensation insurance impacts the ability of Florida employers to do business in the state. These costs are in large measure driven by the fees of claimants' attorneys. For small employers, including many of FHM's clients, continued increases in the expense of workers' compensation insurance coverage can threaten their very survival in the marketplace.

SUMMARY OF ARGUMENT

Section 440.34, Fla. Stat., as amended effective October 1, 2003, imposes a limit on the amount of attorney's fees which may be paid by a workers' compensation claimant to his own attorney, and upon attorney's fees which can be recovered from employer/carriers on a claimant's behalf. The statute, read as a whole, makes clear that a "reasonable fee" is solely to be defined by the formula contained in § 440.34(1).

The Senate Staff Analysis and Economic Impact Statement, issued prior to the passage of the 2003 amendment to § 440.34, set out the concerns about the spiraling costs of workers' compensation coverage in Florida. The changes to the attorney's fee provisions were intended to curtail litigation expenses and thereby lower insurance and claim costs.

Claimant Emma Murray takes the position that the limits on fees imposed by § 440.34 violate her constitutional rights to an attorney, to court access, to due process and equal protection. However, a prevailing litigant is ordinarily not entitled to collect attorney's fees from the loser, absent express statutory or contractual authority allowing the taxing of attorney's fee as costs. What the legislature can grant, it can also take away.

This Honorable Court has on numerous occasions considered the constitutionality of various aspects of the workers' compensation laws in

Florida, and has long recognized that this legislation is a "reasonable alternative" to the unwieldy and expensive tort system it replaced.

Injured workers do not constitute a "suspect class," nor are any fundamental rights implicated by § 440.34. Therefore, workers' compensation law is properly reviewed pursuant to the "rational basis" test, rather than the more stringent test of "strict scrutiny." The legislature had legitimate reasons to limit the amount of claimants' attorney's fees in order to protect claimants' benefits and to keep the administration of these benefits as simple, efficient and inexpensive as possible.

Due process is amply afforded by the system of workers' compensation laws, which grants an injured worker his "day in court", affording him the ability to call and cross-examine witnesses, present evidence, testify, and if need be, take an appeal through the court system.

This Court has previously decided that a claimant in a workers' compensation case was not denied his constitutional right to access to the courts, as guaranteed by Art. I, § 21, Fla. Const. In the case at bar there has been no showing that claimant was denied access to the courts and has in fact been represented by counsel every step of the way. Moreover, the proffered evidence that the statutory fee cap renders it impossible for a

claimant to obtain legal representation is legally insufficient to prove that premise.

Workers' compensation is a system administered by the executive branch, and whose judges are executive branch employees, though their decisions can be appealed to the First District Court of Appeal, and by writ of certiorari, to this Court. The doctrine of separation of powers requires that the judiciary refrain from abrogating legislation which does not unconstitutionally infringe upon an injured workers' rights. Therefore, § 440.34, Fla. Stat. (2003), should not be changed unless by legislative action.

POINTS OF ARGUMENT

I. **THE JCC AND THE FIRST DISTRICT COURT OF APPEAL CORRECTLY HELD, AS A MATTER OF LAW, THAT THE JCC MUST APPLY THE STATUTORY CAP ON A CLAIMANT'S ATTORNEY'S FEE, AS REQUIRED BY § 440.34(1), FLA. STAT. (2003).**

II. IN LIMITING THE FEES OF CLAIMANTS' ATTORNEYS TO A STATUTORY GUIDELINE, § 440.34(1), FLA. STAT. (2003), DOES NOT VIOLATE A CLAIMANT'S RIGHT TO EQUAL PROTECTION AS SET FORTH IN ART. I, § 2, FLA. CONST., AND ART. XIV, § 1 U.S. CONST.

III. **SECTION 440.34(1) FLA. STAT. (2203), DOES NOT VIOLATE A CLAIMANT'S DUE PROCESS RIGHTS UNDER ART. I, § 9, FLA. CONST., AND ART. XIV, § 1, U. S. CONST.**

IV. **A CLAIMANT'S RIGHT OF ACCESS TO THE COURTS, AS GUARANTEED BY ART. I, § 21, FLA. CONST. IS NOT UNCONSTITUTIONALLY IMPAIRED BY THE AMENDMENT TO § 440.34(1), FLA. STAT. (2003).**

ARGUMENT

I. THE JCC AND THE FIRST DISTRICT COURT OF APPEAL CORRECTLY HELD, AS A MATTER OF LAW, THAT THE JCC MUST APPLY THE STATUTORY CAP ON A CLAIMANT'S ATTORNEY'S FEE, AS REQUIRED BY § 440.34(1), FLA. STAT. (2003).

The standard of review is de novo since the issue is one of statutory interpretation. Daniels v. Florida Dept. of Health, 898 So. 2d 61 (Fla. 2005).

FHM concurs with respondents that the language of § 440.34, taken as a whole, makes clear that the statutory schedule is meant to define a "reasonable fee," whether paid by claimant or by the employer/carrier.

The right to recover attorney's fees from one's opponent in litigation did not exist under American common law. The "American rule" is that the prevailing litigant is ordinarily not entitled to collect attorney's fees from the loser, absent express statutory or contractual authority allowing the taxing of attorney's fees as costs. Rivera v. Deauville Hotel, 277 So. 2d 265 (Fla. 1973); Fleischmann Distilling Corporation v. Maier Brewing Co., 386 U.S. 714 (1967).

The history of the attorney's fee provisions in § 440.34 has been set forth in detail in other briefs previously filed herein and need not be reiterated. The Florida legislature deliberately amended the statute in 2003 to delete the attorney's fee criteria enacted after Lee Eng'g & Const. Co. v.

Fellows, 209 So. 2d 454 (Fla. 1968), in order to limit attorney's fees paid by or on a claimant's behalf, with a view toward decreasing the amount and cost of litigation in workers' compensation cases.

The Senate Staff Analysis and Economic Impact Statement, S.B. 50A, 2003 Special Session A (May 19, 2003) stated with regard to the workers' compensation reforms then proposed:

> "The bill provides changes to the workers' compensation system that are designed to expedite the dispute resolution process…and increase availability and affordability of coverage. . . ." S.B.50A, S. Staff An., at 1.

Under the heading, "Present Situation: Availability and Affordability of Workers' Compensation Insurance," the Staff Analysis report provided:

> "Many stakeholders in the workers' compensation system have contended that Florida has the highest premium rates for workers' compensation insurance in the country, while its statutory benefits are among the lowest. In 2000, Florida had the highest premiums in the country, and in 2001 Florida was ranked second only to California. Some workers' compensation carriers have indicated that they are not issuing new policies, renewing policies, or are tightening their underwriting requirements in response to a downturn in the economy and uncertainties in the market place. . . . "S.B. 50A, S. Staff An., at 7. . . .
>
> "In 2003, the National Council on Compensation Insurance (NCCI) identified the following major cost drivers in the workers' compensation system in Florida:
>
> - High frequency of permanent total disability (PTD) claims--five times higher than the national average; high medical costs for permanent partial disability (PPD) claims--nearly two times higher than the national average; high medical costs for temporary total disability (TTD) claims--80 percent higher than the national average; and relatively high hospital costs. . . .

> Florida does not have unusual types of injuries that would explain higher costs. Attorney involvement is significant in Florida and helps explain the major cost drivers. When attorneys are not involved, the difference in claim costs between Florida and the national average is minimal. When attorneys are involved, Florida's claim size is nearly 40 percent higher than the national average. . . ." S.B. 50A, S. Staff An., at 8.

Workers' compensation is purely a creature of statute and, as such, is subject to the basic principles of statutory construction. Sunshine Towing, Inc. v. Fonseca, 933 So. 2d 594 (Fla. lst DCA 2006). The starting point for all statutory interpretation is the language of the statute itself. When the statute is clear and unambiguous, the plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. When the statutory language is clear, courts have no occasion to resort to rules of construction; they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power. Daniels, supra, at 4-6.

By enacting a material amendment to a statute, the legislature is presumed to have intended to alter the law unless the contrary is made clear. Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1977). Attorney fee statutes should be strictly construed. Daniels, supra, at 4. Where the legislature has set forth specific criteria for determining reasonable attorney fees to be awarded through a fee-authorizing statute, a

judge is bound to use only the enumerated criteria, and if the statute does not contemplate the use of additional factors such as multipliers, such factors may not be considered. Schick v. Dept. of Agriculture and Consumer Services, 599 So. 2d 641 (Fla. 1992).

Civil litigants have fewer protections than those available to criminal defendants. McDermott v. Miami Dade County, 753 So. 2d 729 (Fla. lst DCA 2000) (also holding that a claimant had no constitutional right to counsel during a workers' compensation deposition). Therefore, the cases cited by claimant's attorney herein are inapposite to the case at bar, including Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), which was cited for the proposition that fee maximums are unconstitutional when applied to cases involving "extraordinary circumstances or unusual representation." Makemson involved an attorney's fee for representation of an indigent criminal defendant. Claimant also cited Olive v. Mass, 811 So. 2d 644 (Fla. 2002), which involved a fee for an attorney appointed to represent indigent death row inmates in post-conviction proceedings (again, invoking the Sixth Amendment), and White v. Board of County Commissioners of Pinellas County, 537 So. 2d 1376 (Fla. 1989), which raised the issue of a fee for representation of an indigent defendant in a capital case.

Also distinguishable are the dependency cases cited by claimant, Marion County v. Johnson, 586 So. 2d 1163 (Fla. 5th DCA 1991), and Board of County Commissioners of Hillsborough County v. Scruggs, 545 So. 2d 910 (Fla. 2d DCA 1989), which held that the court may depart from statutory fee guidelines for "extraordinary and unusual" civil dependency proceedings where counsel was "constitutionally required to be appointed." Id. at 911.

II. IN LIMITING THE FEES OF CLAIMANTS' ATTORNEYS TO A STATUTORY GUIDELINE, § 440.34(1), FLA. STAT. (2003), DOES NOT VIOLATE A CLAIMANT'S RIGHT TO EQUAL PROTECTION, AS SET FORTH IN ART. I, § 2, FLA. CONST., AND ART. XIV, § I, U. S. CONST.

Art. I, § 2, Fla. Const., provides:

> "Basic rights. - All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry…"

Art. XIV, § I, U. S. Const., provides, inter alia:

> "No State shall deny to any person within its jurisdiction the equal protection of the laws."

The threshold question to be decided in an equal protection challenge is whether a suspect class or violation of fundamental rights has been implicated. A suspect class is involved when a statute operates to the disadvantage of some group such as race, nationality, or alienage or

impinges on a fundamental right. In re Greenberg's Estate, 390 So. 2d 40 (Fla. 1980). Injured workers are not a suspect class. Acton v. Fort Lauderdale Hospital, 440 So. 2d 1282 (Fla. 1983). Section 440.34(1), applies to all workers' compensation claimants, regardless of race, age, national origin, or sex. No subset of claimants has been singled out for disparate treatment, and even so, disparate treatment which is rationally related to a permissible governmental purpose would not violate equal protection. McElrath v. Burley, 707 So. 2d 836 (Fla. 1st DCA 1998).

Fundamental rights are those which are, objectively, deeply rooted in the nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed, such as the right to contract, to marry, to bodily integrity, and to raise one's children as one deems fit. Zurla v. City of Daytona Beach, 876 So. 2d 34 (Fla. lst DCA 2004). However, a statute restricting the right to contract will not be invalidated if the restriction was enacted to protect the public's health, safety, or welfare. Khoury v. Carvel Homes South, Inc., 403 So. 2d 1043 (Fla. 1st DCA 1981). The right to access the courts is an important, but not fundamental, right for the purpose of constitutional analysis. Wagner v. AGW Consultants, 114 P.3d 1050 (N.M. 2005). (In Wagner the New Mexico Supreme Court held that a workers' compensation

fee limitation was subject to a rational basis review). The burden of proving that a statute violates equal protection is heavy, and any doubt must be resolved in favor of the enactment's constitutionality. McElrath, supra at 841.

Social legislation, such as workers' compensation acts, is generally subject to a rational relationship analysis. B&B Steel Erectors v. Burnsed, 591 So. 2d 644 (Fla. lst DCA 1991). Using this test, a court must simply review the legislation to ensure that it bears a reasonable relationship to a legitimate state interest. The legislation is presumptively constitutional, and the challenging party must prove that the legislation does not bear a reasonable relationship to a legitimate state interest. North Florida Women's Health and Counseling Servs., Inc., v. State of Florida, 866 So. 2d 612 (Fla. 2003).

Florida's workers' compensation program was established for two reasons: (1) to see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents. De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So. 2d 204 (Fla. 1989).

In Taylor v. School Board of Brevard County, 888 So. 2d 1(Fla. 2004), this Court stated:

> The workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike…. It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The Division of Workers' Compensation shall administer the Workers' Compensation Laws in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments. . . .

Id. at 890.

The rational basis equal protection standard does not allow a court to substitute its personal notions of good public policy for those of the legislature. Schweiker v. Wilson, 450 U.S. 221 (1981).

In 1980 this Honorable Court found that the provision in § 440.34(4), requiring that the judge of industrial claims approve attorney's fees in workers' compensation cases, was constitutional. Samaha v. State, 389 So. 2d 639 (Fla. 1980).

The Court of Appeal, First District, has repeatedly and, it is submitted, correctly, upheld the constitutionality of the amendment to § 440.34(1), Fla. Stat. (2003), applying the rational basis analysis. Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506 (Fla. lst DCA 2006), rev. den.,

939 So. 2d 93 (Fla. 2006); Campbell v. Aramark, 933 So. 2d 1255 (Fla. lst DCA 2006); rev. den., 944 So. 2d 986 (Fla. 2006); Wood v. Florida Rock Indus. & Crawford & Co., 929 So. 2d 542 (Fla. lst DCA 2006), rev. den., 935 So. 2d 1221 (Fla. 2006); Buitrago v. Landry's, 949 So. 2d 1046, (Fla. lst DCA 2006), rev. den., March 5, 2000; and La Petite Academy v. Duprey, 948 So. 2d 868 (Fla. lst DCA 2007), rev. den., 963 So. 2d 227 (Fla. 2007).

III. SECTION 440.34(1), FLA. STAT. (2003), DOES NOT VIOLATE A CLAIMANT'S DUE PROCESS RIGHTS UNDER ART. I, § 9, FLA. CONST., AND ART. XIV, § I, U. S. CONST.

Art. I, § 9, Fla. Const., provides:

> Due process - No person shall be deprived of life, liberty or property without due process of law. . . .

Art. XIV, § 1, U. S. Const., provides, inter alia:

> Nor shall any State deprive any person of life, liberty or property without due process of law. . . .

The essence of due process is the right to a hearing upon reasonable notice. Smith v. Smith, 964 So. 2d 217 (Fla. 2d DCA 2007). Due process requires an opportunity to call witnesses and to testify in one's own behalf. Times Publ'g Co. v. Burke, 375 So. 2d 297 (Fla. 2d DCA 1979).

Numerous provisions of Florida's Workers' Compensation Act have previously been upheld in the face of constitutional challenges. For example, see Newton vs. McCotter Motors, Inc., 475 So. 2d 230 (Fla. 1985), cert.

den., 475 U.S. 1021 (1986) (upholding statute that requires, in order for injured employee's death to be compensable, death must occur within one year of accident or follow continuous disability and result from accident within 5 years); Acton, 440 So. 2d 1282, (upholding permanent impairment and wage-loss benefits system that replaced permanent partial disability benefits); Winn Dixie v. Resnikoff, 659 So. 2d 1297 (Fla. lst DCA 1995) (upholding 78 week limit on wage loss eligibility); Rodriguez v. Prestress Decking Corp., 611 So. 2d 59 (Fla. lst DCA 1992) (upholding statute limiting receipt of death benefits to certain dependents); Radney v. Edwards, 424 So. 2d 956 (Fla. lst DCA 1983) (upholding statute excluding private employers with less than three employees from provisions of Florida Workers' Compensation Act); and Barry v. Burdines, 675 So. 2d 587 (Fla. 1996), cert. den., 519 U.S. 966 (1996) (upholding the constitutionality of the impairment system set forth in § 440.15(3)(b)4.d. as a "fair and efficient method for handling the large volume of workers' compensation claims filed in this state. . . ."). Id. at 591.

Workers' compensation is set up to be "self-executing." Section 440.191, Fla. Stat., provides for a state-funded ombudsman to assist claimants in drafting petitions and in working out disagreements. Once a petition is filed, a mandatory state mediation, which a claimant must attend

in person, is required by § 440.25. (Section 440.25(3)(b) provides that the employer "**may** be represented by an attorney at the mediation conference **if** the employee is also represented by an attorney at the mediation conference.") Should the parties still not reach agreement on all issues, a pretrial conference may be held and thereafter the petition is set for evidentiary hearing. § 440.29(4)(d). The JCC is empowered to make "such investigation or inquiry as to best ascertain the rights of the parties," per § 440.29(1), which powers include, in § 440.33, the ability to compel attendance of witnesses and order the production of records.

A useful analogy is presented by Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985), wherein the U. S. Supreme Court faced similar issues to those raised by the instant appeal. In Walters the Court granted certiorari to determine whether the attorney's fee provision of 38 U.S.C. § 3404(c), the Veterans Benefits Act, which limited veterans' attorney's fees to $10, violated due process. The Court explained that Congress enacted Title 38 to establish an administrative system for granting service-connected death or disability benefits to veterans to protect the interests of veterans from the perceived threat that agents or attorneys would charge excessive fees for their services, which essentially required only the preparation and presentation of an application for benefits. Because the

process for seeking veterans' benefits had historically been intentionally structured as informal and non-adversarial, the assistance of paid agents or attorneys was not deemed necessary or desirable in the overwhelming majority of cases. The Court found the statute constitutional and stated, "The destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible." Id. at 305.[1]

The U.S. Supreme Court also considered the constitutionality of an attorney's fee in cases brought pursuant to the Black Lung Benefits Act in U.S. Dept. of Labor v. Triplett, 494 U.S. 715 (1990). In upholding the attorney's fee limitations of that law, the Court pointed out that the plaintiff presented three lawyers' assessments that "fewer qualified attorneys are accepting black lung claims." As in Walters, the Court made clear that "this sort of anecdotal evidence will not overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled." U.S. Dept. of Labor, 494 So. 2d 715.

IV. A CLAIMANT'S RIGHT OF ACCESS TO THE COURTS, AS GUARANTEED BY ART. 1, § 21, FLA. CONST., IS NOT UNCONSTITUTIONALLY IMPAIRED BY THE AMENDMENT TO § 440.34 (1), FLA. STAT. (2003).

[1] 38 U.S.C. § 3404(c) was later amended by Congress.

Art. 1, § 21, Fla. Const., provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

This Honorable Court has already decided that a claimant in a workers' compensation case has a reasonable alternative to his right to sue his employer following an injury, and thus, the workers' compensation system did not unconstitutionally deny a claimant access to courts without providing a substitute. Eller v. Shova, 630 So. 2d 537 (Fla. 1993).

A party is afforded his "day in court" with respect to an administrative decision when he has a right to a hearing and has the right of appeal to a judicial tribunal of the action of an administrative body. Scholastic Sys., Inc. v. LeLoup and State of Florida Indus. Relations Comm'n, 307 So. 2d 166 (Fla. 1975).

Procedural due process in an administrative setting does not always require application of the judicial model. Rucker v. City of Ocala, 684 So. 2d 836 (Fla. 1st DCA 1997), rev. dismissed, 689 So. 2d 1071 (Fla. 1997). In Rucker the court held that restrictions on a workers' compensation claimant's ability to present medical evidence did not deny him access to the courts because his cause of action "has not been totally eliminated." Id. at 844.

Clearly, in the case on appeal herein, there has been no showing that claimant's access to the courts was restricted or in any way denied.

V. § 440.34(1), FLA. STAT. (2003), IS NOT UNCONSTITUTIONAL AS A VIOLATION OF THE SEPARATION OF POWERS PROVISIONS OF ART. II, § 3 OR ART. V, § 15, FLA. CONST.

Art. II, § 3, Fla. Const., provides:

> Branches of government. - The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers ascertaining to either of the other branches unless expressly provided herein.

Art. V, § 15, Fla. Const., states:

> Section 15. Attorney; admission and discipline. - The Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

Workers' compensation judges are executive, not judicial, branch officers. Jones v. Chiles, 638 So. 2d 48 (Fla. 1994).

This Court ruled in Amendments to the Florida Rules of Workers' Compensation Procedure, 891 So. 2d 474 (Fla. 2004) that it did not have jurisdiction under the Florida Constitution to adopt rules of practice and procedure for an executive branch agency, and therefore repealed the Florida Rules of Workers' Compensation Procedure. The Court reasoned that the original and appellate jurisdiction of the courts of Florida is derived entirely from Art. V, Fla. Const., and that the legislature had no authority to

authorize the Court to promulgate rules of procedure for workers' compensation cases.

It is respectfully submitted that the doctrine of separation of powers likewise precludes this Honorable Court from prescribing attorney fees in workers' compensation cases.

CONCLUSION

The Florida legislature, in amending § 440.34, was attempting to address the soaring costs of workers' compensation in Florida, having recognized that the fees of claimants' attorneys were one of the major cost drivers making Florida a prohibitively expensive climate for employers.

This Honorable Court, as well as other courts in this state, have held over and over that the system of workers' compensation laws in Florida bears a rational relationship to legitimate state purposes, and is constitutional.

Wherefore, FHM respectfully requests that this Honorable Court affirm the opinion of the Court of Appeal, First District entered October 16, 2006, and answer the certified question by holding that the amendment to § 440.34(1), Fla. Stat. (2003), unambiguously establishes that the percentage fee provided therein is the sole standard for determining the reasonableness of an attorney's fee to be awarded claimant.

Respectfully submitted,

_____
George D. Gabel

_____
Carol M. Folsom
Attorneys for FHM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon **William J. McCabe,** Shepherd, McCabe & Cooley, Counsel for Petitioner, 1450 SR 434 West, Suite 200, Longwood, FL 32750; **Brian O. Sutter,** Counsel for Petitioner, 2340 Tamiami Trail, Port Charlotte, FL 33952; **John R. Darin II**, Counsel for Respondents, 390 N. Orange Avenue, Suite 1000, Orlando, FL 32802; **William H. Rogner,** Amicus on behalf of Zenith Ins. Company, 1560 Orange Avenue, Suite 500, Winter Park, Florida 32789; **Rayford H. Taylor,** Amicus on behalf of Associated Industries of Florida and Florida Ins. Council, P.O. Box 191148; Atlanta, Georgia 31119; **Thomas A. Koval,** Amicus on behalf of Associated Industries of Florida and Florida Ins. Council, 6300 University Parkway, Sarasota, Florida 34240; **Mary Ann Stiles,** Amicus on behalf of Associated Industries of Florida and Florida Ins. Council, P.O. Box 460, Tampa, Fbrida 33601; **Richard A. Sicking,** Amicus on behalf of Florida Professional Firefighters, Inc., 1313 Ponce de Leon Boulevard, Suite 300, Coral Gables, Florida 33134, **Susan Whaley Fox and Richard Ervin,** Amicus on behalf of Voices, Inc., 112 N. Delaware Avenue, Tampa, Florida 33606, **Marcia K. Lippincott,** Amicus on behalf of Seminole County School Board, P.O. Box 953693, Lake Mary, Florida 32695; **Scott B. Miller,** Amicus on behalf of Florida Association of Self Insurance, Inc., 1560 Orange Avenue, Suite 500, Winter Park, Florida 32789; **Barbara Wagner,** Amicus on behalf of Florida Workers Advocates, 2101 North Andrews Avenue, Suite 400, Fort Lauderdale, Florida 33311; **L. Barry Keyfetz**, on behalf of The Florida Justice Association, 44 West Flagler Street, Suite 2400, Miami, Florida 33130; **Wendy S. Loquasto,** on behalf of Voices Inc., 314 West Jefferson Street, Tallahassee, Florida

32301; **George N. Meros, Jr.** and **Andy V. Bardos,** on behalf of Florida Justice Reform Institute, et al., P.O. Box 11189, Tallahassee, Florida 32302; **Todd J. Sanders,** on behalf of on behalf of PBA, 807 West Morse Boulevard, Suite 201, Winter Park, Florida 32789; and **Mark L. Zientz,** on behalf of Workers' Compensation Section of The Florida Bar, 9130 South Dadeland Boulevard, Suite 1619, Miami, Florida 33156, on this the _____ day of January, 2008.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Amicus Brief was computer-generated using Times New Roman fourteen point font on Microsoft Word, and hereby complies with the font standards as required by Fla. R. App. P. 9.210 for computer-generated briefs.

George D. Gabel, Jr., Esq.
Florida Bar No. 027220
Holland & Knight LLP
50 N. Laura St., Suite 3900
Jacksonville, FL 32202-3622

Carol M. Folsom, Esq.
Florida Bar No. 0472735
Holland & Knight LLP
50 N. Laura St., Suite 3900
Jacksonville, FL 32202-3622

Counsel for Florida Hospitality
Mutual Insurance Company

5029088_v1