IN THE SUPREME COURT OF FLORIDA

Emma Murray,

Petitioner,

v.

Mariner Health/ACE USA,

Respondent.

______________________________/

CASE NO: SC07-244

LOWER TRIBUNAL NO: 1D06-475

BRIEF OF *AMICUS CURIAE*
ZENITH INSURANCE COMPANY
FILED IN SUPPORT OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, Emma Murray, will be referred to as the "Claimant" or the "Petitioner." Respondent, Mariner Health will be referred to as the "Employer/Carrier" or the "Respondent." The Judge of Compensation Claims will be referred to as the "JCC." The Division of Administrative Hearings will be referred to as "DOAH." Unless otherwise specified, all references to Chapter 440 address the 2003 version of the statute.

CONCISE STATEMENT OF THE IDENTITY OF THE *AMICUS CURIAE* PARTY AND ITS INTEREST IN THE CASE

This brief is being submitted by *amicus curiae* Zenith Insurance Company. Zenith Insurance Company is a mono-line workers' compensation carrier in the state of Florida. Zenith Insurance Company insures over 11,000 Florida businesses. Zenith Insurance Company is the fourth largest workers' compensation carrier in the state by premium volume. Zenith Insurance Company's interests are closely tied to the workers' compensation law in the state of Florida.

SUMMARY OF ARGUMENT

This case addresses an attorney's fee award in a workers' compensation case under section 440.34, Fla. Stat. The parties agreed that the value of the benefits obtained by Petitioner's attorney was $3,244.21. The JCC applied the mandatory statutory guideline and calculated the presumptive fee. Finding no reason to depart downward from the presumptive fee, the JCC entered the order awarding $648.84 to Petitioner's attorney. This appeal followed.

Petitioner raises five arguments to overturn this result. The first addresses statutory construction. The remaining four are constitutional challenges. All have been raised and rejected on multiple occasions by Florida courts.

First, Petitioner's construction argument distinguishes fees approved by the JCC from those agreed to by the parties, thereby violating basic rules of statutory construction by parsing section 440.34 rather than reading it as a whole. To accept Petitioner's interpretation this Court must conclude that the Legislature did not intentionally delete the *Lee Engineering* factors from the statute in 2003, but rather condensed those factors into the single word "reasonable." Moreover, Petitioner's construction makes agreed upon fees the *only* fees for which the guideline applies. Under section 440.34(1), however, *all* attorneys' fees must be approved by a JCC and they must comply with the guideline.

Second, Petitioner argues that the fee statute violates her equal protection

rights because it treats claimants' attorneys' fees differently than fees paid to employer/carrier attorneys. That dissimilar treatment is grounded in myriad rational reasons so it does not violate equal protection. Among several, the state has a legitimate interest in regulating attorneys' fees generally, in reducing the costs of the workers' compensation system, and in protecting claimants from imprudent contracts with their attorneys.

Third, Petitioner argues that the fee statute violates her right to due process. Civil litigants have no due process right to a lawyer who is paid by their opponent. Moreover, Petitioner received a hearing and has been represented at each level of this litigation. As applied, Petitioner's due process rights were protected. Even if the claimant were unrepresented, the law provides appropriate due process protections for such claimants.

Fourth, Petitioner incorrectly asserts that the statute violates her right to access to court. This Court has routinely upheld the worker's compensation law on access to court challenges addressing benefit adjudications. A claimant has no right to an Article V trial judge when seeking benefits so it necessarily follows that the claimant's lawyer has no right to an adjudication of his fee by an Article V judge.

Finally, Petitioner asserts that the statute violates the separation of powers doctrine. This court has long held that the Legislature permissibly created the workers' compensation system. Adjudication of benefits and fees by JCC's does not

violate the separation of powers even though JCC's are executive branch officers. Petitioner's attempt to thwart the plain language of the statute as well as the intent of the Legislature should be rejected.

ARGUMENT

I. THE MAXIMUM ATTORNEY'S FEE PAYABLE TO A WORKERS' COMPENSATION CLAIMANT'S ATTORNEY IS THE STATUTORY GUIDELINE FEE FOUND IN SECTION 440.34(1), FLA. STAT. (2003).

This appeal followed a final order awarding attorney's fees pursuant to section 440.34, Fla. Stat. The parties agreed that the value of the benefits obtained by Petitioner's attorney was $3,244.21. The JCC applied the statutory guideline and calculated the presumptive fee. Finding no reason to depart downward from the presumptive fee, the JCC entered the order awarding $648.84 to Petitioner's attorney. Following affirmance by the First District, this Court accepted discretionary jurisdiction.

The 2003 amendments to section 440.34 changed the method used to calculate claimants' attorneys' fees. Under prior law, a JCC could award hourly fees based on services provided. Under current law such fees, whether paid by the claimant or the employer/carrier, are based solely on the benefits obtained. The only alternate fee permitted is a maximum $1,500.00 fee payable in connection with a medical only claim. See section 440.34(7).

Under section 440.34(1) a claimant's attorney's fee is calculated as a percentage of the benefits secured. The statute provides a sliding scale starting at 20% of the first $5,000 of benefits obtained. The scale decreases thereafter based on both benefit amount and time period. These calculations are commonly known as the guideline. Under 440.34(2) the JCC is permitted to consider only those benefits obtained through the attorney's effort when applying the guideline. The guideline fee represents the *maximum* fee which the JCC may reduce in the event it appears unreasonably high. See *Wood v. Florida Rock Industries & Crawford & Co.,* 929 So. 2d 542 (Fla. 1st DCA 2006).

To evade the clear Legislative intent of section 440.34, Petitioner advances a contrived interpretation that section 440.34(1) applies only to fees *approved* by the JCC, while 440.34(2) applies to fees *awarded* by a JCC. This case involves a fee *awarded* by a JCC. Thus, argues Petitioner, the guideline restrictions in section 440.34(1) do not apply. Under the plain language of section 440.34(1), however, no fee may be paid in connection with *any* proceeding unless it complies with the guideline. The section specifically mentions fees awarded pursuant to a "compensation order." Quite simply, *all* claimants' attorneys' fees are subject to the guideline. See section 440.34(1).

In considering Petitioner's interpretation, no argument is more convincing than a review of the statute at issue:

> "440.34(1) A fee, gratuity, or other consideration may not be paid for a claimant *in connection with any proceeding* arising under this chapter, unless approved as reasonable by the judge of compensation claims or court having jurisdiction over such proceedings. *Any* attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant *must equal* to 20% of the first $5,000.00 of the amount of the benefits secured, 15% of the next $5,000.00 of the amount of the benefits secured, 10% of the remaining amount of the benefits secured to be provided during the first ten years after the date the claim is filed, and 5% of benefits secured after ten years. The judge of compensation claims *shall not* approve a *compensation order*, a joint stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter that provides for an attorney's fee in excess of the amount permitted by this section..."
> "(2) In awarding a claimant's attorney's fee, the judge of compensation claims *shall* consider *only* those benefits secured by the attorney..." (Emphasis added)

A basic rule of statutory construction requires all parts of a statute to be read together and harmonized to achieve a consistent whole. See *Forsythe v. Longboat Key Erosion Control Dist.*, 604 So. 2d 452 (Fla. 1992). Under the cannon *expressio unius est. exclusio alterius*, where the Legislature creates an exception in the statute, courts may infer that, had the Legislature intended to establish other exceptions, it would have done so unequivocally. See *Dobbs v. Sea Aisle Hotel*, 56 So. 2d 341 (Fla. 1952). The only exception is found in section 440.34(7), permitting a $1,500.00 maximum fee relating to a medical only claim.

Petitioner's construction would have the guideline apply only to fees approved by a JCC in the context of a settlement or agreement, but not to those

awarded by a JCC after a hearing. That construction results in an absurdity. In the instant case, had the parties resolved the fee prior to the hearing, the JCC would be precluded from approving anything greater than the $648.84 guideline fee. But, since the parties did not resolve the fee, the JCC would be free to award $16,000.00, or roughly four times the benefit obtained.

The Legislature did not intend that, if the parties resolve the fee it must be a guideline fee but, if the parties refuse to resolve the fee, the JCC can then award a much larger fee. Indeed, the Legislative history of S.B. 50A evidences exactly the opposite intent. According to the Senate Staff Analysis and Economic Impact Statement, the intent was to permit only the contingent guideline fee in all cases, regardless of whether the fee was paid by the clamant or the employer/carrier. (Appendix C-4, 23). There was no intent to permit a JCC to award an hourly fee except for a $1,500 maximum fee in connection with a medical only claim. (Appendix C-4, 23).

The Senate Report found that attorney involvement was a significant driver in Florida's relatively high workers' compensation costs. (Appendix C-8). The report noted that, under then existing law, the JCC was permitted to award fees in excess of the guideline fee. (Appendix C-12). In analyzing the effect of the proposed changes, the Report found that the amendments would make the guideline fee mandatory in all cases and in connection with all fees. (Appendix C-23).

Petitioner's construction of section 440.34 permits the award of hourly attorneys' fees under subsection (2) and ignores the language in subsection (1) that references "any proceedings." It dismisses the language that restricts *all* attorneys' fees to the statutory guideline. Finally, it ignores specific reference to fees awarded in a "compensation order." Petitioner's construction would lead to absurd results given the limiting language in subsection (1). It would allow hourly fees when awarded after a hearing, but would preclude hourly fees where the parties agree on an amount. If a literal interpretation of the statute leads to unreasonable results, the Court should exercise its power to interpret the statute in such a way as to impart reason and logic to it. See *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.*, 170 So. 2d 577 (Fla. 1964).

Petitioner relies on *Lee Engineering & Construction v. Fellows,* 209 So. 2d 454 (Fla. 1968). *Lee Engineering* was decided under the then existing statute. Workers' compensation is purely a creature of statute and the parties' rights are governed by the date of accident. See *Jones v. ETS of New Orleans, Inc.,* 793 So. 2d 912 (Fla. 2001). The *Lee Engineering* factors were statutorily adopted in 1978 and then repealed when the statute was amended in 2003. Petitioner argues that the Legislature's repeal of those factors was meaningless. That argument must be rejected as this Court has repeatedly declared that it will "assume that the Legislature, by [a statutory] amendment, intended it to serve a useful purpose."

Carlile v. Game & Fresh Water Fish Comm'n, 354 So.2d 362 (Fla. 1977). That useful purpose was to standardize fees through a mandatory guideline.

Petitioner's argument has little to do with statutory construction. It primarily concerns her attorney's economic interests. Petitioner argues that her attorney *had* to expend eighty hours to secure $3,244.21 in benefits. In truth, Petitioner's attorney *chose* to expend eighty hours to secure $3,244.21 in benefits. Petitioner's attorney made that choice despite the clear and unambiguous limitations contained in section 440.34. The Legislature permissibly created a fee system based on the value of the benefits obtained and not on the value of the services provided. The instant fee award complies with the Legislature's intent and it should be affirmed.

II. SECTION 440.34, FLA. STAT. (2003) PROTECTS THE CLAIMANT'S RIGHT TO EQUAL PROTECTION SINCE IT IS RATIONALLY RELATED TO IMPORTANT GOVERNMENTAL INTERESTS.

Contrary to Petitioner's assertion, the workers' compensation act is subject to rational basis analysis. Under that rubric, challenged statutory classifications must be upheld if there is any plausible reason for the Legislature's action, even if the reason was not expressed by the Legislature. See *Acton v. Ft. Lauderdale Hosp.*, 440 So. 2d 1282 (Fla. 1983). Since Florida Courts hold that injured workers are not a suspect class, constitutional challenges to the workers' compensation law

are controlled by the rational basis test.[1]

Petitioner begins by alleging that workers' compensation claimants have a generalized constitutional right to a lawyer. This is not a criminal case. Civil litigants have no generalized right to counsel, and that is also true in workers' compensation cases. See *S.B. v. Dept. of Children & Families,* 851 So. 2d 689 (Fla. 2003); *McDermott v. Miami-Dade County*, 753 So. 2d 729 (Fla. 1st DCA 2000).

Petitioner then argues more specifically that section 440.34 violates equal protection because it caps attorneys' fees payable to claimants' attorneys while failing to cap attorneys' fees payable to employer/carrier attorneys. Admittedly, there is differential treatment. The question, however, is whether that dissimilarity is rationally related to a legitimate state interest. It is.

For more than eighty years courts have upheld the propriety of one-sided fee caps. In *Yeiser v. Dysart, et. al.*, 267 U.S. 540, 45 S. Ct. 399 (1925), the United States Supreme Court held that states may attach conditions to attorneys' licenses deemed necessary for the protection of the public. A fee restriction that applied only to the plaintiff's lawyer did not violate the Federal Constitution. Id.

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[1]See, e.g., *Sasso v. Ram Property Mngmt.*, 431 So. 2d 204 (Fla. 1st DCA 1983); *Hensley v. Punta Gorda and Gallagher Bassett Services*, 686 So. 2d 724 (Fla. 1st DCA 1997); *Strohm v. Hertz Corp.*, 685 So. 2d 37 (Fla. 1st DCA 1997); *Bradley v. The Hurricane Restaurant,* 670 So.2d 162 (Fla. 1st DCA 1996); *Lucas v. Englewood Community Hospital*, 963 So.2d 894 (Fla. 1st DCA 2007).

In *Samaha v. State of Florida*, 389 So. 2d 639 (Fla. 1980), this Court, citing *Yeiser*, upheld the constitutionality of the Florida workers' compensation fee statute. The Court found that the Legislature has a legitimate interest in regulating attorneys' fees in workers' compensation cases. Id. at 640. The statute was upheld in the face of a constitutional challenge although it regulated only the fees payable to claimants' lawyers.

Limitations on workers' compensation attorneys' fees have existed since the inception of our system. See Section 440.34, Fla. Stat. (1935). At all times they have applied only to claimants' attorneys. These limitations have been routinely endorsed by the courts. See, e.g., *Khoury v. Carvel Homes South, Inc.*, 403 So. 2d 1043 (Fla. 1st DCA 1981).

With section 440.34 the state has at least three legitimate interests. The first is the regulation of attorneys' fees in general. See *Samaha,* 389 So.2d at 640. The second is to lower the overall cost of the worker's compensation system, a purpose endorsed by this Court in connection with past reductions in benefits See *Acosta v. Kraco, Inc.,* 471 So.2d 24 (Fla. 1985). The third is to protect injured workers. See *Lundy v. Four Seasons Ocean Grand Palm Beach,* 932 So. 2d 506 (Fla. 1st DCA 2006). Statutes regulating claimants' attorneys' fees are intended to protect claimants who are of relatively limited financial means. See *Samaha,* 389 So.2d at 640; *Lundy*, 932 So. 2d at 510. Employer/carriers need no such protection. Thus,

it is rational to treat the regulation of attorneys' fees differently.

In addition to the United States Supreme Court and the Supreme Court of Florida, multiple courts of other states have approved one-sided attorneys' fee regulations. When challenged, the courts of our sister jurisdictions uphold one-sided fee caps in worker's compensation cases for a variety of reasons. They include the government's interest in fee regulation generally, the goal of reducing the costs of the workers' compensation system overall, and the legislative interest in protecting claimants from entering into potentially unfavorable contracts with their own attorneys.[2]

Petitioners in the instant case rely primarily on *Corn v. New Mexico Educators Federal Credit Union*, 889 P. 2d 234 (N.M. Ct. App. 1994). *Corn* addressed a statute that capped claimants' attorneys' fees at $12,500.00, but provided no such cap for employer/carrier attorneys' fees. The New Mexico Court held that such dissimilar treatment was a denial of equal protection. *Corn* is neither controlling (since we are addressing Florida law) nor even persuasive given

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[2]See *Rhodes v. Industrial Commission*, 868 P. 2d 467 (Idaho 1993); *Buckler v. Hilt*, 200 N.E. 219 (Ind. 1936); *Injured Workers of Kansas v. Franklin*, 942 P. 2d 591 (Kan. 1997); *Ayotte v. United Services, Inc.*, 567 A. 2d 430 (Me. 1989); *Mississippi Employment Security Commission v. Wilks*, 156 So. 2d 583 (Miss. 1963); *Burress v. Employment Relations Division/Department of Labor & Industry*, 829 P. 2d 639 (Mont. 1992); *Crosby v. State of New York, Workers' Compensation Board*, 85 A. 2d 810 (N.Y. App. Div. 1981); *Hudock v. Virginia State Bar*, 355 S.E. 2d 601 (Va. 1987); *Hicks v. Wilson*, 391 S.E. 2d 350 (W. Va. 1990).

the very different system in New Mexico and the facts of *Corn* itself.

New Mexico employs a four level scrutiny analysis when addressing constitutional challenges. Id. at 238. Unlike Florida, the New Mexico courts apply a heightened rational basis test while Florida courts apply the rational basis test. Id. Under their heightened review the *Corn* Court found no evidence in the record to suggest that capping claimants' attorneys' fees would result in significantly lowering the overall cost of legal services. Id. at 239. According to the Court, such evidence was required in order to satisfy their standard of review.

The *Corn* Court stated that it would have upheld the statute under Florida's standard of review. Id. at 243. The *Corn* Court's clear explanation of its reasoning undermines Petitioner's argument and reliance upon the case. More importantly, Florida courts, including this Honorable Court, have rejected similar equal protection challenges to our workers' compensation law's one-sided fee regulation. See *Samaha,* 389 So.2d at 640.

Petitioner in the instant case alleges that the fee cap impairs or eliminates the ability of claimants to obtain assistance of counsel. Petitioner has been represented throughout this litigation. There is no record support for the allegation that the one-sided fee caps have had any effect on Petitioner's ability to obtain counsel. As applied, the statute protected Petitioner's rights.

Moreover, the data does not support Petitioner's assertions that the fee

restrictions will prevent claimants with small claims from retaining counsel. According to the 2007 Annual Report of the Judges of Compensation Claims, there is no evidence of an increase in the number of unrepresented litigants. (Appendix B-13). Moreover, the number of cases filed overall has not decreased. In fact, it has increased. In fiscal year 2001-2002, the last year before the reforms, 34,109 new cases were filed. By contrast, in fiscal year 2006-2007, 36,227 new cases were filed. (Appendix B-12).

The crux of Petitioner's argument is that she is entitled not only to an attorney of her choice, but to an attorney paid on an hourly basis by her opponent. This argument does not concern equal protection. Rather, it concerns the economic interests of the attorney. This Court must focus on equal protection and its proper analysis. Workers' compensation claimants are not a suspect class. The challenged statute is subject to the rational basis test. The statute is rationally related to legitimate governmental goals of regulating attorneys' fees in general, in reducing the overall costs of the workers' compensation system, and in assuring that the maximum amount of any workers' compensation award goes to the claimant as opposed his or her attorney.

III. SECTION 440.34, FLA. STAT. (2003) PROTECTS THE CLAIMANT'S RIGHT TO DUE PROCESS

An injured workers' rights to receive compensation must be protected by procedural safeguards including notice and the opportunity to be heard. See *Dept.*

of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). To qualify under due process standards, the opportunity to be heard must be meaningful and fair. See *Metropolitan Dade County v. Sokolowski*, 431 So. 2d 932 (Fla. 3rd DCA 1983). Proceedings before a JCC satisfy procedural due process requirements. See *Jones v. Chiles*, 638 So. 2d 48 (Fla. 1994).

Petitioner confuses the right to be heard with a non-existent right to be heard while represented by a lawyer of her choosing who is being paid any amount the lawyer wants to charge. A claimant in a workers' compensation case has no constitutional right to a lawyer, particularly a lawyer paid for by her opponent. See *S.B. v. Dept. of Children & Families,* 851 So.2d at 689*; McDermott,* 753 So.2d at 729. Petitioner's due process rights in this case were protected. She had a hearing before a JCC. Her rights were adjudicated. She *won*. She was represented by counsel at all times. She is still represented by counsel.

In addition, the Legislature, through the establishment of the Ombudsman's office, has provided a process for claimants to litigate their claims without attorneys. That office is charged with assisting injured workers in processing their claims. See section 440.191(1)(c). Employer/carriers are required to cooperate with the Ombudsman's office and to provide the office with appropriate documents necessary in order to assist the claimant. See section 440.191(2)(a). The Ombudsman's office is charged with explaining workers' compensation

procedures and assisting the claimant with the drafting of Petitions for Benefits. See section 440.191(2)(c). The office is empowered to do everything except directly represent the claimant before the JCC. See section 440.191(2)(c).

The Legislature also assured that injured workers are advised of their rights in writing. The Legislature required the publication of an understandable guide to explain all benefits and procedures regarding mediations and hearings. The guide must be written at an eighth grade level or less. See section 440.207(2).

Petitioner alleges that, because of the attorneys' fee restrictions, claimants will not be able to obtain attorneys. Petitioner's assertion is simply not supported by the evidence. In fact, the data suggests that the changes to section 440.34 have neither significantly increased the numbers of unrepresented claimants nor resulted in a decrease in new case filings. (Appendix B-11, 12). Even if the assertion were true, however, it does not result in a denial of due process since claimants have an opportunity to be heard in a meaningful way before a JCC regardless of their represented status.

Finally, Petitioner asserts that the guideline fee creates an "irrebuttable presumption" which deprives the claimant of substantive due process rights. The claimant's assertion is flawed. The guideline sets forth a presumed fee. The presumed fee can be rebutted. The JCC retains the power to vary downward from the maximum fee set forth by the guideline. If the JCC determines that a guideline

fee is excessive then he may reduce it in order to protect the claimant's interests. See *Wood,* 929 So. 2d at 543.

Petitioner's due process arguments are misplaced. Her due process rights were protected by Chapter 440. Petitioner had the opportunity to be heard. She was represented at the trial level and remains represented at the appellate level. Petitioner's basic argument is that Petitioner's lawyer should have the right to charge the Respondent an hourly fee. There is no such right protected by the Constitution.

IV. SECTION 440.34, FLA. STAT. (2003) PROTECTS THE CLAIMANT'S RIGHT TO ACCESS TO COURT.

A challenge based on an alleged denial of access to court must involve an abrogation of a common law right of action. See *Strohm v. Hertz Corp.*, 685 So. 2d 37 (Fla. 1st DCA 1997). Workers in Florida gave up their right to an Article V trial court proceeding upon the adoption of the workers' compensation system. That adoption was challenged and upheld by this Court. See *South Atlantic S.S. Co. of Delaware v. Tutson*, 190 So. 675 (Fla. 1939). JCC's are not Article V Judges. They are not a part of the judicial branch. They are executive branch officers. Nonetheless, the workers' compensation system is constitutionally sound. Id.

Petitioner in this case again confuses the right to access to court with the non-existent right of access to court accompanied by a lawyer of her choosing being paid on an hourly basis by her opponent. Petitioner's goal is to have this

Court declare that, when a claimant prevails before the JCC, the employer/carrier is then compelled to pay an hourly attorney's fee to claimant's counsel. That goal has nothing to do with access to court.

Petitioner asserts, without any record evidence, that lawyers will no longer take workers' compensation cases involving small disputes. The data collected by DOAH belies that claim. (Appendix B-11, 12). Even if true, however, it would not result in the denial of access to court. As explained above, the Legislature has addressed this concern through the Ombudsman system. See section 440.191.

There are many disputes in society that do not financially justify the retention of an attorney. There is no constitutional right to have an attorney represent a civil litigant in a minor matter. Lawyers routinely decline a wide variety of cases because the dispute is too small to justify the services of the attorney. That does not result in an unconstitutional denial of access to court. Petitioner was not denied her right to access to court and the lower court's decision should be affirmed.

V. SECTION 440.34, FLA. STAT. (2003) IS CONSISTENT WITH THE SEPARATION OF POWERS DOCTRINE.

Shortly after the adoption of the original Florida workers' compensation law, it was challenged under a separation of powers theory. In *South Atlantic S.S. Co. of Delaware v. Tutson*, 190 So. 675 (Fla. 1939), the law was challenged under Article V of the Florida Constitution. The *Tutson* court found that the workers'

compensation law was consistent with the separation of powers doctrine. Id. at 680. The Legislature permissibly vested the legislative branch with the power to adjudicate workers' compensation claims, subject to final review by an Article V court.

Recently, the First District rejected a separation of powers argument raised specifically in connection with section 440.34. In *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506 (Fla. 1st DCA 2006), the Court noted that the Legislature did not encroach upon the powers of the judiciary by restricting the payment of fees to a percentage of the benefits secured. Id. at 511. The Legislature may limit the amount that a claimant's attorney may charge because the state has a legitimate interest in regulating attorneys' fees. The Legislature may set forth the criteria that it deems will further the purpose of the workers' compensation law.

The Legislative regulation of attorneys' fees is permissible in other areas of Florida law. For example, the regulation of attorneys' fees in eminent domain cases does not violate the separation of powers. See *Seminole County v. Delco Oil, Inc.*, 669 So. 2d 1162 (Fla. 5th DCA), *rev. denied*, 682 So. 2d 1100 (Fla. 1996). This Court approved statutory regulation of attorney's fees in probate cases. See *In re: Estate of Platt*, 586 So. 2d 382 (Fla. 1991). The Legislature's establishment of a procedure for offers of settlement and authorizing awards of attorney's fees for unreasonably refusing such offers does not infringe on the Supreme Court's rule

making powers. See *Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992). This Court held that the Legislature is free to cap attorneys' fees in connection with claims made pursuant to the government's waiver of sovereign immunity. See *Ingraham by and through Ingraham v. Dade County School Board*, 450 So. 2d 847 (Fla. 1984).

Workers' compensation claimants are not a suspect class. A challenge involving an attorneys' fee statute invokes the rational basis test. Legislation restricting the rights of workers' compensation claimants to contract with their lawyers is valid if enacted to protect the public's health, safety, or welfare. See *Khoury*, 403 So. 2d at 1043. In addition to Florida, other states recognize that workers' compensation fee regulation does not violate the separation of powers.[3]

Petitioner's reliance on *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986) is misplaced. *Makemson* is a criminal case. Id. at 1110. It addressed a fee cap relating to criminal defendants. Indigent criminal defendants have a constitutional right to a lawyer paid by their opponent. Id. at 1112. Workers' compensation claimants have no such right.

The *Makemson* statute was not unconstitutional on its face. Id. It was unconstitutional as applied. Specifically, it was unconstitutional as applied to an

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[3]See, e.g., *Joseph v. C.C. Oliphant Roofing Co.*, 711 A. 2d 805 (Del. Super. Ct. 1997); *Injured Workers of Kansas v. Franklin*, 942 P. 2d 591 (Kan. 1997); *Lawson v. Workers' Compensation Appeal Board*, 857 A. 2d 222 (Pa. Commw. Ct. 2004).

indigent criminal defendant since it curtailed the Supreme Court's obligation to insure adequate representation to the criminally accused. Id. at 1113. The Court has no similar role in workers' compensation cases.

There is no constitutional right to a lawyer in a civil matter. See *Bova v. State*, 410 So. 2d 1343 (Fla. 1982). *Makemson* applies only where 6th amendment rights are involved. See *Orange County v. Fishalow*, 513 So. 2d 1109 (Fla. 5th DCA 1987). The right to counsel protections in a criminal case do not extend to civil parties. See *Bova,* 410 So. 2d at 1343; *S.B. v. Dept. of Children & Families,* 851 So. 2d at 689; *McDermott,* 753 So. 2d at 729.

This Court has long held that the workers' compensation law does not violate the separation of powers even though both benefits and attorneys' fees are adjudicated by executive branch officers. The claimant in this case had no right to a trial proceeding before an Article V judge and therefore had no right to an adjudication of her lawyer's fee by an Article V judge. Her rights were protected through *review* by an Article V court. Petitioner's attempt to thwart the plain language of the statute as well as the intent of the Legislature should be rejected.

CONCLUSION

Amicus curiae Zenith Insurance Company respectfully requests that this Court affirm the rulings of the Judge of Compensation Claims and the First District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to Attorney William McCabe (counsel for Petitioner); Attorney L. Barry Keyfetz (counsel for Florida Justice Association); Attorney George N. Meros, Jr. (counsel for Florida Justice Reform Institute; Florida A.G.C. Council, Inc.; Assoc. Builders and Contractors of Florida, Inc.; Florida Retail Federation; National Federation of Independent Business; and Florida Transportation Builders Assoc., Inc.); Attorney Tamela Purdue (counsel for Associated Industries of Florida); Attorney Susan W. Fox, Attorney Wendy Loquasto, and Attorney Richard W. Ervin, III (counsel for Voices, Inc.); Attorney Marcia K. Lippincott (counsel for Seminole County School Board); Attorney Mark L. Zientz (counsel for Workers' Compensation Section, Florida Bar); Attorney Brian O. Sutter (counsel for Petitioner); Attorney Scott B. Miller (counsel for Florida Association of Self Insurance, Inc.); Attorney Roy D. Wasson (counsel for David Singleton); Attorney Rayford H. Taylor, Attorney Thomas Koval, and Attorney Mary Ann Stiles (counsel for Insurance Council); Attorney Richard A. Sicking (counsel for Florida Professional Firefighters, Inc. & International Association of Firefighters, AFL-CIO); Attorney John R. Darin, II (counsel for Respondent); Attorney Barbara Wagner (counsel for Florida Workers Advocates); Attorney George Gabel and Attorney Carol Folsom (counsel for Hospitality Mutual Insurance Co.); Attorney

Cheryl L. Wilke (co-counsel for Mariners); and Attorney Todd J. Sanders and Attorney Geoffrey Bichler, Esquire (counsel for Florida Police Benevolent Association) on this ______ day of January, 2008.

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CERTIFICATION REGARDING FONT TYPE AND SIZE

I HEREBY CERTIFY that the foregoing Brief complies with the font type and size requirements designated in Rule of Appellate Procedure 9.210 on this ________ day of January, 2008.

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