Supreme Court of Florida

CASE NO. SC07-244

EMMA MURRAY,

Petitioner,

v.

MARINER HEALTH/ACE USA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

DAVID SINGLETON'S AMENDED AMICUS CURIAE BRIEF IN SUPPORT OF POSITION OF PETITIONERS

ROY D. WASSON
WASSON & ASSOCIATES, CHARTERED
5901 Southwest 74th Street
Suite 205
Miami, Florida 33143
(305) 666-5053 Telephone
(305) 666-0010 Facsimile

Counsel for Amicus Curiae David Singleton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES **PAGE**

STATEMENT OF IDENTITY AND INTEREST OF AMICUS

David Singleton is the Claimant in a Workers= Compensation claim now pending

before the Division of Administrative Hearings, Orlando Division, who has been unable to retain counsel to represent him in that proceeding[1] due to the limitations on attorneys fees required by Section 440.34 Fla. Stat. (2003).

Mr. Singleton in that Workers= Compensation action filed a Petition to Approve Retainer Agreement whereby he sought approval of a fee agreement with attorney Steven Meyers upon terms that would acceptable to Mr. Singleton and Mr. Meyers, but which were different than the provisions of section 440.34. In denying that petition, the JCC found as follows:

> Claimant maintains he suffered a heat stroke and associated injuries in the course and scope of employment on August 22, 2006 for which the employer has denied compensability. Claimant testified that he had never tried a workers compensation case before and that he was unaware of the law, rules of procedure and rules of evidence that would allow him to be successful at trial. ***The evidence reveals that he contacted at least 15 attorneys in his geographical area, none of which agreed to accept his case. I find the claimant=s efforts to find counsel was reasonable and made in good faith. I find that at least up until the date of hearing on August 3, 2007 Mr. Singleton had been unable to find an attorney willing to accept his claim under the fee arrangements currently available under section 440.34.***
>
> * * *
>
> ***I find that Mr. Singleton=s prospects of success in establishing the compensability of his workers compensation claim would be more greatly enhanced if he had the assistance of counsel.*** I find that the legal

[1] The undersigned is handling this amicus curiae matter on a pro bono basis and does not represent Mr. Singleton in his claim before the Division.

> assistance of Attorney Meyers would substantially enhance Mr. Singleton=s prospects of successfully prosecuting his claim. Nevertheless, I find that the provisions of section 440.34(1) do not permit my approval for fees and costs in excess of that reflected in the section . . . .

Order Denying Petition to Approve Retainer Agreement (August 31, 2007)(emphasis added).

Mr. Singleton will attempt to advance the interests of those injured in work-related incidents who are unable to retain counsel to represent them in Workers Comp claims despite due diligence, and who will be unable to effectively represent their own interests due to a lack of legal knowledge and training.

SUMMARY OF THE ARGUMENT

The 2003 amendment to the Florida Workers Compensation Attorneys Fees statute constitutes a denial of claimants= right to representation by counsel under the due process clauses to the Florida and United States Constitutions. A claimant in a Workers Compensation proceeding has a recognized property right sufficient to invoke the procedural due protections of notice and an opportunity to be heard. The courts have recognized that the denial of retained counsel in a complex civil or administrative proceeding constitutes a denial of the right of a meaningful hearing. The intricacies and complexities of the Workers Comp process renders the assistance of counsel necessary to provide claimants like Ms. Murray with an effective opportunity to be heard. The drastic reduction in E/C-paid fees is not rationally related to any legitimate state objective and constitutes a denial of due process. Under the strict scrutiny analysis necessary to

support deprivation of fundamental constitutional rights, there is no compelling state interest that would warrant denying claimants their right to engage counsel at their own expense.

The statutory prohibition upon the right of a claimant to contract to pay his or her own attorney is a denial of equal protection of laws. First, there is no rational reason why the amounts paid to claimants= counsel must be limited to a pittance, while there is no limitation at all upon the amounts that the E/C may pay their attorneys. Second, there is no rational reason why a Workers Comp claimant should be treated differently from a tort claimant who may agree to pay his or her attorney a substantial sum for legal representation.

The Amicus Singleton adopts the arguments made by the Petitioner and other amici that the 2003 amendment to section 440.34, Fla. Stat. violates the access-to-courts and separation of powers provisions of the Florida Constitution.

Invalidation of the 2003 amendment to section 440.34 should result in reinstatement of the pre-2003 statute whereby the E/C pays a successful claimant=s attorneys fees using the *Lee Engineering* factors.

ARGUMENT

I.

THE 2003 WORKERS COMPENSATION ATTORNEYS FEE AMENDMENT DENIES CLAIMANTS= CONSTITUTIONAL RIGHT TO

REPRESENTATION BY COUNSEL UNDER THE FLORIDA AND FEDERAL DUE PROCESS CLAUSES

The 2003 amendment to the Workers Compensation Attorneys' Fees statute is unconstitutional as denying Comp claimants' right to representation by counsel secured by the Due Process Clauses under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 9 of the Florida Constitution.

A. Due Process Right To Counsel In Civil Cases:

The U.S. Supreme Court and other courts have recognized civil litigants' constitutional right to representation by counsel, as noted by the Sixth Circuit:

> While case law in the area is scarce, ***the right of a civil litigant to be represented by retained counsel, if desired, is now clearly recognized.*** See *Goldberg v. Kelly*, 397 U.S. 254, 270-71, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (welfare recipient must be allowed to retain an attorney at welfare termination hearing if recipient so desires); *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 256-57 (1st Cir. 1986); *Indiana Planned Parenthood Affiliates Assoc. v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied*, 449 U.S. 820, 66 L. Ed. 2d 22, 101 S. Ct. 78 (1980). Recognition of this right can be traced back to the Supreme Court's holding in *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932), where the Court held that "if in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

Anderson v. Sheppard, 856 F.2d 741, 747 (6th Cir. 1988)(emphasis added).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970) the Court recognized a constitutional right to retained counsel in proceedings to terminate welfare benefits and noting that

"[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Id*. at 270-71. That right to counsel should be even stronger in a case involving claims to benefits to be paid by an opposing party, as the adversarial nature of the proceeding makes the assistance of counsel more necessary than in a claim for public assistance.

An adversarial Workers Compensation claim is a complex, quasi-judicial proceeding in which the assistance of competent counsel is much more necessary than in an Ainformal and nonadversarial@ proceeding for receipt of government entitlements. *Compare Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985) (upholding against due process attack a statutory $10 limitation on attorney fees payable by veterans seeking disability or death benefits in proceedings before the Veterans= Administration). In *Walters* the Court noted that the process before the VA Ais not designed to operate adversarially, and that A[w]hile counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decision maker whose duty it is to aid the claimant, and significant concessions with respect to the claimant=s burden of proof, the need for counsel is considerably diminished.@ *Id*. at 333-34.

In more complex and controverted types of cases, where attorneys are necessary

to permit claimants to fairly vindicate their claims, the showing required to launch a successful due process attack upon an attorneys fee limitation Acontains two component parts: (1) that claimants could not obtain representation, and (2) that this unavailability of attorney was attributable to the Government=s fee regime.@ *U.S. Dept of Labor v. Triplett*, 494 U.S. 715, 723 (1990) (finding that claimants had failed to meet burden where Ano lower court had heard evidence or made factual findings . . . and generalized statements by the attorney about lack of willing counsel was insufficient Asort of anecdotal evidence [that] will not overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled@).

The following are the minimum hurdles that a Workers' Comp claimant would have to overcome in order to successfully litigate his or her comp claim without the assistance of counsel:

- The Claimant must determine whether a managed care arrangement exists, and exhaust all grievance procedures before filing a Petition for Benefits for medical treatment. ' 440.134(15)(a), Fla. Stat. (2003)
- Next, injured workers must file a Petition for Benefits for all benefits ripe, due, and owing, and only those benefits contained in the Petition can be considered.
- The Petition must be both specific and detailed, containing the information detailed in '440.192(1) & (2), Fla. Stat. (2003). For example, the petition

must contain "[a] detailed description of the injury and cause of the injury, . . . [t]he time period for which compensation was not timely provided . . . [, d]ate of maximum medical improvement, character of disability, and ***specific statement of all benefits or compensation that the employee is seeking***." '440.192(2), Fla. Stat. (2003)(emphasis added).

- Lack of compliance with these statutes will result in the Petition being dismissed pursuant to Fla. R. Work. Comp. P. 60-Q-6.107(1).
- The Petition can only be amended by stipulation of both parties or Judge of Compensation Claims under Fla. R. Work. Comp. P. 60-Q-6107(2).
- The only medical opinions allowed into evidence are from authorized treating doctors, independent medical examiners, and expert medical examiners. *See* '440.13(5)(e), Fla. Stat. (2003).
- Many of the cases are controverted, in which there are no authorized physicians, thus making it mandatory for the injured worker to obtain an independent medical evaluation, schedule, notice and take the deposition as governed by the same rules as civil actions in circuit courts. *See* '440.30, Fla. Stat. (2003).
- Expert witnesses, witness fees and costs for court reporters are governed by the same rules as civil actions '440.30 and 440.31, Fla. Stat.
- An injured worker is entitled to only one independent medical examination

(*see* '440.13(5)(a)) notice of which must be provided to the opposing party within 15 days of the evaluation or the claimant cannot use the IME testimony at trial.

- In cases controlled by a Managed Care Arrangement ("MCA"), the IME must be one of the physicians within the E/C-selected MCA network.
- In addition to being allowed only one IME examination, the claimant is bound by the result under '440.13(5)(b) and may not get another IME.
- Even in cases where the physicians are authorized to handle Workers' Compensation Claims, there is no guarantee**C**or even a probability**C**that the physicians' notes will contain all of the necessary information to make out a prima facie case. For example, often these notes do not contain any information on the claimants' specific work status and limitations, which is necessary under Section 440.15 to prove eligibility for any type of indemnity benefit. Even if the authorized doctors' notes do happen to contain all necessary information, they cannot be used at trial by the injured worker except upon "proper motion" and by serving them on the opposing party at least thirty days before the hearing. *See* '440.29(4), Fla. Stat.
- If there is any dispute between two or more healthcare providers on any medical issues or concerning whether the employee can return to work, the JCC must appoint an expert medical examiner to render an opinion that is

presumed correct unless rebutted by clear and convincing evidence. ' 440.13(9)(c), Fla. Stat. (2002).

- An injured worker must follow substantially the same rules of discovery as those in civil procedure, file requests for medical records, requests for production (such as his personnel file), and respond to the E/C requests for production.
- Expert testimony must be elicited by deposition, which the worker must schedule, notice and depose his own experts, qualifying them as experts. The worker must also cross-examine E/C=s experts.
- Once the Petition for Benefits is received by the Department of Administrative Hearings, DOAH automatically notices a mandatory pre-trial hearing, which must be attended by unrepresented claimants.
- Attendance at mediation is mandated pursuant to '440.25, Fla. Stat.
- If the parties do not settle in mediation, a hearing is held before the Judge of Compensation Claims pursuant to the Rules of Procedure for Workers' Compensation Adjudications, where the Rules of Evidence apply, including the *Frye* standard. *See U.S. Sugar Corp. v. Henson*, 787 So. 2d 3 (Fla. 1st DCA 2000).
- Even after compensability has been established, the E/C could simply not provide any recommendation made by a physician, thus obligating the

> claimant to file a petition for benefits on each benefit and be prepared to go through the entire filing of the PFB, attending a mediation conference, scheduling, preparing for and attending depositions, preparing a pre-trial stipulation form and hearing information sheet, preparing for and attending the final hearing on each and every benefit that could be sought, including bi-weekly compensation payments.

A Florida Workers' Compensation proceeding is just the sort of complex, adversarial proceeding where assistance of counsel is necessary and a matter of right.

B. Workers' Compensation Claims As Protected Property Right:

An injured worker's right to pursue a claim for Workers Compensation benefits is a property right recognized as giving rise to the protections of procedural due process. In *Rucker v. City of Ocala*, 684 So. 2d 836 (Fla. 1st DCA 1996), the court summarized those legal principles and supporting case law as follows:

> "Procedural due process rights derive from a property interest in which the individual has a legitimate claim." *Metropolitan Dade County v. Sokolowski*, 429 So. 2d 932, 934 (Fla. 3d DCA 1983), *petition for review denied*, 450 So. 2d 488 (Fla. 1984). An injured employee's right to receive workers' compensation benefits qualifies as such a property interest. *See De Ayala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 204, 206 n.6 (Fla. 1989) . . . . Property rights are among the basic substantive rights expressly protected by the Florida Constitution." *Department of Law Enforce. v. Real Property*, 588 So. 2d 957, 964 (Fla. 1991). "Once acquired, a property interest falls within the protections of procedural due process." *Sokolowski*, 439 So. 2d at 934. Therefore, an injured employee's right to receive workers' compensation, as a property right, must be protected by procedural safeguards including notice and an opportunity

> to be heard. *See Real Property*, 588 So. 2d at 964; *see also* Art. I, ' 9, Fla. Const. ("No person shall be deprived of life, liberty or property without due process of law . . . ."). . . .

Id. at 840-41. *Accord, e.g., Casper v. Herman*, No. 97-3093; 1998 U.S. Dist. LEXIS 1845 (E.D. Pa. Feb. 11, 1998), in which the court held:

> The Supreme Court has declared that the government may not reduce or eliminate social security disability payments without affording the protections of procedural due process. *See Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). For this purpose, we ***see no plausible distinction between social security benefits and federal workers compensation***. *Raditch v. United States*, 929 F.2d 478, 480 (9th Cir. 1991). ***Both constitute protected property interests.***
>
> Because workers compensation benefits are protected property interests under the Fifth Amendment, plaintiff may only be deprived of them if he is first given notice and an "opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). This hearing must occur at a "meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965).

Id. at ** 5-6 (emphasis added).

The denial of access to counsel resulting from the 2003 amendment to section 440.34 would operate to deny Ms. Murray, Mr. Singleton and other claimants similarly situated their fair Aopportunity for hearing appropriate to the nature of the case . . . in a meaningful manner.@ Thus, this Court should recognized claimants= right to effective representation by counsel in the Workers Compensation process.

C. Impingement of Claimant's Right to Counsel Subject to Strict Scrutiny:

There was no compelling state interest underlying the 2003 amendment that

justified intruding upon claimants= due process rights. Where a statutory limitation on attorneys fees deprives claimants of the ability to meaningfully exercise their rights in the Workers Comp process, the statute should be subject to scrutiny more strict than the rationally-related test.

In *Wagner v. AGW Consultants*, 114 P.3d 1050 (N.M. 2005) the Supreme Court of New Mexico considered the constitutionality of a statute limiting attorneys fees paid to Workers Compensation claimants= counsel of $12,500, half by each party, but lacking any provision for any additional fee for appellate services.

The court in *Wagner* held that the claimant had standing to contest the fee caps, even though he had been represented by counsel in the course of his claim. *Id*. at 1054-55. The court then held that stricter scrutiny of the fee cap statute would apply if the claimant demonstrated that the statute deprived him of adequate representation, thereby denying him Ameaningful access@ to the appellate courts:

> Worker argues that the fee cap impacts workers' appellate rights because it discourages lawyers from taking complex or time-consuming cases, depriving those claimants of meaningfully exercising their appellate rights. Meaningful access to our appellate courts depends in part on an individual's ability to obtain adequate representation. *See Herndon*, 92 N.M. at 288, 587 P.2d at 435; *Mieras*, 1996 NMCA 95, P48 (Hartz, J., specially concurring) ("A statute that deprives someone of the ability to obtain adequate representation in litigation could, in a very real sense, deprive the person of a right of access to the courts."); *Corn*, 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., concurring). Whether representation is "adequate," however, depends on the circumstances, including the nature of proceedings and the ability of the other side to secure representation.

Id. at 1056.

The claimant in *Wagner* failed to make any showing that the lack of any separate fee for appellate services meaningfully impacted the appellate rights of claimants, so the court applied the rationally-related test to the constitutional questions, noting as follows:

> As in *Mieras*, ***the record here fails to demonstrate that some claimants are unable to obtain representation in workers' compensation proceedings, either initially or on appeal***, or that a decrease in available attorneys renders access to our appellate courts any less meaningful. . . .
>
> ***Before finding that the fee limitation meaningfully impacts claimants' appellate rights, therefore, we would require more evidence in the record, such as testimony or data showing that workers with complex cases are unable to obtain representation due to the fee limitation.*** *See Triplett*, 494 U.S. at 723-24.

Id. at 1057-58 (emphasis added).

Thus, had there been competent evidence in the record**C**like there is in the present case**C**that claimants will not be able to retain counsel under the subject fee caps, and will not be able to adequately navigate the compexities of the Workers Comp system without competent counsel, the court in *Wagner* would have applied stricter scrutiny to the New Mexico fee caps. Therefore, this Court should apply strict scrutiny to the constitutional questions herein presented.

D. Denial of Right To Retain and Pay Counsel Denies Due Process:

The 2003 amendment to ' 440.34 not only sets a cap on E/C-paid fees that is so low as to deny due process, that amendment unconstitutionally prohibits claimants from retaining counsel at their own expense. Even if rationally-related to the legitimate legislative goal of maximizing the amount of a claimant=s recovery, under the strict scrutiny standard that applies to intrusions on the fundamental right to engage counsel, the prohibition on claimant-paid fees fails due process analysis.

II.

THE STATUTORY PROHIBITION UPON A CLAIMANT=S RIGHT TO CONTRACT TO PAY HIS OR HER OWN ATTORNEY IS A DENIAL OF EQUAL PROTECTION OF LAWS

The 2003 amendment to ' 440.34, by prohibiting claimants such as Ms. Murray and Amicus Curiae Mr. Singleton from retaining counsel at their own expense, denies them the equal protection of laws. Amicus Singleton agrees with the Petitioner=s position that the lack of a cap on fees that the E/C can pay to its attorney amounts to a denial of equal protection, as there is no valid reason why claimants= counsel should be paid a pittance compared to counsel defending corporate entities. *See Corn v. New Mexico Educators Federal Credit Union*, 889 P. 2d 234 (N.M. App. 1994) (invalidating on equal protection grounds, Workers Comp fee cap of $12,500 applicable only claimants= counsel, not to employers= counsel), *overruled on other grounds, Trujillo v. City of Albuquerque*,

965 P.2d 305, (N.M. 1998).

Additionally, there is no rational reason why a Workers Comp claimant should be treated differently from a tort claimant in this area. A tort claimant has the right to engage counsel and agree to pay a reasonable fee, whether an hourly fee, contingent percentage fee, or a fee otherwise computed.

For example, victims of medical malpractice may contract for fees in excess of those that otherwise would be the maximum permitted by law. Even though an amendment to the Florida Constitution has been offered as a limitation upon the fees that can be paid to attorneys by malpractice victims this Court has approved a waiver of the clients= assumed right under that law limiting those fees. *In Re: Amendment to the Rules Regulating The Florida Bar*C*Rule 4-1.5(f)(4)(B) of the Rules Regulating Professional Conduct*, 939 So. 2d 1032 (Fla. 2006).

The 2003 amendment to ' 440.34, by failing to provide Workers Comp claimants a similar right to engage their counsel at their own expense, after taking away the E/C=s obligation to pay a reasonable fee, violates claimants= right to equal protection of laws. The amendment should be declared unconstitutional.

III.

THE 2003 AMENDMENT IS UNCONSTITUTIONAL UNDER THE ACCESS TO COURTS AND SEPARATION OF POWERS PROVISIONS OF THE FLORIDA CONSTITUTION

Amicus Curiae Singleton agrees with the arguments of Petitioner and other Amici that the 2003 amendment to section 440.34 violates the access-to-courts and separation of powers provisions of the Florida Constitution. In the interest of brevity, Mr. Singleton will not repeat all of those arguments.

IV.

INVALIDATION OF THE 2003 AMENDMENT SHOULD RESULT IN A RETURN TO PRIOR LAW WHEREBY THE E/C PAYS SUCCESSFUL CLAIMANTS= REASONABLE ATTORNEYS FEES

Although part of the reason the 2003 fee amendment is unconstitutional is that it denies claimants the right to retain counsel at their own expense, invalidation of that amendment should not result in the abolition of the fee-shifting approach that has been part of Florida Workers Compensation law since 1941. Reversal of the legislature=s unconstitutional definition of a Areasonable fee@ should result in reinstatement of the pre-2003 statutory scheme whereby the Employer/Carrier pays a successful claimant=s attorneys fees computed using the *Lee Engineering*[2] factors.

Unless claimants= attorneys fees are shifted to employers, they will be denied part of their constitutionally-protected property right in the benefits required to compensate them for their work-related injuries. The need for such fee-shifting laws has been

[2] *See Lee Eng=g & Constr. v. Fellows*, 209 So. 2d 454 (Fla. 1968).

recognized in other states, as noted in the following:

> There is a growing trend toward adding attorney fees to a claimant's award. In 1972, Section 28 of the Longshoremen's and Harbor Workers' Compensation Act was amended to provide a claimant payment for legal fees in cases in which the existence or extent of liability is controverted and the claimant employs legal counsel and successfully prevails on his or her claim. . . . 33 U.S.C.A. ' 928(a); *see also Ford Aerospace & Communications Corp. v. Boling,* 684 F.2d 640 (9th Cir. 1982). In upholding the constitutionality of ' 28, courts have relied on a "congressional intent" that attorney fees not diminish the recovery by a claimant "when an employer contests its liability for compensation in whole or in part and the claimant is ultimately successful regardless of how close a case might be which is litigated but finally lost by (the employer)." *Hole v. Miami Shipyards Corp.,* 640 F.2d 769, 774 (5th Cir. 1981) (quoting *Overseas African Construction Corp. v. McMullen,* 500 F.2d 1291, 1298 n. 14 [2nd Cir. 1974]).
>
> Likewise, other jurisdictions have enacted statutory provisions for adding on attorney fees under specific circumstances. In *Baker v. Louisiana Pac. Corp.,* 123 Idaho 799, 853 P.2d 544 (Idaho 1993), *cert. denied,* 510 U.S. 1024, 126 L. Ed. 2d 592, 114 S. Ct. 634 (1993), the Idaho Supreme Court found the employer's appeal to be essentially an attempt to have the court reweigh the evidence, and awarded attorney fees to the claimant under a statute permitting fees to be awarded when an employer appeals a compensation award "without reasonable grounds." In *Herndon v. Albuquerque Pub. Sch.,* 92 N.M. 287, 587 P.2d 434 (N.M. 1978), the court of appeals had increased a claimant's award but awarded no additional attorney's fees. The New Mexico Supreme Court held that the failure to award attorney's fees for the appeal was an abuse of discretion by the lower court. The supreme court based its decision on the state policy favoring representation of workers, protecting particularly the right to such representation when the employer appeals.
>
> Several states have statutes providing for the award of attorney fees to be assessed against the employer in cases where the claimant prevailed below and the award was affirmed on the employer's appeal. Ark. Code. Ann. ' 11-9-715(b)(1) (Michie 1999); Cal. Lab. Code ' 5801 (Deering 2000); Del. Code Ann. tit. 19, ' 2350(f) (2000); Haw. Rev. Stat. ' 386-93

(2000). . . [citing Florida=s 2000 version of ' 440.34].

> ***When [the "American Rule"] . . . practice is superimposed upon a closely calculated system of wage-loss benefits, a serious question arises whether the social objectives of the legislation may to some extent be thwarted.*** The benefit scales are so tailored as to cover only the minimum support of a claimant during disability. There is nothing to indicate that the framers of the benefit rates included any padding to take care of legal and other expenses incurred in obtaining the award. The level of benefits is so closely calculated that all costs must be regulated to prevent frustration of the purposes of the act. ***Accordingly, exceptions to the American Rule have developed when "overriding considerations of justice seem to compel such a result.***" *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 1407, 18 L. Ed. 2d 475 (1967).

City of Louisville v. Slack, 39 S.W.3d 809, 814-15 (Ky. 2001)(Graves, J., dissenting) (emphasis added and footnote deleted).

Invalidation of the unconstitutional 2003 amendment to section 440.34**C**and the concomitant return to the Areasonable fee@ approach using the *Lee Engineering* factors**C**will cure the constitutional defects involved in this case by effectuating the legislature=s intent to permit claimants to recover the full amount of their benefits without reduction for compensating counsel. Constitutional principles require invalidation of the 2003 amendment. Fundamental fairness requires a return to the pre-2003 statutory fee-shifting regime. It would unnecessarily encroach upon the legislature=s prerogative to return to claimant-paid fees.

CONCLUSION

WHEREFORE, the attorneys fee caps in question constituting a denial of federal and Florida due process, violating Claimants= right to equal protection of laws and access to courts, and constituting an impermissible encroachment by the legislature upon the powers of the judiciary, this Court should quash the decision below, declare the 2003 amendment unconstitutional, and remand with instructions to calculate the Claimant=s reasonable attorneys fees to paid by the Employer/Carrier.

Respectfully submitted,

WASSON & ASSOCIATES, CHARTERED
5901 SW 74th St., Suite 205
Miami, Florida 33143
(305) 666-5053 Telephone
(305) 666-0010 Facsimile
roy@wassonandassociates.com

Counsel for Amicus Curiae David Singleton

By: _____
ROY D. WASSON
Florida Bar No. 332070

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, Florida 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 26th day of December, 2007.

By: _____
ROY D. WASSON
Florida Bar No. 332070

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

By: _____
ROY D. WASSON
Florida Bar No. 33207