SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

Emma Murray,

Petitioner, CASE NO.: **SC07-244**

vs. Lower Tribunal: **1D06-475**

Mariner Health/Ace USA,

Respondent.
_____/

AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE ASSOCIATION

IN SUPPORT OF POSITION OF PETITIONER

L. Barry Keyfetz, Esquire
FBN 042658
On behalf of the Florida Justice Association
44 W. Flagler Street, Suite 2400
Miami, FL 33130
(305) 358-1740

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THECASE

The Florida Justice Association (FJA) is a large statewide professional organization of attorney's whose practices emphasize representation of plaintiffs' and claimants' and which association is dedicated to the principals of fairness and justice throughout the judicial process.

SUMMARY OF ARGUMENT

The constitutional right of access to the courts is a fundamental right. Psychiatric Assocs. v. Siegel, 610 So.2d 419, 424 (Fla. 1992). It guarantees that the common law cause of action to sue for injury for those injured at work or otherwise may be altered only if there is a "reasonable" alternative "protecting" the persons protected by the common law remedy. Kluger v. White, 281 So.2d 1 (Fla. 1973).

The workers' compensation law immunizes the employer from tort suit and the carrier from any bad faith action supposedly in return for far lesser but certain compensation and medical benefits to promptly be provided without consideration of fault. Under this alternative remedy injured workers are precluded from obtaining common law damages for injury some of which such as pain and suffering, permanent loss of earning capacity, disfigurement, loss of consortium may be very substantial. (e.g. compare benefits herein allowed regarding injury

resulting in a hysterectomy with Cedars Medical Center, Inc. v. Ravelo, 738 So.2d 362 (Fla. 3rd DCA 1999), involving jury verdict of $2 million based on negligence in obtaining informed consent to remove all of reproductive organs). The 2003 changes complete a draconian reduction in benefits since this Court last addressed this workers compensation alternative remedy in Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). (e.g. no matter how severe and disabling any permanent psychiatric sequelae- even if permanently totally disabled only, 2 weeks impairment benefits permitted. §440.15(3)(c) & §440.15(1)(a) Fla.Stat. (2003) (Appx.1). That has been coupled with (1) exceptionally enhanced pleading and procedural requirements (e.g. §440.192 Fla.Stat. (2003) and (2) exceptionally complex substantive law changes in order to secure benefits.

However, from 1941, (and in 1990 when this Court last addressed this issue) until October 1, 2003 injured workers were still able to secure counsel and allowed access to courts to try to secure these lesser benefits **because the E/C was obligated to pay a "reasonable" attorney fee when benefits were wrongfully withheld.** Unlike ability to retain counsel to pursue a tort action, as a part of this alternative benefits scheme, the injured worker is not permitted to retain and pay an attorney to secure these substitute benefits without governmental approval- in fact it is a crime to do so. Thus, the E/C's obligation to pay a "reasonable" attorney

fee is an even more an essential underpinning for necessary access to counsel and concomitant access to courts.

The record herein establishes, by overwhelming un-contradicted evidence and so found by the JCC that: (1) claimant could not possibly secure the benefits without assistance of exceptionally skilled counsel and (2) no counsel can afford to represent injured workers for strict application of the statutory fee schedule, which in this case computes to less than $9.00 per hour (compare the fee award of $648.84 to the successful claimant's attorney with the more than $16,000 paid to the unsuccessful defense counsel). (R.185, 306). The JCC found application of the fee schedule to be "manifestly unfair." (R.306).

The challenged amendment effectively removing the ability of the injured worker to obtain counsel and concomitantly secure these substitute benefits under the workers compensation law is a violation of access to courts.

ARGUMENT

POINT I

WHETHER THE AMENDMENT TO §440.34 EFFECTIVE OCTOBER 1, 2003 IS UNCONSTITUTIONAL AS A VIOLATION OF ACCESS TO COURTS?

The issue presented is a question of law, one of first impression and involves a fundamental right. The standards for review are de novo and strict scrutiny.

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

A. The Right Of Access to Courts

Article I Section 21 of the Florida Constitution provides:

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

The mandatory workers compensation law seeks to substitute the benefits and procedures provided therein in lieu of the common law right of an employee to sue for an injury. This Court held "the Legislature is without power to abolish such a right without providing a *reasonable alternative* to protect the right of the people of the State to *redress for injuries*, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." Kluger v. White, 281 So.2d 1, at p. 4 (Fla. 1973) (Emphasis supplied). This Court has pointed out in interpreting the provision: "The history of the provision shows the courts' intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes." Psychiatric Assocs. v. Siegel, 610 So.2d 419 (Fla. 1992). No overpowering public necessity and lack of an alternative regarding the challenged amendment has been asserted let alone established.

The last time an access to courts- fair alternative issue in regard to workman's compensation was addressed by this court was in connection with the 1990 amendments to the workers compensation law. Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). In Scanlan, this court held the reduced benefits flowing from the 1990 amendments did not facially cross the threshold rendering the law facially unconstitutional as an inadequate alternative. In rejecting the facial challenge the Court stated: "It continues to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty…" Martinez v. Scanlan, supra p.1172

Since then there has been a dramatic reduction in benefits; first in 1994 and then 2003; including elimination of wage loss entirely and elimination of full medical (medical apportioned, co-payment).(Appx.1). However, what continued to exist in 1990, 1994 and from 1941 until October 1, 2003, was the opportunity to secure these lesser benefits when wrongfully withheld because the E/C remained obligated for a "reasonable" attorney fee.

This court need not address the more general issue as to whether the greatly reduced benefit structure in combination with expanding immunity and increasing procedural intricacies can survive a similar constitutional challenge as made in Scanlan. What this Court is requested to address, is the limited issue as to whether the 2003 amendment to §440.34 - if interpreted to prohibit the E/C's obligation to

pay a "reasonable" fee after wrongfully withholding benefits- is unconstitutional as applied by effectively denying access to the courts.

B. Unlike Pursuing Common Law Tort Action Injured Worker Already Handicapped – Crime To Seek Counsel Other Than On A Contingency Basis And Approval Required Before Counsel May Be Paid

Since inception of the workers compensation law in 1935, the injured worker has been prohibited from securing and paying counsel for legal services unless governmental approval has been secured.[1] The 1941 amendment, adding obligation of the E/C to pay a reasonable fee for wrongfully withheld benefits, also provided it would constitute criminal conduct for the injured worker to secure and pay counsel any fees without approval.[2] It was contemplated and in practice applied, that fees could only be paid on a contingency upon securing benefits. That was later specifically codified as follows:

---

[1] "No claims for legal services or for any other services rendered in respect of a claim or award for compensation, to or on account of any person, shall be valid unless approved by the Commission, or if the proceedings for review of the order of the Commission, in respect of such claim or award are had before any Court, unless approved by such Court. Any claims so approved shall in the manner and to the extent fixed by the Commission or such Court, be a lien upon such compensation." Laws 1935, c. 17481, §34.

[2] "Any person (a) who receives any fees, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the commission or such court, or (b) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof, shall, for each offense, be punished by a fine of not more than five hundred dollars or by imprisonment not to exceed one year, or by both such fine and imprisonment." §440.34 (3)(1941).

> In awarding a reasonable attorney's fee, the judge of compensation claims shall consider only those benefits to the claimant that the attorney is responsible for securing.

s.440.34 (2)(1990):

However, were a tort action permitted, the injured worker is not similarly impeded in access to counsel and concomitant access to courts. He would be permitted to contract for legal services and pay counsel therefore: (1) without any required approval, (and without the concomitant additional professional time, delay and effort associated therewith); (2) on an hourly basis or far higher contingency (within the standards set by the Florida Bar and this Court e.g. 1/3 of the first $1,000,000 if no suit is filed up to 40% after filing suit and answer and a court may increase these percentages in appropriate circumstances) Rule 4-1.5 of Rules of Professional Conduct); (3) with the opportunity for his attorney to have all past and future issues determined in one trial and; (4) with the opportunity to claim and receive substantial additional damages not permitted in the workers compensation scheme which allows only limited weekly compensation and no longer full medical benefits. The constitutionality of the amendment challenged herein has to be considered in conjunction with this existing statutory scheme, in place since the inception of the workers compensation law.

C. Benefits Greatly Reduced And Immunity Expanded

In the 1990 amendments the permitted duration of temporary benefits was reduced from 350 weeks to 260 weeks. Now the limit including any compensation for rehabilitation re- training, is 104 weeks. In 1990 the 10 year wage loss program was reduced to a maximum of 7 years (364 weeks) with entitlement up to that dependent upon the extent of impairment. As an example with 6% impairment of the body, the current impairment guide rating for a herniated lumbar disc, there would still be eligibility under the 1990 amendments for 78 weeks of wage loss. *Now there is none.* Instead there are "impairment benefits" that in the above example of a 6% impairment would pay 12 weeks of impairment benefits (2 weeks for each 1% impairment).

No matter how severe any permanent psychiatric sequelae, for accidents after October 1, 2003 there is a statutory limit of 2 weeks impairment benefits (1% impairment). 440.15(3)(c) Fla. Stat. (2003). Psychiatric injury can never result in permanent total disability benefits since those are now limited to only a physical basis. §440.15 (1) Fla. Stat. (2003). However debilitating an injury on the ability to earn, entitlement to permanent total disability benefits <u>is no longer based on the facts</u> as the statute had previously provided. Rather, <u>unless</u> it is established that <u>on a physical basis</u> an injured worker is <u>relegated to less than sedentary work</u> the award of permanent total benefits is prohibited. §440.15 Fla. Stat. (2003).

Medical benefits have as well been dramatically restricted. Those benefits, for the first time, are now apportioned. 440.15 (5)(b) Fla. Stat. (2003). The E/C selects the initial physician **to whom the injured worker must go**, whatever the qualifications or lack thereof. If the claimant wants a different physician, then the **E/C also selects the one and only alternate physician** with whom claimant is then required to treat whatever may be the lack of qualifications or rapport. Butler v. Bay Center/Chubb Insurance Co., 947 So.2d 570, (Fla. 1st DCA 2006).

While benefits have been substantially reduced, E/C immunity has been expanded. (Appx.1).

Claimant Murray who was injured at work resulting in a hysterectomy, with this reduced benefit structure under the mandatory workers compensation law, was not entitled to any damages for pain and suffering or any of the other common law damages, but only some temporary benefits and medical care. But the E/C who was immunized from any tort and any bad faith action refused to provide even those lesser benefits requiring claimant to obtain skilled counsel.

D. Claimant Cannot Prevail Without Counsel And Cannot Secure Counsel Under The Workers Compensation Law Without Payment by the E/C Of A "Reasonable" Fee

As pointed out in subsection "B" when seeking payment of these substitute benefits the injured worker is not permitted to retain and pay counsel except on a contingent basis and then only upon approval of fees by a JCC or Court. In Lundy

v. Four Seasons Ocean Grand Palm Beach, 932 So.2d 506 Fla. 1st DCA 2006), rev. den. 939 So.2d 93 (Fla. 2006), Judge Ervin stated on the access to courts issue:

> unless that right were rendered illusory by evidence disclosing that (1) in certain types of claims the worker *could not realistically expect to obtain the assistance of counsel*, and (2), if not, *the worker could not plausibly be expected to prevail in the prosecution of his or her own claim,* due to the complexity of the proceeding, I doubt very much that a sufficient showing could be made that the statute, as applied, violates the access to courts provision.(Emphasis Supplied).

This record is overwhelming and without dispute from all experts that has herein been established. (R.169, 172,184, 199-203, 235-236). The JCC found:

> The case was vigorously prosecuted and vigorously defended. It involved difficult and complex factual, legal and medical issues**…**
>
> (R.305). …(80) hours were reasonable and necessary to obtain the benefits awarded to claimant. The novelty and difficulty of the questions involved in this litigation were daunting. The requisite skill required was of the greatest magnitude. Cases with this degree of difficulty require not only a practitioner with a concentration in workers compensation but one who performs in the top tier of the practice. (R.308).

The JCC goes on to discuss the difficulty of additional issues applicable to the case "including apportionment, exclusion of a pre-existing condition, issues relating to major contributing cause, the offer of judgment, and other evidentiary issues. Also adding to the difficulty of the case was the employer/carriers assertion that the claimant committed 'fraud' [a violation of Section 440.105 Florida Statutes with a resulting forfeiture benefits pursuant to Section 440.09(4), Florida Statutes]" (R.308, 309). The JCC determined he was required to strictly apply and award the

statutory fee of $648.84, but concluded it was not reasonable and "manifestly unfair." (R.306). In Davis v. Bon Secours-Maria Manor, 892 So.2d 516 (Fla. 1st DCA 2004), the court similarly held a guideline fee computing to $4.48 per hour was manifestly unfair.

Parenthetically it is interestingly equally established in this record that defense counsel would not consider defending this case, even on a non-contingency basis, for the amount of the fee awarded claimant's counsel- or even 10 times that amount. The defense fees up to the hearing, in unsuccessfully resisting the payment of the less than $4000 of benefits, were $16,050. (R.185). Apart from the overwhelming un-contradicted evidence, and JCC findings, it is suggested this Court can judicially notice an injured worker- unless already a skilled workers compensation lawyer- cannot now succeed pro se, overcoming the current procedural intricacies and current substantive law.

In regard to procedural aspects, from A. B. Taff & Sons v. Clark, 110 So.2d 428 (Fla.1st DCA 1959), ("a simple letter … advising of claimant's belief that he is entitled to compensation is treated as a claim …"), exceptional skill and specificity of pleadings and procedural handling is now required tripping up even skilled counsel. Chapter 60Q-6 Rules of Procedure for Workers Compensation Adjudications; §440.192 Fla. Stat. (2003) (also e.g. understanding and responding to offer of settlement as occurred in the pending matter; medical recommendations

by a physician must be secured and attached where any medical care is sought or a petition is dismissed; sophisticated pre-trial stipulations and requirements with which even non workers compensation counsel would have difficulty).

Substantively the workers compensation law is and has become increasingly complex. As some examples what is commonly referred to as the fraud provision, which was raised as a defense in this matter. It is far broader than anything contemplated in a common law tort action (compare Cox v. Burke, 706 So. 2d 43 (Fla. 5th DCA 1998) citing Aoude v. Mobil Oil Corp., 892 F. 2d 1115 (1st Cir. 1989), with Village of North Palm Beach v. McKale, 911 So.2d 1282 (Fla. 1st DCA 2005), (not necessary to show by clear and convincing evidence and "it is not necessary that a false, fraudulent, or misleading statement be material to the claim; it only must be made for the purpose of obtaining benefits.") The concept of major contributing cause, also involved in this case, was a difficult issue even for jurists and is arguably even more complex with the new statutory amendment raising the requisite showing of the work cause to more than 50 %. Closet Maid v. Sykes, 763 So.2d 377 (Fla. 1st DCA 2000); §440.09(1) Fla.Stat. (2003). Similarly, difficult medical issues, as in the pending case, apportionment now including medical [§440.15 (5)(b) Fla. Stat (2003)], what is and the impact of a pre-existing condition. Louisiana Pacific Corp. v. Harcus, 774 So.2d 751, (Fla. 1st DCA 2000).

The issue is not concern for attorneys, but as ably articulated by this Court:

> it is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus. We find the two inextricably interlinked.

Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986) cert. den. Martin County, Fla. v. Makemson, 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (U.S.1987), (holding even where public funds are necessary that the statute providing an absolute fee limitation in a criminal case is directory rather than mandatory). As this Court previously held in Lee Engineering & Const. Co v. Fellows, 209 So.2d 454 (Fla. 1968):

> to apply a contingent percentage to the total value of the award, … is not an appropriate method for fixing a fee in Workmen's Compensation cases… the nature of the Workmen's Compensation Law is such that the contingent percentage basis is not appropriate.

Lee Engineering & Const. Co. v. Fellows, supra p.458. Judge Barfield correctly concludes in addressing the amendment in issue that it "severely impairs, if not eliminates, the ability of claimants to obtain the assistance of counsel…" Wood v. Florida Rock Industries 929 So.2d 542 (Fla. 1st DCA 2006), rev. den. 935 So.2d 1221 (Fla. 2006)."

E. "Reasonable" Fee Paid By E/C Is An Essential Underpinning Of Access To Courts To Obtain These Dramatically Reduced Statutory Alternative Benefits.

"Reasonable" attorney's fees, paid by the employer-carrier (E/C), where benefits have wrongfully been withheld, have been an integral part of the workers

compensation alternative remedy since 1941. s. 440.34 Fla. Stat (1941).[3] Following adoption of that provision, the workers compensation carrier, unlike other carriers, has been excluded from accountability for bad faith actions. See Great American Indemnity Co. v. Smith, 156 Fla. 662, 24 So.2d 42 (Fla. 1945), (legislature intended §440.34 Fla. Stat (1941) as the exclusive basis for award of an attorney fee against the carrier in a workers compensation matter and that §625.08 Fla. Stat. (1941)[4] was inapplicable); Aguilera v. Inservices, Inc., 905 So.2d 84 (Fla. 2007), fn.3 at p. 91, (no bad faith action is permitted against a workers compensation insurance carrier). Following adoption by the legislature of the statutory bad faith provisions in §624.155, the workers compensation law was promptly amended to specifically exclude any such action against a workers compensation carrier. §440.11(3) Fla. Stat (1983) [currently found in subsection (4)]. The only

[3] If the employer or carrier shall file notice of controversy as provided in §440.20 of this chapter, or shall decline to pay a claim on or before the twenty-first day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the injured person shall have employed an attorney at law in the successful prosecution of his claim, there shall, in addition to the award for compensation be awarded *reasonable attorneys fee*, to be approved by the commission which may be paid direct to the attorney for the claimant in a lump sum. If any proceedings are had for review of any claim, award or compensation order before any court, the court may allow or increase the attorney's fees, in its discretion, which fees shall be in addition to the compensation paid the claimant, and shall be paid as the court may direct. §440.34(1)(1941) (emphasis supplied).

[4] "upon the rendition of a judgment or decree * * * against an insurer in favor of the beneficiary under any policy or contract of insurance * * * there shall be adjudged * * * against such insurer, and in favor of the beneficiary * * * a reasonable sum as * * * compensation for his attorneys * * *."

accountability for a worker's compensation carrier to provide these "substitute" benefits has been the obligation to pay a "reasonable" attorney's fee when wrongfully withholding benefits.

A key tradeoff for immunizing the E/C from tort suit for these currently significantly lesser benefits (Appx.1), has heretofore been the E/C obligation to pay a "reasonable" attorney fee when the injured worker has to obtain counsel to secure the benefits. All the cases heretofore upholding the workers compensation law as a fair alternative not only involved statutes providing far greater workers compensation benefits (Appx. 1), but **most important, an opportunity to actually obtain the benefits because the E/C was obligated for a "reasonable" fee if benefits were wrongfully withheld.** See Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991), and cases cited therein. Absent that obligation, the "certainty" of receiving these lesser statutory alternative benefits- and without "delay," repeatedly expressed as support for workers compensation benefits being a fair alternative, would be like the emperor's clothes- non-existent. This Court addressed this issue of these lesser substitute benefits and E/C obligation for a "reasonable" fee more than fifty years ago in the early case of Lockett v. Smith, 72 So.2d 817 (Fla. 1954). Therein this court held the E/C obligated for a "reasonable" attorney fee in securing penalties stating:

> The amount recovered will generally be so small, however, being only twenty percent of the amount actually in arrears (in the present case

> the additional amount recovered was only $25.50) that if the claimant must make his own arrangements for counsel fees, as respondent contends that he should, the statutory purpose will be thwarted. …He should not be impeded by the thought of counsel fees which may render the enterprise an empty gesture so far as he is concerned.

Lockett v. Smith supra p. 818

In Davis v. Keeto Inc., 463 So.2d 368 (Fla. 1st DCA 1985), the JCC deviated upward from the fee schedule, but applied as a cap the amount of these alternative benefits authorized, which for loss of an eye, computed to $1335 (including penalties and interest). The award by the JCC computed to approximately $30 per hour for the necessary professional time. In reversing the award as inadequate, the court quoted from the case of Neylon v. Ford Motor Company, 27 N. J. Super, 511, 99 A.2d 665 (1953), and pointed out:

> Without the assistance of competent counsel, claimant would similarly have been 'helpless as a turtle on its back,' *Neylon v. Ford Motor Company, supra,* and could very well have not recovered her impairment benefits.

Davis v. Keeto Inc., supra p.371

The court correctly pointed out the amount of benefits obtained cannot set the maximum amount that can be awarded as a fee in that:

> Were it otherwise, the employer/carrier could resist payment of smaller claims, and those claims would be virtually uncollectable.

Davis v. Keeto Inc., supra p.371.

This substitute benefit scheme by its design involves (1) far smaller claims than permitted in a common law tort action (e.g. only weekly compensation for limited periods, no pain and suffering, no loss of consortium, not even loss of wage earning capacity for permanent injuries and loss of earnings resulting therefrom) and (2) at best a series of smaller on going claims as compared to the one shot trial in a common law tort action involving all past and all future claims.

The "damages" allowable in this claim for the hysterectomy flowing from the work injury at the time of trial were less than $4,000 because that is all this alternative remedy statute allowed. That may be compared to verdicts in liability cases for these type injuries and the concomitant permissible fees allowing access to counsel and courts. E.g. Cedars Medical Center, Inc. v. Ravelo, 738 So.2d 362 (Fla. 3rd DCA 1999), (jury verdict of $2 million based on negligence in obtaining informed consent to remove all of reproductive organs); Franklin v. Public Health Trust of Dade County, 759 So.2d 703 (Fla. 3rd DCA 2000), (unnecessary removal of appendix resulting in scarring and internal adhesion of her organs requiring further surgery, including a hysterectomy, jury verdict of $200,000 damages but new trial granted on basis plaintiffs expert was not qualified to render an opinion).

It is apparent in the pending matter, as in Lockett and Davis that these lesser benefits permitted under the workers compensation law would be uncollectable, the injured worker left without recourse and effectively denied access to the courts

unless the E/C is obligated to pay a "reasonable" fee when unsuccessfully resisting the payment of these benefits. Without obligation for a "reasonable" fee (not even a bad faith action for egregious conduct), the workers' compensation carrier can with impunity simply refuse to even provide these lesser substitute benefits- as they did in the pending matter. The record is without dispute, and the JCC concurred, that no attorney would be willing to try to secure the less than $4,000 of benefits permitted under the workers compensation law, to be paid upon success, by a strictly a statutory fee of less than $800. (R.169, 172, 184,199-203,235-236).

The issue herein is not impacted by "penalty" provisions for delay in making compensation payments (neither penalties nor interest are due for delay in provision of medical payments). They have been recognized by the Courts to provide no meaningful "stimulus."[5] The attorney fee amendment herein under challenge has rendered completely meaningless the import of penalties as any "stimulus." Payment of penalties and interest can no longer be sought on their own under the challenged amendment when not paid as a part of the underlying compensation benefits due. See e.g. Turner v. Miami-Dade County School Board, 914 So.2d. 508 (Fla. 1st DCA 2006); Turner v. Miami-Dade County School Board,

[5] "We observe that it has long been the law that the penalty provisions (10% and 20%) are insufficient to compensate a workers' compensation claimant for delay in receiving his benefits if he must make arrangements for and pay his own attorney's fees incurred in collecting benefits due him." City of Miami v. Schiffman, 144 So.2d 799 (Fla.1962). Florida Erection Services, Inc. v. McDonald 395 So.2d 203 (Fla. 1st DCA 1981).

So.2d. 32 FLWD 2341 (Fla. 1st DCA 2007). That case required multiple trial proceedings and appeals to secure the 20% penalties clearly due on long delayed impairment benefits, which the E/C continued to refuse to pay. The injured worker could hardly on his own traverse the workers compensation procedural quagmire and substantive requirements to try to secure said benefits where even skilled counsel had great difficulty prevailing against the "stonewalling" carrier. Claimant Turner had access to counsel and to the courts because at the time of her accident the E/SA was obligated for a "reasonable" attorney fee. However, no attorney under the amendments being challenged could afford to assist seeking independent payment of said benefits. Hence, however clearly due, **if the E/C chose not to pay them they simply would not be paid.**

Additionally, before the injured worker can even seek either penalties or interest, the underlying benefits, to which penalties and interest attach, must be secured. As exemplified by the case before the Court the "potential" payment of $352.78 penalties based upon the long delayed payment of $1,763.86 compensation is obviously not any "stimulus" where the E/C elected to pay their attorneys in excess of $16,000 to unsuccessfully resist the payment of the small underlying compensation. As a practical matter even that extra penalty cost is probably more than offset by the benefit of withholding payment of medical benefits to which neither penalties nor interest attach.

The amendment under consideration, heretofore interpreted to prohibit the JCC from ever considering the award of a reasonable fee, becomes a double "whammy" when applied to the increasing reduction in benefits. Thus, when wrongfully withheld, the singular mechanism permitting even the possibility of securing these increasingly reduced "substitute" workers compensation benefits, was the obligation by the E/C for a "reasonable" attorney fee, allowing the injured worker to obtain counsel and access to courts.

CONCLUSION

For the foregoing reasons it is submitted the amendment(s) to §440.34 effective October 1, 2003, if interpreted to only permit award of an attorney fee against the E/C strictly in accordance with the fee schedule as applied to the benefits secured, is unconstitutional as applied in violation of Article I Section 21 of the Florida Constitution.

Respectfully submitted,

By: _____
L. Barry Keyfetz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief and appendix has been furnished by US mail this 10th day of December, 2007 to **William McCabe, Esq.,** Attorney for Petitioner, 1450 SR 434 West, Ste 200, Longwood, FL 32750, **John R. Darin II, Esq.**, Attorney for Respondents, P.O. Box 2753, Orlando, FL 32802, **Roy Wasson, Esq.,** Amicus on behalf of David Singleton, 5901 SW 74 St, Ste 205, Miami, FL 33143, **William H. Rogner, Esq.**, Amicus on behalf of Zenith Ins. Company, 1560 Orange Ave Ste 500, Winter Park, FL 32789, **Rayford H. Taylor, Esq.**, Amicus on behalf of Associated Industries of Fla. and Florida Ins. Council, P.O. Box 191148, Atlanta, GA 31119, **Thomas A. Koval, Esq.**, Amicus on behalf of Associated Industries of Fla. and Florida Ins. Council, 6300 University Pkwy, Sarasota, FL 34240, **Brian O. Sutter, Esq.**, Attorney for Petitioner, 2340 Tamiami Trl, Port Charlotte, Florida 33952, and **Mary Ann Stiles, Esq.**, Amicus on behalf of Associated Industries of Fla. and Florida Ins. Council, PO Box 460, Tampa, FL 33601, **Richard A. Sicking**, **Esq.**, Amicus on behalf of Florida Professional Firefighters, Inc., 1313 Ponce De Leon Blvd, Ste 300, Coral Gables, FL 33134, **Susan Whaley Fox**, **Esq.**, Amicus on behalf of Voices, Inc., 112 N. Delaware Ave, Tampa, FL 33606, **Marcia K. Lippincott, Esq.**, Amicus on behalf of Seminole County School Board, P.O. Box 953693, Lake Mary, FL 32795, **Scott B. Miller, Esq.**, Amicus on behalf of Florida

Association of Self Insurance, Inc., 1560 Orange Ave, Ste 500, Winter Park, FL 32789, **Barbara Wagner, Esq.**, Amicus on behalf of Florida Workers Advocates, 2101 N. Andrews Ave Ste 400, Ft Lauderdale, FL 33311.

L. BARRY KEYFETZ, P.A.
On behalf of the
Florida Justice Association
44 W. Flagler Street, Suite 2400
Miami, Florida 33130
Phone- 305/358-1740
Fax- 305/358-7664

By: _____
L. Barry Keyfetz, Esquire
FBN: 042658

CERTIFICATE OF TYPE SIZE & STYLE

I HEREBY CERTIFY that this Amicus Curiae Brief of the Florida Justice Association in Support of Position of Petitioner was computer generated using Times New Roman 14-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.

L. BARRY KEYFETZ, P.A.
On behalf of the
Florida Justice Association
44 W. Flagler Street, Suite 2400
Miami, Florida 33130
Phone- 305/358-1740
Fax- 305/358-7664

By: _____
L. Barry Keyfetz, Esquire
FBN: 042658

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

Emma Murray,

Petitioner, CASE NO.: **SC07-244**

vs. Lower Tribunal: **1D06-475**

Mariner Health/Ace USA,

Respondent.
_____/

Appendix of Petitioner

Index to Appendix of Petitioner

COMPARISON OF BENEFITS AND IMMUNITY FROM 7/1/ 79

BENEFITS	7-1-79 – 6-30-90	7-1-90 – 10-01-93	10-01-1993 – 10-01-2003	10-01-2003 – Present
Temporary 440.15 (2)	350 weeks	260 weeks	104 weeks plus up to 52 weeks rehab	104 weeks including rehab
Wage Loss 440.15(3)	10 years allowed if any permanent impairment.	Reduced duration correlated to % of impairment (e.g. 6% equals eligible for 78 weeks)	Only if impairment reaches 20% body	None, instead only 2 weeks impairment benefits for each 1% Impairment (e.g. 12 weeks for a 6% impairment).
Permanent Total 440.15 (1)	determined in accordance with the facts	determined in accordance with the facts	Catastrophic injury defined to include qualifying for SSD	Prohibited unless on a physical basis less than sedentary. 440.15 (1)
Psychiatric Disability	No separate limitation for temporary benefits or permanent benefits.	No separate limitation for temporary benefits or permanent benefits.	No separate limitation for temporary benefits or permanent benefits.	Maximum allowed 6 months temporary benefits and 1% for permanent injury. s,440.093, 440.15(3)(c)(Fla. Stat. 2003).
Provision of Medical 440.13	Provision of full medical; unlawful to coerce employee in selection of physician and obligation to select another physician if employee objects to selected physician. 440.13(3)	Provision of full medical; unlawful to coerce employee in selection of physician and obligation to select another physician if employee objects to selected physician. 440.13(3)	$10.00 claimant paid co-payment after MMI s.440.13 (14) (c) Fla. Stat (Supp.1994); deletes language that unlawful to coerce employee in selection of physician.	Apportionment of medical 440.15 (5)(b); Carrier selects first doctor, also alternate if desired- that is all to which claimant is entitled. Butler v. Bay Center/Chubb Insurance Co., 947 So.2d 570 (Fla. 1st DCA 2006).
Immunity 440.11	Carrier exempted from statutory bad faith action §440.11(3) Fla. Stat. (1983); Raised the threshold from gross to culpable negligence for suit against corporate officers, supervisors. s.440.11(1)Fla. Stat.(1988)	No material immunity change	No material immunity change	Standard for intentional tort raised to employer knew was virtually certain or deliberately intended to injure 440.11(1) Fla. Stat. (2003); immunity granted all sub-contractors from horizontal suits except for gross negligence over-turning decision in Employers Ins. of Wausau v. Abernathy 442 So.2d 953 (Fla.1983). (immunity follows liability). s.440.10 (1)(e) Fla. Stat (2003).
Attorney Fees 440.34	25/20/15% guideline; but authority to award "reasonable" fee (increase or decrease)	25/20/15% guideline; but authority to award "reasonable" fee (increase or decrease)	20/15/10/5%guideline; but authority to award "reasonable" fee (increase or decrease)	20/15/10/5% mandated; **no authority to award "reasonable" fee.** s.440.34(1) Fla. Stat.(2003)