SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

Emma Murray

Petitioner,

v. CASE NO.: **SC07-244**

Lower Tribunal: **1D06-475**

Mariner Health/Ace USA,

Respondents.

_____/

ORIGINAL

AMICUS CURIAE BRIEF OF FLORIDA WORKERS' ADVOCATES

IN SUPPORT OF POSITION OF PETITIONER

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INTRODUCTION

In this brief, the Petitioner, Emma Murray, will be referred to as the Claimant. Respondents, MarinerHealth/Ace USA, will be referred to as the Employer/Carrier or E/C. The Judge of Compensation Claims will be referred to as the JCC. References to the record on appeal will be designated by the letter "R" followed by the appropriate volume and page number.

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

Florida Workers' Advocates (FWA) is a statewide organization composed of attorneys who represent the interests of injured employees in workers' compensation proceedings. As such, FWA has an interest in the issue of the validity of §440.34, Fla. Stat. (2003) which governs and limits fees payable for legal services rendered on behalf of injured workers in this procedurally and substantively complex field of law.

SUMMARY OF ARGUMENT

Section 440.34, Fla, Stat., as amended in 2003, limits fees payable for representation of a claimant in a workers' compensation proceeding to a percentage of benefits secured, regardless of the unreasonableness or manifest unfairness of the fee under the particular circumstances (such as the instant case, in which the appellate court was "constrained" to affirm the JCC's award of a fee which compensated claimant's counsel at $8.11 per hour for 80 hours of legal services). Application of the statute to circumstances involving substantial time expended to secure minimal benefits results in violations of due process, separation of powers, equal protection, and access to the courts. The statute must therefore be declared unconstitutional.

The statutory limitation of fees to a percentage of benefits secured violates the constitutional guarantee of due process of law. The fee restriction effectively deprives an injured worker in many cases (including the case at bar) of competent legal representation to pursue or maintain a claim for workers' compensation benefits. The statute is discriminatory, arbitrary, and oppressive and bears no reasonable relation to a permissible legislative objective. Section 440.34, Fla. Stat. (2003) establishes an unconstitutional conclusive presumption that the statutory guideline fee is reasonable under all circumstances. Based on the three-prong analysis applied by this Court of in Recchi America, Inc. v. Hall, 692 So. 2d 153

(Fla. 1997), the irrebuttable presumption established by the statute is an unconstitutional denial of due process. The legislature has taken away the discretion and role of workers' compensation judges in determining appropriate fees, hindered or prevented injured workers from retaining competent counsel, and paved the way for fee payments which may be completely unreasonable based on the circumstances of a particular case.

An interpretation of §440.34, Fla. Stat. (2003) which makes determination of attorney's fees nothing more than a mathematical calculation by a JCC based on a strict formula created by the legislature, with no opportunity for the exercise of judicial discretion or judicial review as to reasonableness, violates the separation of powers doctrine. The legislature has usurped the power of the judicial branch of government to regulate attorneys and oversee the appropriateness of attorney's fees.

The Court should recognize and hold that it is within the inherent power of Florida courts to allow, in extraordinary and unusual cases, departure from statutory fee guidelines to ensure that an attorney is not compensated in an amount which is "confiscatory of his or her time, energy, and talents." See Makemson v. Martin County, 491 So. 2d 110 9 (Fla.1986); See also United States Department of Labor v. Triplett, 494 U.S. 715 (1990) (acknowledging that a complex, adversarial adjudicatory system that places significant evidentiary and procedural burdens on

claimants implicates a due process right to counsel).

Section 440.34, Fla. Stat. (2003) creates a distinction between employees and employer/carriers as litigants in workers' compensation proceedings. By severely limiting the fees available to a claimant's counsel, regardless of the time or effort necessary to assist a claimant in securing benefits which have been wrongfully denied, and imposing no limits on fees paid by an employer/carrier to defend a claim, the statute denies equal protection to injured employees. There is no rational basis for this discriminatory classification.

FWA also adopts the argument of Petitioner and other amici in support of the position of Petitioners that application of §440.34, Fla. Stat. (2003) results in denial of access to the courts. Based on the arguments raised in this brief and others on behalf of Petitioner, FWA suggests respectfully that §440.34, Fla. Stat. (2003) must be declared unconstitutional.

ARGUMENT

AN INTERPRETATION OF §440.34, FLA. STAT. (2003) AS REQUIRING STRICT ADHERENCE TO STATUTORY GUIDELINE PERCENTAGES IN DETERMINING APPROPRIATE ATTORNEY'S FEES IN THIS WORKERS' COMPENSATION PROCEEDING RENDERS THE STATUTE UNCONSTITUTIONAL AS IT RESULTS IN VIOLATIONS OF DUE PROCESS, SEPARATION OF POWERS, EQUAL PROTECTION, AND ACCESS TO COURTS.

A. Background

The attorney's fee in the instant case was sought and awarded pursuant to §440.34(3), Fla. Stat. (2003) which states:

> A claimant shall be responsible for the payment of her or his own attorney's fees, except that a claimant shall be entitled to recover a reasonable attorney's fee from a carrier or employer:
> ...
> (b) In any case in which the employer or carrier files a response to petition denying benefits with the Office of the Judges of Compensation Claims and the injured person has employed an attorney in the successful prosecution of the petition;

(emphasis added). This or a similar provision has been in the statute since 1941. The shift of responsibility for attorney's fees from the claimant to the E/C under certain limited circumstances, including a carrier's denial of benefits later acknowledged or determined to have been owed, is an appropriate means of encouraging employers and carriers to pay valid claims in a timely manner so as to achieve the legislative intent of "quick and efficient delivery of disability and medical benefits to an injured worker". §440.015, Fla. Stat. (2003). See Great American Indemnity Co. v. Smith, 24 So. 2d 42, 44 (Fla. 1945) (pointing out that §440.34 was amended in 1941 to provide for the assessment of attorneys' fees if the employer or carrier declined to pay a claim within a stated time or resisted unsuccessfully such payment); Ohio Casualty Group v. Parrish, 350 So. 2d 466,

470 (Fla. 1977) (noting that "Section 440.34, Florida Statutes (1975), was enacted to enable an injured employee who has not received an equitable compensation award to engage competent legal assistance and, in addition, to penalize a recalcitrant employer."). This purpose is achieved however, only if the E/C has an incentive (avoidance of potentially costly attorney's fees as a result of extensive litigation) to provide benefits timely. See Sam Rogers Enterprises v. Williams, 401 So. 2d 1388 (Fla. 1st DCA 1981).

In determining the amount of a "reasonable" fee to be paid to the claimant's counsel by the E/C, after entitlement has been established, the court has been guided in the past by the statute and case law. In Lee Engineering and Constr. Co. v. Fellows, 209 So. 2d 454 (Fla. 1968) this Court recognized that "fees should not be so low that capable attorneys will not be attracted, nor so high as to impair the compensation program". Id at 457. This Court stated that in workers' compensation cases the "contingent percentage basis is not appropriate" and instead the Deputy Commissioner (now JCC) should consider the list of factors in the Canons of Professional Ethics in determining the amount of a "reasonable" fee. The factors, which include the time and labor required, the novelty and difficulty of the questions involved, the skill required, customary charges for similar services, the amount involved in the controversy, resulting benefits, and the contingency or certainty of compensation, were codified in §440.34, Fla. Stat. in

1977. The factors remain in the Code of Professional Responsibility as Rule 4-1.5 of the Rules of Regulating the Florida Bar.

A contingent percentage formula for fees (statutory guideline) was enacted in 1977 as a "starting point" for determination of a reasonable fee. The guideline was "an amount ... equal to 25% of the first $5,000.00 of benefits obtained, 20% of the second $5,000.00 of benefits obtained, and 15% of the value of all benefits secured over $10,000.00". §440.34(3)(1), Fla. Stat. (1977). The workers' compensation judge was then required to consider each of the factors, and increase or decrease the fee only if the formula amount was manifestly unfair. Marsh v. Benedetto, 566 So. 2d 324 (Fla. 1st DCA 1990); Okaloosa County Gas District v. Mandel, 394 So. 2d 453 (Fla. 1st DCA 1981). The rationale for this approach is best exemplified and explained in Davis v. Keeto, 463 So. 2d 368 (Fla. 1st DCA 1985) in which the court noted that the amount of benefits obtained should not be the only factor considered in determining fees payable by the E/C. In Davis, as in the instant case, the statutory guideline fee based on the benefits awarded would have compensated claimant's counsel at an hourly rate of $8.00. Id. at 370. The Deputy Commissioner found it was "obviously necessary to deviate from the fee schedule" in a situation where "the amount of benefits involved in the controversy are grossly disproportionate to the time necessary to obtain said benefits". Id. The court agreed, noting that "(w)ere it otherwise, the employer/carrier could resist

payment of smaller claims, and those claims would be virtually uncollectible". Id. at 371. Citing Neylon v. Ford Motor Co., 27 N. J. Super. 511, 99 A.2d 665 (1953), the court pointed out that without the assistance of competent counsel, the claimant would have been "helpless as a turtle on its back". Id.

As of 1/1/94, the starting point statutory guideline fee was reduced to 20 percent of the first $5,000.00 of the amount of benefits secured, 15% of the next $5,000.00 of benefits secured, 10% of the remaining benefits to be provided within 10 years of the claim, and 5% of benefits secured after 10 years. §440.34(1), Fla. Stat. (1994). The factors remained in the statute, to be considered if the guideline formula produced a fee that was manifestly unfair and therefore not "reasonable". See Davis v. Bon Secours-Maria Manor, 892 So. 2d 516, 518 (Fla. 1st DCA 2004) (order reversed and remanded because "awarding a fee to claimant's counsel that amounts to an hourly rate of $4.48 an hour is 'manifestly unfair'.").

Section §440.34(1), Fla. Stat. was amended again, effective 10/1/03, and the factors included previously were omitted. The statute still provides, however, that a fee paid for a claimant in connection with any proceedings arising under the chapter must be "approved as reasonable" by the Judge of Compensation Claims. The statute includes the contingent percentage formula which has been applied since 1994, and further states:

> 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.

§440.34(1)Fla. Stat. (2003). Based on this language, the JCC in the instant case awarded claimant's counsel a statutory guideline fee of $648.84, despite the fact that it compensated him at an hourly rate of $8.11 for 80 hours found to have been reasonable and necessary to obtain the benefits awarded to the claimant. (R.II: 308). The First District Court of Appeal was "constrained" to affirm the award. Murray v. Mariner Health/Ace USA, 946 So. 2d 38 (Fla. 1st DCA 2006). This fee, although mathematically correct according to the statutory formula, is not "reasonable" under any definition of the word. As noted in Davis, strict adherence to a fee schedule under these circumstances hinders an employee's ability to obtain competent counsel, leaving him/her "helpless as a turtle on its back." 463 So. 2d at 371. Fortunately, the Florida Constitution protects injured workers and prohibits this outcome. The statute, which when applied under these circumstances results in denial of due process, meaningful access to courts, and equal protection of the law, must be declared unconstitutional.

B. Due Process Violation

The Florida Constitution and the Fourteenth Amendment provide that no person shall be deprived of life, liberty, or property without due process of law. Art. I, §9 Fla. Const.; U.S. Const. Amend. XIV. It has been established that an

injured employee's right to receive workers' compensation benefits is a property interest. See DeAyala v. Florida Farm Bureau, 543 So. 2d 204; 206 (Fla. 1989). The test for determining whether a statute violates the due process clause is whether it bears a "reasonable relation to a permissible legislative objective and it is not discriminatory, arbitrary or oppressive." Lasky v. State Farm Insurance Co., 296 So. 2d 9, 15 (Fla. 1974). In Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506 (Fla. 1st DCA 2006), rev. denied 939 So. 2d 93 (Fla. 2006), the First District Court of Appeal held that §440.34 does not violate the equal protection clause or the due process clause (which was acknowledged to protect the right to be represented by counsel) because it bears a "reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant." Id. Respectfully, amicus Florida Workers' Advocates disagrees with this conclusion. The analysis is flawed because fees ordered to be paid by the E/C based on wrongful denial of a claim, such as in the instant case, have no effect on the amount of benefits awarded to an injured employee. As noted above, the shifting of fee responsibility was intended to enable an employee to engage competent legal assistance and penalize an employer who fails to pay a valid claim. The fee is not paid from the claimant's benefits. In addition, the First District Court of Appeal noted previously that restriction of fees to a percentage of benefits secured, without regard to the circumstances of the case, promotes a

"chilling effect on the claimant's right to obtain legal services in the face of bad faith denial of benefits [and] is inconsistent with the benevolent purposes of the Workers' Compensation Act". Rivero v. SCA Services of Florida, Inc., 488 So. 2d 873, 876 (Fla. 1st DCA 1986). The evidence and testimony in this case demonstrate how the statute impairs an injured worker's ability to obtain representation. In depriving a claimant of legal assistance, no state interest is served by the statute, and due process is denied.

Section 440.34, Fla. Stat. (2003) is also violative of due process based on its establishment of a conclusive presumption as to a "reasonable" attorney's fee. By allowing a claimant to recover a "reasonable attorney's fee", and then prohibiting a JCC from approving any fee in excess of the statutory percentages, the statute creates an irrebuttable presumption that a specified percentage of benefits secured, regardless of time, labor, case complexity, or other factors, is a reasonable fee. In Recchi America Inc. v. Hall, 692 So. 2d 153 (Fla. 1997), this Court adopted the opinion of the court below which applied a three-pronged analysis for determining the constitutionality of a conclusive presumption:

(1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid;
(2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and
(3) whether the expense or other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.

Id. at 154. Applying this analysis to §440.34 Fla. Stat. (2003) leads to the

conclusion that the fee limitations are unconstitutional.

With regard to the first prong, the legislature may have been concerned about the possibility of attorneys taking alleged unreasonable fees from claimants, and therefore they sought to standardize fees. Since JCC's have always been required to scrutinize and approve fees, this concern would have been unfounded. Moreover, in cases such as the one at bar, where the E/C is responsible for paying claimant's attorney's fees and the JCC is responsible for determining the fee based on evidence presented by the parties, there is no basis for concern about abuse.

As to the second prong of the Recchi analysis, the legislature may have concluded that strict fee guidelines would prevent the possibility of attorneys taking inappropriate fees from a claimant's recovery. The irrebuttable fee guidelines serve no purpose with regard to fees payable by the E/C, however, and instead remove any incentive for a carrier to provide benefits timely rather than forcing a claimant to initiate litigation.

Lastly, with regard to the third prong, there is absolutely no justification for the inherent imprecision of this conclusive presumption. The fundamental unfairness and arbitrariness of strict application of the percentage fee guidelines, with no consideration of evidence as to circumstances of a particular case, is a clear denial of due process. Judges who decide workers' compensation claims have determined, awarded, and approved reasonable attorney's fees for over 30

years by considering statutory guidelines together with the other factors set forth in case law. The statutory percentage guidelines were a "starting point", and served the purpose of standardizing fees except when the result was "manifestly unfair", either too high or too low. The other factors, including time, labor, issues involved, and skill of the attorney, have been recognized by the courts as appropriate considerations in determining attorney's fees and have served as a "safety valve" to ensure that a fee is reasonable when the guideline fee is not. By enacting an irrebuttable presumption in 2003, the legislature has taken away the discretion and role of workers' compensation judges in determining appropriate fees, hindered or prevented injured workers from retaining competent counsel, and paved the way for fee payments which may be completely unreasonable (high or low) based on the circumstances of a particular case. Based on the analysis set forth in Recchi America Inc., §440.34, Fla. Stat. (2003) violates due process and must be found unconstitutional.

C. Separation of Powers Violation

The strict application of the statutory guidelines to determine attorney's fees also violates the separation of powers doctrine. The Florida Constitution provides that:

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

Art. II §3 Fla. Const. The regulation of attorneys and the practice of law is the responsibility of the Supreme Court, within the judicial branch of government. An interpretation of §440.34, Fla. Stat. (2003) which makes the determination of attorney's fees a strict mathematical calculation by a JCC based on a formula created by the legislature, with no opportunity for the exercise of judicial discretion or judicial review as to reasonableness, violates the separation of powers doctrine.

This Court has noted that the state has a legitimate interest in regulating attorney's fees in workers' compensation cases. See Samaha v. State, 389 So. 2d 639, 640 (Fla. 1980). Nevertheless, despite legislative guidelines, the final determination of an appropriate fee in a particular case is a judicial function. In Tampa Aluminum Products Co. v. Watts, 132 So. 2d 414 (Fla. 1961), the Court recognized the importance of its role in reviewing fee awards, pointing out that "when a charge of excessive or unlawful attorney's fees is alleged and plausibly advocated, it becomes the duty of this court to investigate...and if the fee is shown to be unreasonable or excessive, designate such a fee as would be reasonable or return the case to the deputy commissioner for further consideration". Id. at 415 (emphasis added). Later, in Lee Engineering this Court pointed out that "(a)llowance of fees is a judicial action", and attorney's fees which constitute "enforceable costs in a court of justice command and should receive the closest scrutiny of the courts and should never be awarded in a perfunctory proceeding."

209 So. 2d at 457, quoting Lewis v. Gramil Corp., 94 So. 2d 174 (Fla. 1957) (emphasis added).

The irrebuttable presumption created by §440.34, Fla. Stat. (2003) makes the determination of fees nothing more than a mathematical calculation in a "perfunctory proceeding". The statutory mandate of determination of fees in such manner effectively precludes judicial review as to reasonableness based on circumstances, and thereby usurps the inherent power of the judicial branch of government to oversee the appropriateness of attorney's fees. See Irwin v. Surdyks Liquor, 599 N.W. 2d 132 (Minn. 1999) (holding that legislation which prohibited court from deviating from precise amount of awardable attorney fees impinged on judiciary's inherent power to oversee attorneys and attorney fees, and therefore was unconstitutional). As in Florida, workers' compensation proceedings in Minnesota are conducted by judges who are executive branch officers. The Court in Irwin held that legislative delegation of attorney fee regulation exclusively to the executive branch of government violated the doctrine of separation of powers. 599 N.W. 2d at 142. See also Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986) (holding that it is within inherent power of Florida's courts to allow, in extraordinary and unusual cases, departure from statutory fee guidelines in a criminal case to ensure that attorney "is not compensated in an amount which is confiscatory of his or her time, energy and talents"). While there is no specific

constitutional right to counsel in a civil case, the reasoning of Makemson has been adopted in civil cases, and has particular applicability in workers' compensation cases which are procedurally and substantively complex, and in which due process requires that claimants have assistance of competent counsel.[1] See United States Department of Labor v. Triplett, 494 U.S. 715, 727 (1990) (acknowledging that a complex, adversarial adjudicatory system that places significant evidentiary and procedural burdens on claimants implicates a due process right to counsel). Section 440.34, Fla. Stat. (2003) which limits attorney fees to a percentage of benefits secured, regardless of circumstances and without consideration of other factors by either the JCC or a reviewing court, as applied in a complex, time-consuming case such as the one at bar, renders the statute unconstitutional in violation of due process and the separation of powers doctrine. The court's authority to regulate lawyers and the practice of law by overseeing fees, as pointed out in Tampa Aluminum and Lee Engineering, and its inherent authority to ensure adequate representation, as pointed out in Makemson and Triplett, must be preserved.

D. Equal Protection Violation

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[1]This issue is the subject of an appeal pending in the First District Court of Appeal, O'Shea v. Progress Energy, Case No. 1D07-3278, and is addressed extensively in the JCC's order and Appellant's Initial Brief.

The equal protection clauses of the Florida and federal constitutions require that statutory classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike. Art. I, §2.Fla. Const.; U.S. Const. Amend. XIV, §1; Section 440.34, Fla. Stat. (2003) which has been interpreted as limiting a claimant's attorney's fees solely to a percentage of benefits secured, regardless of time expended or other circumstances, while imposing no limits on attorneys' fees paid by an Employer/Carrier for defense of a claim, violates the equal protection clause and is unconstitutional.

The Workers' Compensation Law creates distinctions between employees and employers as litigants in proceedings arising under the act. Section 440.105(3)(c), Fla. Stat. (1994) provides that it is unlawful (a misdemeanor of the first degree) for any attorney or firm to receive a fee for services rendered unless such fee is approved by a JCC or by the Deputy Chief Judge of Compensation Claims. This provision has been interpreted as applying only to attorneys who provide services to injured workers, and not to attorneys who represent employers and carriers. Also, §440.34, Fla. Stat. (2003), which deals with judicial approval of attorney's fees and establishes limitations on amounts, applies only to fees payable "for a claimant". The statute does not address or limit in any manner the fees which may be charged by or paid to attorneys defending claims on behalf of employers and carriers. When a statute creates discriminatory classifications, it

must be scrutinized to determine its constitutional validity.

Under the rational basis test, a challenged statute will be upheld only if the classificatory scheme rationally advances a legitimate governmental objective. Sasso v. Ram Property Management, 431 So. 2d 204, 216 (Fla. 1st DCA 1983). The purported purpose of the statutory changes to the Workers' Compensation Law enacted in 2003 was to cut costs and thereby reduce premiums for workers' compensation insurance. While cost-cutting is generally considered a legitimate objective, the means employed to achieve this goal must be reasonable and rational. The current version of §440.34 creates a completely uneven playing field in workers' compensation litigation. The statute thwarts an injured worker's ability to retain competent counsel of his choosing (because of strict limitations on fees without regard to time or effort expended) while allowing employers and carriers to defend claims without limitation as to time or costs. This classificatory scheme does not rationally advance a legitimate purpose. As Judge Booth of the First District court of Appeal has noted:

> No defensible state interest can exist in unilaterally proscribing and restricting the right of claimants to negotiate and obtain legal services while leaving the employer/carriers free to contract with attorneys of their choice without restriction or limitation. Claimants should have the same rights as other litigants.

Khoury v. Carvel Homes South, Inc., 403 So. 2d 1043, 1047 (Fla. 1st DCA 1981)

(Booth, J., dissenting). In the case at bar, the JCC found that 80 hours expended by claimant's counsel were reasonable and necessary to obtain the benefits awarded to the claimant. (R.II: 185). Counsel for the E/C expended 135 hours. (R.I: 185). Nevertheless, claimant's counsel's fee was calculated as a percentage of benefits secured, resulting in extremely low and unreasonable compensation under the circumstances, while the E/C's attorney earned over $16,000.00, based upon a contracted hourly rate, for unsuccessfully defending the claim. Claimant's counsel testified that the award of a statutory guideline fee under the circumstances of this case would have a "chilling effect" on his willingness to take a case like this. The rigid fee limitations in §440.34 hinder a claimant's ability to obtain and maintain legal representation, particularly in time-consuming complex cases, while enabling and possibly encouraging employers/carriers to vigorously defend claims. The statute does not rationally advance any legitimate legislative objective, but rather results in unreasonable, arbitrary, and impermissible discrimination against injured workers as litigants. See Corn v. New Mexico Educators Federal Credit Union, 119 N.M. 199, 889 P. 2d 234 (N.M. App. 1994) (holding statute imposing attorney's fee cap unconstitutional, noting that cap "handicaps one side of an adversarial proceeding, and thus imposes the risk of appearing without representation solely upon one class of litigants, the class we have traditionally thought of as disadvantaged in these kinds of proceedings and the class in whose

interest the legislation has been created").

An interpretation of §440.34, Fla. Stat. (2003) as requiring strict adherence to a statutory guideline percentage of benefits secured in awarding a fee to claimant's counsel, while fees paid by employers/carriers are unrestricted, results in a denial of equal protection to injured workers as litigants in workers' compensation proceedings. As there is no rational basis for this legislation it must be declared unconstitutional.

E. Access to Courts Violation

In addition to the arguments advanced above as to the unconstitutionality of §440.34, Fla. Stat. (2003), FWA asserts that the statute denies injured workers access to courts, and adopts the arguments on this issue advanced in the Petitioner's Initial Brief, the Amicus Curiae Brief of the Florida Justice Association and other Amicus Curiae briefs in support of the position of Petitioner.

CONCLUSION

Based on the argument and legal authority cited above, Florida Workers' Advocates requests respectfully that the Court declare §440.34, Fla. Stat. unconstitutional as applied in this case, reverse the decision of the First District Court of Appeal, and remand this case to the Judge of Compensation Claims for determination of reasonable attorney's fees to be paid to Claimant's counsel.

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel, on behalf of Florida Workers' Advocates, hereby certifies that the type size and style of the Amicus Curiae Brief is Times New Roman #14.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on **December 17, 2007**, to the following:

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