SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

EMMA MURRAY,

Appellant,

CASE NO: SC07-244

vs. Lower Tribunal: 1D06-475

MARINER HEALTH/ACE USA,
properly named ACE AMERICAN
INSURANCE COMPANY

Appellees,

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# ANSWER BRIEF OF MARINER HEALTH/ACE AMERICAN INSURANCE COMPANY

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## DESIGNATION OF THE PARTIES AND RECORD

The parties will be designated as follows: the claimant, Emma Murray, will be listed by name or as "Appellant." The Judge of Compensation Claims, will be designated as "JCC." Mariner Health/ACE USA, (properly named ACE AMERICAN INSURANCE COMPANY) will be referred to individually by name, and collectively as "E/C."

Trial counsel for the claimant, Brian Sutter, Esq., is not named as a party in this Appeal, but will be referred to by name or as "Claimant's Counsel." All references to statutes not otherwise designated are Florida statutes. Appellant's counsel, Bill McCabe, Esq., will be referred to by name or as "Appellant's Counsel."

All cites to the record will be set forth as Volume V___- ___ Page Number. For example, VII-00242.

## STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case involves a challenge to the constitutionality of the 2003 amendments to Florida Statutes 440.34. The amendments at issue extend the same guideline for attorney fees paid by injured workers to the fee awards payable by carriers and self-insureds.

The interested party who would be affected by any decree issued by this Honorable Court is trial counsel Brian Sutter. He was not named as a party before the First District Court of Appeal and is likewise not named in this Appeal. Appellant, Emma Murray's interests will not be affected by any decree as the benefits awarded at the trial court level are not at issue. This scenario is contrary to this Honorable Court's rationale in *Armour Fertilizer Works v. N.G. Wade, Inv. Co.*, 105 So. 819 (Fla. 1925). That case holds that some named party should be affected by the decree requested in order for the Court to exercise its jurisdiction. (Please see the Order which was appealed in the Record on Appeal Volume II, page 00312, hereinafter abbreviated thusly: VII-00312.)

As to the merits of the issues raised by Appellant, it is argued that attorneys representing injured workers should be compensated for their time by the hour, and thatthe amended version of the 440.34 Florida Statutes is unfair and

unconstitutional because it reduced the fees Ms. Murray's attorney would have received under the pre-2003 version of the statute. The Florida Constitution itself in Article I, Section twenty-six, ensures the amount of damages clients receive in medical malpractice cases by setting a ceiling on contingent attorneys' fees in those cases. Caps on attorney's fees are not *per se* unconstitutional, but rather are found in the Florida Constitution itself.

Noteworthy, an Offer of Settlement had been tendered in this case prior to trial. Had that Offer of Settlement been accepted by Appellant, she would have received more money than she was awarded and her attorney would have received a greater fee (VI-0076). Furthermore, Florida Statutes 440.34(2) states that if an Offer of Settlement, including attorney's fees, is communicated at least thirty days prior to trial, as was done in this case, then the "benefits secured" are limited to the amount awarded above the amount specified in the Offer.

Appellant rejected the Offer of Settlement. If accepted, the hours her attorney devoted to the case would have been greatly reduced. Appellant now argues that the fee awarded on an hourly basis calculated on the hours devoted to the case amounts to an unconscionable low hourly rate. This argument assumes that an hourly rate is required for an attorney fee statute to be constitutionally

sound.

Based on the minimal damages ultimately at issue and the hours required to secure an award, it is obvious that this case was selected especially for this constitutional challenge. Even though one of the most compelling arguments made in this appeal is that trial attorneys should be adequately compensated for their time, factually this case presents a very poor justification for that proposition. It was not the Employer/Carrier but the rejection of the Offer of Settlement by the Appellant and her trial counsel which led to trial counsel expending his time, the trial Court's time and defense counsel's time obtaining a lower award and lower attorney's fees than had been offered.

In any case involving minimal damages, there is nothing unconstitutional or unusual about the attorneys' fees obtained therefrom also being minimal.

Trial Counsel was not a novice attorney caught unaware by an unfair statutory scheme, but rather was the president of Florida Workers' Advocates (FWA), group which lost its battle to maintain the pre-2003 law in the Legislature, and which is now attempting to secure through the judiciary what it could not obtain from the Legislature. (VII-00242.)

This Honorable Court has previously been presented with the constitutional

challenges raised by the Appellant when it denied review 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), *Campbell v. Aramark*, 933 So. 2d 1255 (Fla. 1st DCA 2006), Rev. den. 944 So. 2d 986 (Fla. 2006) and *La Petite Academy v. Duprey*, 948 So. 2d 868 (Fla. 1st DCA 2007), Rev. den. 963 So. 2d 277 (Fla. 2007). The National Council on Compensation Insurance's 2007 Advisory Forum found that Florida's compensation costs had decreased significantly every year since the 2003 amendments. The Florida Office of Insurance Regulation on October 23, 2007 recommended an 18.4 percent rate reduction for workers' compensation. (Insurance Journal 10/24/07; www.InsuranceJournal.com). This Honorable Court then entered an Order on October 30, 2007 exercising its discretionary jurisdiction in this case on the constitutionality of the attorney fee provisions found in 440.34 Florida Statutes (2003).

## SUMMARY OF APPELLEES' ARGUMENTS

There are five Constitutional issues raised by Appellee, none of which are meritorious. The trial judge and First District Court of Appeal did not err in applying the guideline attorney fees set forth in Florida Statutes 440.34 (2003). The trial judge was obligated to follow the statute and the First District Court of Appeal was bound by its own precedents, which this Court had declined to review in several previous cases.

With respect to the equal protection issue, the standard of "some reasonable basis" between the classificatory scheme and the legislative objective in enacting 440.34 Florida Statutes has been met. There was a reasonable basis to extend to carriers the same guideline fee schedule that was already being used for injured workers to pay their attorneys because of the legislature's stated intent in 440.015 Florida Statutes (2003), that is, to make the workers' compensation system more even-handed to both injured workers and employer/carriers, more economical overall and more administratively efficient. The Appellant, as the party challenging the statute, has the burden to demonstrate there is no conceivable basis for upholding the law. *Gallagher v. Motor Ins. Corp*., 605 So. 2d 62, 68-69, (Fla. 1992).

As for the argument that the Appellant's due process rights have been violated, the Florida Workers' Compensation Act, Florida Statutes 440. et seq., provides the Appellant with a reasonable alternative form of relief to the Appellant's common law rights, and notably, there is no common law right to hourly attorneys' fees to a prevailing party.

Access to the Courts has not been denied to the Appellant, as evidenced by her ability to proceed to the trial and two appellate levels in the instant case with both trial and appellate counsel. Additionally, an Ombudsman Office was created by the Legislature through 440.191 (1993) to assist both unrepresented and represented injured workers with pre-litigation dispute resolution. There are many cases, not just workers' compensation cases, in which the damages to be obtained are so minimal that many attorneys are dissuaded from accepting those cases. This is not the same as a denial of access to the Courts. Following Appellant's logic, the legislature could only guarantee access to the courts by providing every civil litigant in Small Claims and County Court with counsel by enacting legislation to provide for hourly fees to prevailing parties. This is not required by the Florida Constitution.

440.34 Florida Statutes (2003) does not violate the Separation of Powers

provisions of Article II, Section three of the Florida Constitution. The workers' compensation system in Florida is a creation of the Legislature. The statute under consideration simply extends application of the guidelines for attorneys' fees already paid by injured workers to apply to carrier fee awards as well. This Honorable Court has held that the offices of the Judges of Compensation Claims are part of the Executive, rather than the Judicial branch, and has refused to be involved with even the approval of Rules of Procedure for that Executive Office. Still, Appellant argues that the regulation of any attorney fee in Florida falls within the purview of the Judiciary and that a legislative enactment related thereto violates the Separation of Powers provisions of the Florida Constitution.

## ARGUMENT

### I. THE JCC AND THE FIRST DISTRICT COURT OF APPEAL DID NOT ERR IN FOLLOWING THE LAW AS SET FORTH IN FLORIDA STATUTES 440.34 (2003)..

440.34 Florida Statutes (2003) specifically states:

> Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20% of the first $5,000.00 of the amount of the benefit secured, 15% of the next $5,000.00 of the amount of the benefit secured, 10% of the remaining amount of the benefit secured to be provided during the first ten years after the date the claim is filed, and 5% of the benefit secured after ten years. The judge of compensation claims shall not approve a compensation order, a joint stipulation or a lump-sum settlement, a stipulation or agreement between the 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.

(emphasis added.)

Clearly, the Appellant strains the clear and unambiguous language of the statute in arguing that a later provision found at 440.34(3) Florida Statutes (2003), which entitles a prevailing claimant to recover a "reasonable" attorney's fee from a carrier or employer, supersedes the section set forth above. Appellant contends the language set forth above should be ignored and this Court should revert to *Lee*

*Engineering and Construction Company v. Fellows*, 209 So.2d 454 (Fla. 1960). The criteria set forth in *Lee Engineering and Construction Company*, supra, which was codified by the Legislature, had overburdened the workers' compensation system. Hourly fee awards encouraged protracted litigation through the filing of multiple petitions which backlogged dockets and made it more profitable for attorneys to take issues to trial rather than seek resolution. There was that was little "reasonable" about the exorbitant fees paid to injured workers' attorneys for litigating minor issues. Likewise, in the case at bar, the claimant refused an Offer of Settlement that would have resulted in more monies being paid to her and her attorney than were award at trial.

Just as *Lee Engineering* has never been overturned by Court decision, neither has *Florida Erection Services, Inc. v. McDonald*, 395 So.2d 203 (Fla. 1st DCA 1981) been overturned. This case provided a basis for a bad faith award of attorney fees citing to F.S. 440.34(2)(b)(1979). However, in 1990, the Florida Legislature amended F.S. 440.34 (1990) eliminating bad faith fees and, as a result, the holding in *Florida Erection Services, Inc.*, is no longer applicable.

In the case at bar, claimant would have this Court resurrect *Lee Engineering* and all related attorney fee cases and apply those provisions to award a fee greater

than that set forth in F.S. 440.34 (2003).

Clearly, the Legislature amended the statute specifically to eliminate the factors of *Lee Engineering*. Just as the bad faith provision of *Florida Erection Services* cannot be utilized to award attorney fees after 1990, neither should *Lee Engineering* be resurrected to allow this Court to apply case law concepts expressly rejected by the Legislature in 2003.

As to fairness, the Legislature made an accommodation for those cases involving medical care unjustly denied to the claimant. In those cases, the E/C can be assessed an hourly fee up to $1,500.00 per Florida Statutes 440.34(7) (2003). It is only indemnity issues for which the statutory fee formula strictly applies.

Prior to the enactment of the Florida Workers' Compensation system, an employee injured at work had no common law right to attorney's fees to be paid by the employer or carrier if he or she prevailed at trial. The current legislation provides the employee with a payment of attorney's fees so that they can net the total amount of benefits secured. Part of the legislative intent in enacting Florida Statutes 440.34 (2003) was to provide penalty and interest provisions for benefits inappropriately denied in Florida Statutes 440.20(6)(7) and (8), and cost awards, including attorney's fees, for frivolously filed claims as set forth in Florida Statute

440.32.

Florida Statutes 440.34(1) read *in para meteria* with section (3) would suggest that a "reasonable" attorney fee would be one in accord with the percentages listed in section (1). Furthermore, if this Court were to consider what the term "reasonable" means separate and apart from the percentage guidelines, consideration should be given to the fairness of the system as a whole as opposed to any individual case. For example, Appellant argues that the percentage fee amounting to $8.11 per hour in Emma Murray's case is manifestly unfair, but in the case of *What An Idea, Inc. v. Sitko*, 505 So.2d 497 (Fla. 1st DCA 1987), guidelines sought by the claimant's counsel amounted to $2,700.00 per hour.

The extremely low and extremely high award cases are the exceptions to the rule in a system which has been applied in Florida for decades and continues to function with the enactment of the 2003 amendments.

Appellant argues that, if the Legislature adds a provision which codifies case law, and later deletes the provision, the deletion of that provision does not abrogate the prior judicial construction and cites in support of that proposition *Sam's Club v. Bair*, 678 So.2d 902 (Fla. 1st DCA 1996). However, *Sam's Club* is distinguishable. At page 904 of its decision, that Court stated:

> Although it might be reasonable to conclude that the Legislature intended to eliminate reimbursement for costs of transportation by deleting that provision from the 1993 amendment, any such conclusion must be harmonized with recognition that the Legislature reenacted the longstanding requirement that the employer shall furnish "remedial treatment, care, and attendance for such period as the nature of the injury or process of recovery may require." Accordingly, the Legislature must be presumed to have continued its approval of the Supreme Court's construction of this language in *Mobley v. Jack & Son Plumbing*, 170 So.2d 41 (Fla. 1964) to permit reimbursement of medical transportation. In the case at bar, there is no actual conflict between the amendment omitting the express authorization of transportation costs, and the retained language of Section 440.13(2)(a) requiring remedial treatment, care and attendance, and therefore the legislative acts can be harmonized.

In the instant case, though, the Legislature intentionally omitted the codified version of the *Lee Engineering* criteria. It substituted the percentage guidelines already in the statute along with new language indicating that a judge of compensation claims shall not approve orders or stipulations in excess of the amount permitted in that section.

The Appellant also cites *Makemson v. Martin County*, 491 So.2d 109 (Fla. 1986), a criminal case, and *Board of County Commissioners of Hillsborough*

*County v. Scruggs*, 545 So.2d 910 (Fla. 2nd DCA 1989), a parental termination proceeding, to suggest that fee caps are unconstitutional.

Appellees contend that the cases above are applicable to their limited statutory construction. Specifically, in criminal and parental termination cases, counsel is constitutionally mandated. As such, those cases are clearly distinguishable from workers' compensation proceedings in which there is no such constitutional right to counsel. The Florida Legislature has gone to extraordinary lengths to allow claimants to proceed without counsel by providing the Ombudsman's office under F.S. 440.191 (2003) as well as notice and disclosure requirements requiring employers to advise claimants of their rights under F.S. 440.01 et seq.

Finally, on page 25 of the Initial Brief, the Appellant argues that the reference in 440.34(1) Florida Statutes (2003) to a fee "approved" applies only to the approval of attorney's fees in a settlement or stipulation. In is unclear how this could be the case, as the statute clearly states the judge of compensation claims shall not approve a "compensation order" in excess of the percentage guidelines. *Id*. A compensation order would include any order requiring payment by an E/C or claimant.

## II. THE 2003 AMENDMENT OF FLORIDA STATUTES 440.34 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Appellant argues that a statutory cap on attorneys' fees paid to claimants' attorneys with no reciprocal cap on attorney's fees paid to defense attorneys handicaps claimants. However, there is nothing so unique in the workers' compensation system so as to require an extraordinary remedy to injured workers over and above that provided to any other injured plaintiff. Contingent fees to civil trial plaintiffs' attorneys and hourly fees to defense attorneys have been the standard in Florida. If anything, the Florida no-fault compensation system treats prevailing injured workers more favorably by granting attorneys' fees whereas the non-industrial tort system does are not usually award hourly fees to the prevailing party.

There are numerous states that do not provide for awards of hourly fees to claimant's counsel to be paid by the E/C.

California Labor Code Sec. 4907 (2005) expressly awards attorney fees to claimants (applicants) as a lien against the settlement proceeds. In these cases, the workers' compensation board can award an attorney fee of between nine to twelve percent (9-12%) of the award. In extraordinary cases, the judge can award a higher

fee in those cases that establish a new or obscure theory of injury or law or those cases involving highly disputed factual issues requiring detailed investigation, or interrogation of witnesses, or multiple or lengthy hearings, etc. However, even if a higher fee percentage is awarded, the award is paid by the claimant from the claimant's benefits not by the E/C. *Wheeler v. Beaton v. WCAB (Thomlinson)*, 46 Cal.Rptr.2d 581 (1995).

Likewise, under Illinois law, no claim for attorneys' fees - whether for benefits secured by agreement, award, or order of judgment in any court - shall exceed twenty percent (20%) of the amount of compensation recovered and paid, unless further fees are allowed to the attorney upon a hearing by the Commission fixing fees. IL ST CH 48 Sec. 138.16(a).

The claimant in this case properly asserts that rules of statutory construction require that all words used by the legislature be accorded plain and ordinary meaning. *Carson v. Miller*, 370 So.2d 10 (Fla. 1970).

Florida Statute 440.34(2003) in relevant part states the following:

> "Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal 20 percent of the first $5,000.00 of the amount of benefits secured, 15 percent of the next $5,000.00 . . . etc."

(emphasis added)

> The statute goes on to state that:
>
> "The judge of compensation claims shall not approve a compensation order, a joint stipulation, . . . 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 chapter."

(emphasis added)

The definitive language of the above provisions clearly dictates that the Judge of Compensation Claims has the mandate to award an attorney fee in compliance with the statutory fee calculations of F.S. 440.34(1) (2003). The statute is neither vague nor ambiguous in any way, and the JCC complied with the statute in his ruling.

Statutes will not be interpreted in a manner that leads to an unreasonable or ridiculous result or a result obviously not intended by the Legislature. *Drury v. Harding*, 461 So.2d 104 (Fla. 1984). By using the specific words "must" and "shall not" as set forth above, the Legislature set forth a clear and unambiguous mandate to eliminate the award of hourly attorney fees payable by the E/C to the claimant as has been provided in F.S. 440.34(1) (2002).

Appellant argues that Florida Statutes 440.34 (2003) violates this injured worker's right to equal protection. In fact, the named party, Emma Murray, received all the benefits to which she was entitled by the Court's award.

The real issue here involves equal protection for injured workers' attorneys. In this case, an Offer of Settlement was made prior to trial. The acceptance of the Offer would have resulted in Emma Murray and her attorney receiving more money than they were awarded at trial. (V1-0076). The Appellees of course could not force the Appellant to settle her case or accept a higher offer than awarded by the Judge. The fact that the employer was forced by the Appellant to spend more money defending the case through trial does not establish a violation of Appellant's right to equal protection.

Claimant's counsel also asserts that the JCC's award is manifestly unfair. The Supreme Court has held that the appropriate remedy for an unfair statutory provision is modification by the Legislature, not the Courts. *Hillock v. Heilman*, 201 So.2d 544 (Fla. 1967). In the *Hillock* decision, the Florida Supreme Court held that Florida's guest statute and subsequent cases interpreting same may or may not be unfair. However, the ultimate remedy was not a decision for judicial review. In a special concurrence, Justice Thomas stated:

> "Counsel for appellants argue with considerable eloquence that the challenged statute is unfair, but that is an appeal which should be properly addressed to the legislative body. It strikes me that the startling increase in automotive casualties while a matter of concern and worry to all Americans is a situation which cannot be remedied by judicial fiat."

Similarly, in the case at bar, if the issue is one of fairness, this Court is not the proper forum for such a debate. The legislative process is the proper forum to correct any unjust or unfair provisions.

The above analysis is true even in a statutory discrimination analysis. Statutory discrimination will not be set aside if any accommodation of facts reasonably may be conceived to justify it. As the U. S. Supreme Court stated in *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (U.S. 1970):

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis", it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. . . . The problems of government are practical ones and may justify, if they do not require rough accommodations-illogical, it may

be, and unscientific. (At 90 S. Ct. 1161).

Likewise, in *McGowan v. State of Md.*, 366 U.S. 420, 426, 81 S. Ct. 1101 (U. S. 1961) the U. S. Supreme Court held that statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it.

The party challenging a legislative enactment has the burden to negate every conceivable basis which might support it. *Gallagher v. Motor Ins. Corp.*, 605 So. 2d. 62, 68-69, (Fla. 1992).

In the instant case, the Legislature explained through wording in the statute itself why it was amending 440.01 et seq. at 440.015 Florida Statutes (2003).

First, the Legislature expressed an intent to treat more even-handedly both injured workers and industry by not having the facts in a case interpreted more liberally in favor of either side. Next, the Legislature stated that the workers' compensation laws were to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either side. Finally, the Legislature also stated its intent to ensure the prompt delivery of benefits to the injured through an efficient system that is not an economic or administrative burden.

In amending the fee provisions of 440.34 Florida Statutes (2003), the

Legislature even-handedly extended the same guidelines for fees that injured workers had been using to pay their attorneys to the fee awards entered against carriers and self-insureds.

Prior to the 2003 amendments, hourly fees had created delays and continuances. These delays were detrimental to injured workers in need of prompt relief and overburdened the court system in both its docket and its costs. The delays were generated by additional hours spent by claimant's counsel on hearings depositions, and related discovery inflating the hours spent on a claim.

If any portion of the trial resulted in a fee, the amount of additional and even unnecessary time was included in the attorney fee award against the E/C. This was the case even if the benefits to the claimant were minimal or nonexistent. An example of awards of fees resulting in no benefits to claimant included the reclassification of the claimant's indemnity benefits. Even in those cases where the claimant had been paid indemnity benefits under the statutory maximum, an award of attorneys fees would be ordered. *Corporate v. Meredith*, 482 So. 2d 515 (Fla. 1st DCA 1986).

If Florida is to maintain its competitive edge for jobs against its sister-states, much less a global economy, a more even-handed workers compensation system is

needed. If the system Florida had was working, the Legislature would not have changed it. A very small minority, consisting of workers' compensation attorneys, have been adversely impacted financially as a result of the enactment of 440.34 Florida Statutes (2003), whereas the significant cost reductions since 2003 reported by the National Council on Compensation have resulted in workers' compensation rate reductions in Florida in line with the Legislature's stated intent and goals. (www.InsuranceJournal.com; 10/14/07 at 83086). It is industry and not claimant's counsel who ultimately bears the expense of funding the administration of the workers' compensation system in Florida pursuant to 440.51(1) (b) Florida Statutes (2003) which provides:

> The total expenses of administration shall be prorated among the carriers writing compensation insurance in the state and the self-insurers. The net premiums collected by the carriers and the amount of premiums calculated by the department for self-insured employers are the basis for computing the amount to be assessed.

If Florida is not a good place to set up business or continue business operations, then jobs are lost and far more people than the workers' compensation bar are exposed to financial difficulties.

In *Sasso v. Ram Property Management*, 452 So. 2d 932, at 934 (Fla. 1984),

this Honorable Court deferred to Judge Ervin's analysis regarding the appropriate standard of review to be used in a case involving statutory discrimination based on age. That detailed analysis, cited with approval, and found at pages 211-18 of *Sasso*, would be applicable to the case under consideration as well:

> Accordingly, the "some reasonable basis" standard, as originally set forth in *Dandridge* and cited in *U.S. Railroad Bd. v. Fritz*, 450 U.S. 960, 101 S. Ct 1421 (Mem); now appears to be the proper form of the rational basis test under the Florida Constitution. This view squares with many of the most recent Florida Supreme Court opinions in which *Dandridge* has been cited as employing the proper rational basis test. See, e.g. *Ostendorf v. Turner*, 426 So. 2d 546 (Fla. 1982) (Alderman, C. J. dissenting); *Gluesenkamp v. State*, 391 So. 2d at 200 (Fla. 1980); *In re Estate of Greenberg*, 390 So. 2d 42, 46 (Fla. 1980); see also *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So. at 367 (Fla. 1981) (relying on the *Dandridge* test cited in *Greenberg*). Although the composition of the rational basis test has had a checkered application, neither state nor intermediate federal appellate courts can be faulted for participating in its somewhat erratic course, given the fact that even the United States Supreme Court readily admits to the lack of "a uniform consistent test under equal protection principles."

Appellees now turn to the proper method of employing the rational basis test

by use of the "some reasonable basis" standard. Generally, as long as the classificatory scheme chosen by the Legislature rationally advances a legitimate governmental objective, courts will disregard the methods used in achieving the objective, and the challenged enactment will be upheld. *Schweiker v. Wilson*, 450 U.S. 221, 235, 101 S. Ct. 1074, 1083, 67 L.Ed. 2d 186 (U.S. 1981). The test, like that used in *McGowan v. Maryland*, *supra*, is still highly deferential toward actions taken by the stateperhaps unduly so. It is virtually insurmountable, because the burden of showing that the state action is without any reasonable rational basis is placed on the individual assailing the classificatory scheme.

In the instant case, the Legislature's objective is easily identified in the Legislative Intent set forth at 440.015 Florida Statutes (2003). The amendment to the statute at issue did not change the percentages of attorney's fees to be paid by injured workers, but instead even-handedly applied those same percentages to the fees to be paid by carriers and self-insureds. The Legislative Intent section states:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker . . . at a reasonable cost to the employer. . . . Therefore, an efficient and self-executing system must be created which is not an

economic or administrative burden.

The Florida Legislature considered, debated and eventually passed the amendments to F.S. 440.34 (2003). These amendments have a reasonable basis and do not violate the equal protection clause of either the State of Florida or the United States Constitutions. As such, this court should continue to allow this statute to stand as constitutional.

## III. THE 2003 AMENDMENT OF FLORIDA STATUTES 440.34 DOES NOT VIOLATE THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

It is argued that the 440.34 Florida Statutes (2003) violates due process rights under the Florida and United States Constitutions. Based on case law set forth below, there is no violation of due process.

In considering the validity of a legislative enactment, this Court can overturn an act on due process grounds in only two circumstances:

1. When it is clear that the law is not in any way designed to promote the people's health, safety or welfare, or,

2. The statute has no reasonable relationship to the statute's avowed purpose.

*Department of Insurance v. Dade County Consumer Advocates Office*, 492 So.2d 1032 (Fla. 1st DCA 1986) citing to *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881 (Fla. 1974).

Claimant argues that restriction of attorney fees ordered to be paid by a JCC to a percentage of benefits secured, without regard to the circumstances of the cases, deprives the claimant of due process of law. Using the analysis above, this is not the case.

This Appeal itself demonstrates that the fee guidelines found at Florida Statutes 440.34 (2003) presented no obstacle to Emma Murray's obtaining attorneys to handle her case at both the trial and the appellate levels. Florida Statutes 440. et seq. satisfies the due process safeguards of the Florida and U.S. Constitutions by providing an alternative form of relief to the common law rights of injured workers through the provision of timely medical care and wage loss benefits in a no-fault system in which litigation is intended to be the exception. *Barry v. Burdines*, 675 So. 2d 587, 589 (Fla. 1996); *Taylor v. School Bd. of Brevard County*, 888 So. 2d 1, 4 (Fla. 2004); *Bakerman v. The Bombay Company*, 961 So. 2d 259, 261, (Fla. 2007).

Furthermore, with respect to attorney fees in particular, in *Stone v. Jeffres*, 208 So. 827, 828 (Fla. 1968) this Honorable Court stated: "

> We agree, too, that allowance of attorneys' fees is in derogation of common law and may be awarded a litigant only if provided by contract or statute. . . . In the first place, the Workers' Compensation Act does authorize attorneys' fees to claimants' attorneys under certain conditions and circumstances."

However, this Court further found there was no common law right to attorneys' fees for a prevailing party.

The analysis set forth in *Recchi America, Inc. v. Hall*, 692 So.2d 153 (Fla.

1997) clearly supports the conclusive presumption that a "reasonable fee" as defined by Florida statutes is not violative of due process. As noted, the test set forth in *Recchi*, looks to the following:

> 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.

As set forth under Point I above, many states, including California and Illinois, allow contingent fees to be paid from the proceeds of the claimant's benefits. Florida, on the other hand, does not allow the reduction of the benefits paid to the claimant and requires the E/C to pay a percentage of the benefits to the claimant's counsel in addition to the benefit proceeds.

Using the analysis above, the Legislature has prevented abuse of excessive payment of fees by the claimant and a resulting reduction of his or her benefits. Abuses as to excessive fees are eliminated, clearly satisfying the initial prong of the *Recchi* test.

As to the second prong, it is clear that the mandatory nature of the provisions of Florida Statutes 440.34 (2003) prevent most abuses. Since the fee award from the E/C is applicable to all claims and claimants, no one party or classification of claimants is awarded more benefits than any other.

Finally, the third prong of the test is satisfied as the legislative goal of reducing premiums paid by employers, has no direct impact on the benefits awarded to the claimant.

In addition, there is a "safety net" for those situations where minimal medical benefits are secured with the assistance of counsel. In such situations, the provisions of Florida Statutes 440.34(7) (2003) apply to provide for an hourly fee up to $1,500.00 to be paid by the E/C to the claimant's counsel.

In comparison with other fee statutes, the Florida Constitution in Article I, Section twenty-six, sets caps on contingent attorneys' fees in medical malpractice cases. Since the Florida Constitution itself permits caps on attorney's fees, the cap on attorney's fees in Florida Statute 440.34 (2003) is constitutional.

In *Laskey v. State Farm Ins. Co.*, 966 So. 2d 9, 15 (Fla. 1974), this Court stated, "The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible

legislative objective and is not discriminatory, arbitrary or oppressive."

The legislative objective stated in 440.015 Florida Statutes is to create "an efficient and self-executing system . . . which is not an economic or administrative burden." The Legislature eliminated the factors for determining hourly attorney fees set forth in *Lee Engineering and Construction Company v. Fellows*, 209 So.2d 454 (Fla. 1968) and later codified in Florida Statutes 440.34 (2003) was designed to correct abuses to the timely and efficient processing of claims that had developed within the workers' compensation system. Hourly fees encouraged protracted litigation by making it more profitable not to resolve issues until the last minute or to progress to trial, resulting in additional and unnecessary attorney fees and administrative costs as well as Court delays.

Florida appellate courts have previously addressed the application of due process to a legislative change in workers' compensation benefits afforded to claimants. In *Carr v. Central Florida Aluminum Products*, 402 So.2d 565 (Fla. 1st DCA 1981), this Court held that the implementation of a one-time payment for serious injuries did not violate due process of law. Specifically, this Court found that its task was to determine whether the classification by the Legislature was made on some reasonable basis bearing a substantial relationship to a legitimate

purpose. The statutory classifications used need not be mathematically precise, and they need not address all aspect of a problem at once.

An analogy can be drawn between the Florida Workers' Compensation system prior to the 2003 amendments and the conditions which led to England's enactment of The National Insurance (Industrial Injuries) Act of 1946 described in Florida Workers' Compensation, Section 1-3, 1995 Edition by Alpert, Barker, Greene and Rodems at page 4:

> Most serious of all the defects of the system was the way in which the provisions of the Acts for the determination of disputes had worked in practice. The disputes were not settled in a cheap and expeditious manner. They degenerated from an informal friendly affair into a protracted wrangle with a long court hearing, acrimony, and so on. "It could hardly have been otherwise", says Potter and Stansfeld. On the whole it may fairly be said that the system of claims and settling disputes was one of the worst features of the system, and it added enormously to the total cost of administration. . . . it has, in fact, become a branch for specialists, and it has its own set of law reports which now run to forty-seven volumes . . .

Similarly, it was attorney fees, and not claimant benefits, which drove the compensation system in Florida prior to 2003.

There were other problems with the workers' compensation system

addressed in the 2003 amendments to the Act. However, not addressing hourly attorney's fees as they were being awarded against carriers and self-insureds would have done little to cure the overall condition of the system or to improve the administration of justice.

The contingent fee statutory percentage system already in place for injured workers and extended to carriers in 2003, based on the amount of benefits secured, differs little from the contingent fee provisions recommended by The Florida Bar and approved by this Honorable Court for civil litigation. See *The Florida Bar re: Amendment to the Code of Professional Conduct*, 494 So.2d 960 (Fla. 1986). Only the amount of percentages is different and because workers' compensation is a "no-fault" system in which liability is seldom at issue, less risk is involved for most attorneys.

Therefore, it would appear the contingent fee "system" or approach is fair and meets the due process test. Whether the amount of the percentage is reasonable is really what is at issue. Appellees contend the statute is neither discriminatory nor arbitrary because it was already being applied to injured workers' fees in compensation cases, and no challenge is raised as to that application being unreasonable. So are percentage fees in some way abusive when applied to fee

awards against carriers? Appellants contend they are not because those carrier paid awards are meant to preserve the injured workers net recovery, which is still accomplished under the amendment.

In support of her position, Appellant cites *Makemson v. Martin County*, 491 So. 2d 109 (Fla. 1986), a case dealing with attorney fees for indigent criminal defendants. She argues that inflexible statutory fee caps in criminal cases likewise should not apply in workers' compensation cases. However, unlike the criminal law, there is no constitutional right to representation in workers' compensation cases. The systems are very different. Furthermore, the Legislature has provided employees assistance through an Ombudsman Office (Florida Statutes 440.191 (2002)) which assists injured workers, employers, carriers, health care providers and managed care arrangements in fulfilling their responsibilities under the Act. There is no equivalent of the Ombudsman Office in the criminal justice system. References to criminal cases involving indigents' rights to counsel are simply inapplicable to the issues before this Court.

The Court will note that in *Makemson*, supra, the Appellant was an attorney, a real party in interest in the outcome of the case, unlike the case at bar in which, win or lose, Appellant Emma Murray is unaffected. The Appellant also argues that

the *Makemson* rationale has been applied in Minnesota and Delaware but does not explain the statutory schemes in those States in order for this Court to make a true comparison of those statutes with Florida law regarding to attorneys' fees. The Appellant also cites as authoritative the case of *Davis v. Keto, Inc.*, 493 So. 2d 368 (Fla. 1st DCA 1985) which dealt with a different version of the challenged statute and which has little, if any, precedential value to the case at bar.

Finally, Appellant argues that Florida Statutes 440.34 (2003) creates an "irrebuttable presumption". Florida Statutes 440.34 (2003) does not create a "presumption" as that term is usually referenced with regard to the Rules of Evidence or findings of fact. This is a mandatory guideline for fees, much like the Florida Bar's cap on contingent fee contracts, rather than a presumption. Appellant's reliance on the holding in *Olive v. Maas*, 811 So.2d 644 (Fla. 2002) also is misguided because that case involved the violation of a criminal defendant's sixth amendment right to assistance of counsel. Appellant cites this case in support of her position that statutory maximum fees may be unconstitutional when they are inflexibly imposed in capital or criminal cases involving unusual or extraordinary circumstances. At page 42 of the Initial Brief. In the worker' compensation system, the fees awarded are not capped by any specific dollar or rate amount.

Fees can be essentially unlimited depending on the amount of benefits secured. Therefore, the cases cited by the Appellant are not applicable and do not indicate unconstitutionality.

## IV. THE 2003 AMENDMENT TO FLORIDA STATUTES 440.34 DOES NOT DENY PARTIES ACCESS TO COURTS.

Appellant argues that Florida Statutes 440.34 (2003) violates injured workers' rights to access the Courts as guaranteed by Article I, Section twenty-one of the Florida Constitution. The alleged basis for this position is that the statute allegedly impairs the ability of injured workers to obtain counsel.

Again, the factual basis for this argument is not one required to be addressed by this Honorable Court. There is nothing in the record indicating that Emma Murray had difficulty obtaining legal counsel. However, that being said, the Court will note that the amended version of 440.34 (2003) makes it no more difficult for an injured worker with minimal damages to obtain counsel than is the case with any other injured plaintiff with minimal damages. The fact that for years workers' compensation claimants were provided with high carrier paid fees that encouraged counsel to accept minimal damage cases was never intended to be a guarantee that practice could continue indefinitely.

The realities of competing in a global economy simply made it disadvantageous and impractical for the State of Florida to provide legal fees as an incentive for litigation. The Florida Legislature has an interest in protecting and

expanding employment opportunities in this state extending far beyond the rather isolated minority of attorneys handling workers' compensation cases. The Florida Constitution guarantees access to courts. Nowhere does it guarantee a right to counsel for civil litigants, such as workers' compensation claimants.

If Appellant's position is accepted, then the prevailing party in every small claim and minimal damages suit should be awarded hourly attorney's fees because without such an incentive for their attorneys, they will be unable to retain counsel and will be denied access to the courts.

This Court long ago held that an injured worker's constitutional right of access to the courts is guaranteed through the availability of administrative hearings and review by the Florida Supreme Court in *Scholastic Systems, Inc. v. Le Loop*, 307 So.2d 166 (Fla. 1974).

As such, Ms. Murray's right to counsel was not impaired - as evidenced by the excellent representation she received including the filing of this case with the Supreme Court.

## V. THE 2003 AMENDMENT OF FLORIDA STATUTES 400.34 DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION.

Where a right of access to the courts for redress for a particular injury has been provided by statutory law, the Legislature is without power to abolish such a right, without providing a reasonable alternative to protect the rights of the people, unless the Legislature can show an overpowering public necessity for the abolishment of such right. *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

In the case at bar, the Florida Legislature has not taken away a claimant's right to pursue workers' compensation benefits. It has not eliminated the right of claimants to obtain payment for services from the E/C. The relevant amendment to F.S. 440.34(1) (2003) applies only to the amount the E/C can be required to pay to the claimant's attorney for successful prosecution of a claim or negotiated settlement.

The workers' compensation system is a legislatively created mechanism. The Legislature can determine how and to what extent benefits under the system are paid and can determine where appellate review is venued. *Rollins v. Southern Bell Telephone and Telegraph*, 384 So.2d 650 (Fla. 1980). The Florida Supreme

Court has found that theLegislature can mandate the venue of the appellate process effectively removing any right the claimant may have to appeal in his or her county of residence. *Kluger* at 3.

Similarly, in *Strohm v. Hertz Corporation/Hertz Claims Management*, 685 So.2d 37 (Fla. 1st DCA 1996), this Court found no violation of constitutional rights when legislation was passed. That reduced the amount of chiropractic visits to eighteen (18). This Court specifically addressed the issue of access to the Courts and held that in order to make a colorable claim of denial to access to the courts, an aggrieved party must demonstrate that the Legislature has abolished a common law right previously enjoyed by the people of the state. The court stated:

> "The restriction created by the Legislature in 440.13(2)(a) Florida Statutes does not restrict the workers' compensation claimant's right to receive appropriate treatment, it merely diminishes after a certain point in time, the range of providers who can offer such treatment under the Workers' Compensation Act."

In making this finding, this Court relied on numerous cases that also altered existing benefits. These cases include the elimination of permanent partial benefits, *Iglesia v. Floran*, 394 So.2d 994 (Fla. 1981), as well as discontinuation of wage loss benefits at age 65. *Acton v. Ft. Lauderdale Hospital*, 440 So.2d 1282

(Fla. 1983).

The Appellant argues that Florida Statutes 440.34 (2003) violates the Separation of Powers provision of Article II, Section three of the Florida Constitution. Appellant's argument suggests that the Courts of the State, including the Courts of Compensation Claims in the Department of Administrative Hearings, are mandated under the Judicial Branch, and therefore 440.34 Florida Statutes (2003) guidelines for attorneys' fees is a legislative infringement on the Judiciary.

In *Amendments to the Florida Rules of Workers' Compensation Procedure*, 891 So. 2d 474 (Fla. 2004) this Honorable Court ruled that because the offices of the Judges of Compensation Claims were not Courts of the State as defined under Article V, Section one, of the Florida Constitution (1972), the Supreme Court must be removed from the rule making process in workers' compensation cases. The Court stated:

> Further, more recently in *Jones v. Chiles*, 638 So. 2d 48 (Fla. 1994), the Court found that "Compensation Claims Judges are Executive Branch officials." Given that the OJCC is not an Article V Court, but rather part of an Executive Department, we find that this Court has no authority under the Florida Constitution, nor has this Court ever had the constitutional authority to promulgate rules of practice and procedure for this Executive entity. (At page 478.)

Given this Court's rulings above, and the powers granted to the Court under Article V, Section three of the Florida Constitution, the Legislature was not encroaching on this Court's authority by amending Florida Statutes 440.34. Attorney's fees to be awarded within the workers' compensation system are within the prerogative of the Legislature. If for some reason, in either substance or application, such guidelines are unconstitutional, then of course this Honorable Court is empowered to so rule. The mere enactment of a fee guideline did not infringe on this Court's powers or violate the Separation of Powers clause of the Florida Constitution.

## CONCLUSION

The Appellees request that this Honorable Court rule that the guideline fees established at 440.34 Florida Statutes (2003) were within the legislature's authorized discretion to enact and are constitutional. For the reasons stated above, the Appellees respectfully request that this Honorable Court deny the Appellant's challenges to the constitutionality of 440.34 Florida Statutes (2003).

Respectfully submitted,

_____

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this _____ day of January, 2008 to all parties on the attached service list.

## CERTIFICATE OF COMPLIANCE

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

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