SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

EMMA MURRAY,

Petitioner,

CASE NO.: SC07-244

vs.

Lwr Tribunal: 1D06-475

MARINER HEALTH/ACE USA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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This is an appeal from an opinion of the First District Court of Appeal, dated October 16, 2006.

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PRELIMINARY STATEMENT

The Petitioner, EMMA MURRAY, shall be referred to herein as the “Claimant” or by her separate name.

The Respondents, MARINER HEALTH/ACE USA, shall be referred to herein as the “Employer/Carrier” (E/C) or by their separate names.

References to the record on appeal shall be abbreviated by the letter “V” (Volume), followed by the applicable volume and page number.

The Judge of Compensation Claims will be referred to as the JCC.

STATEMENT OF THE CASE

On 1/10/04, the Claimant, EMMA MURRAY, filed a Petition for Benefits for injuries sustained in an accident occurring on 10/31/03 (V1-2-6).

On 12/12/04 a hearing on the aforementioned PFB was held before the Honorable Judge of Compensation Claims Dan F. Turnbull (V1-12). At that hearing, Claimant sought, inter alia, the following benefits:

1. Proper payment of temporary total disability (TTD) or temporary partial disability (TPD) benefits from 10/31/03 to present and continuing.
2. Medical care for Claimant's second degree uterine prolapse.
3. Penalties, interest, costs, and attorney's fees (V1-12,13).

The E/C defended the claim, inter alia, on the following grounds:

1. That no injury arose out of and in the course of employment.
2. Fraud per F.S.440.105; Claimant provided an inaccurate and incomplete medical history to Dr. Domingo.
3. The major contributing factor for Claimant's prolapsed uterus was her birthing experience.

4. No penalties, interest, costs, or attorney's fees are owed (V1-13).

Thereafter, on 5/9/05 the Honorable JCC Dan F. Turnbull entered a Final Compensation Order (V1-12-18). In that order, the JCC found the most convincing testimony came from Dr. Swor, a highly credentialed obstetrician/gynecologist, who testified Claimant’s need for surgery was directly related to her lifting on the job (V1-16). The JCC found Dr. Swor indicated the lifting incident at work is the major contributing cause for the need for surgery as well as Claimant’s disability that occurred subsequent to her accident (V1-16).

Based upon the aforementioned findings the JCC ordered and adjudged that:

1. The E/C shall pay TTD from 11/1/03 through 1/30/04 in the stipulated amount of $1,763.86.
2. The E/C shall reimburse reasonable and necessary out of pocket medical expenses in the stipulated amount of $1,092.57.
3. The E/C shall pay $352.78 in penalties and $35.00 in interest.
4. Jurisdiction shall be reserved over the claim for costs, including the cost of the independent medical evaluation of Dr. Swor and reasonable attorney's fees (V1-17).

Thereafter, on 8/8/05 counsel for Claimant filed a Verified Motion for Attorney's Fees (V1-21,22).

Thereafter, on 8/10/05 a hearing on the aforementioned Verified Petition for Attorney's Fees was held before the Honorable JCC Dan F. Turnbull (V1-141). At that hearing, Claimant sought the following:

1. Claimant was seeking a reasonable attorney's fee per the provisions of F.S.440.34(3)(2003) to be determined based on the "Lee Engineering" factors, see Lee Engineering and Construction v. Fellows, 209 So.2d 454(Fla.1968), (V2-255).
2. Claimant was seeking $200 an hour for 84.4 hours for a total attorney's fee of $16,880 (V1-36, V2-261,266,272,273).
3. Reimbursement of costs in the amount of $2,098.83 (V1-26, V2-266).

Claimant contended the statutory guideline fee set forth in F.S.440.34(1)(2003) applies only in those situations where the parties enter into a settlement agreement, and would not apply to the case at bar, because the statutory guideline fee would not be reasonable and would be manifestly unfair (V2-255-257).

Counsel for Claimant also contended that if Claimant's attorney's fees are limited to the guideline fee then F.S.440.34(1)(2003) and F.S.440.34(3)(2003) are unconstitutional

as a violation of equal protection, access to the courts and separation of powers (V2-254,258,259).

The E/C defended the claim, inter alia, on the following grounds:

1. The Claimant is entitled to a carrier paid attorney's fee, but the attorney's fee must be based solely on the statutory guideline formula contained in F.S.440.34(1)(2003), (V1-49, V2-203).
2. In the alternative, if Claimant was to be paid at an hourly rate, the maximum hourly rate the Claimant could receive would be $150 per hour per the provisions of F.S.440.34(7)(2003) (V1-177, V2-214).

Thereafter, on 1/17/06 the Honorable JCC Dan F. Turnbull entered his Final Compensation Order (V2-302-313). In that order the JCC found the initial merit proceedings in this case, resulting in the 5/9/05 order, involved difficult and complex factual, legal and medical issues (V2-305). The JCC found the total amount of benefits secured by counsel for Claimant was $3,244.21 (V2-304). The JCC found that a statutory guideline attorney's fee per F.S.440.34(1)(2003) would be $648.84 yielding an hourly rate of $8.11 per hour (V2-306).

The JCC found it was the Legislative intent to limit the award of attorney's fees to the statutory formula set forth in F.S.440.34(1)(2003) in most situations (V2-307). The JCC

therefore found that a “reasonable” attorney's fee awarded in this case is $648.84 even though that resulted in an hourly rate of $8.11 per hour and totally ignored the so-called Lee Engineering factors (V2-307).

The JCC found the JCC lacked the jurisdiction to adjudicate the constitutionality of the statute (V2-307).

The JCC further found that had the JCC utilized the Lee Engineering criteria, a reasonable attorney's fee in this case would be $16,000 based on eighty hours of work at $200 per hour (V2-308-310).

Based upon the foregoing the JCC ordered and adjudged as follows:

1. The Employer/Carrier shall pay an attorney's fee to Claimant’s counsel in the amount of $648.84.
2. The Employer/Carrier shall reimburse costs in the amount of $2,123 to Claimant’s counsel (V2-312).

On October 16, 2006 the First District Court of Appeal entered an opinion affirming the JCC’s 1/17/06 order, Murray v. Mariner’s Health/ACE USA, 946 So.2d 38(Fla.1st DCA 2006).

On 10/30/07 this Honorable Court entered an order accepting jurisdiction of this case.

STATEMENT OF THE FACTS

The Claimant, EMMA MURRAY, is a fifty-five year old woman with a high school education who was employed with the employer herein as a certified nurse's assistant (V1-15). On 10/31/03, Claimant was assisting a co-worker in lifting a patient from a chair into bed (V1-15). While lifting that patient, Claimant felt something "move" or tear in her abdomen (V1-15). Claimant continued to work and finished her duties for that day (V1-15). Later at home, Claimant inspected herself while in the shower and felt a bulge in her vaginal area (V1-15).

Eventually, on 11/4/03 Dr. Jose Domingo diagnosed symptomatic pelvic relaxation including a moderate to large cystocele, second degree uterine prolapse and a mild rectocele (V1-15). Dr. Domingo recommended a total vaginal hysterectomy, bilateral salping oophorectomy and an anterior/posterior colporrhaphy which surgery was performed on 12/8/03(V1-15).

The E/C initially gave authorization for care by Dr. Domingo, however, that care was de-authorized when the Claimant's claim was totally controverted on 12/11/2003 (V1-15).

On 1/2/04 Claimant filed a Petition for Benefits (V1-2-6).

As indicated in the Statement of the Case, a hearing on the aforementioned PFB was held before the Honorable Judge of Compensation Claims Dan F. Turnbull on 12/12/04 (V1-12).

Additionally, as indicated in the Statement of the Case, the JCC entered an order on 5/9/05, rejecting all of the E/C's defenses, finding Claimant's condition compensable, and ordering the E/C to pay TTD from 11/1/03 through 1/30/04 in the stipulated amount of $1,762.86, reimburse the reasonable and necessary out of pocket medical expenses to Dr. Swor and Dr. Domingo in the stipulated amount of $1,092.57, penalties in the amount of $352.78 and $35.00 in interest (V1-17).

Brian O. Sutter is counsel for Claimant. Mr. Sutter graduated from Indiana University Business School in 1979 and Stetson Law School in 1982 (V2-261). Mr. Sutter has been practicing workers' compensation since 1985 (V2-261). Mr. Sutter is rated AV by Martindale Hubbell, which is the highest rating given (V2-262). Mr. Sutter has been board certified since 1990 in workers' compensation with recertification in 1995 and 2000 (V2-262). Mr. Sutter is a member of the workers' compensation section of the Florida Bar (V2-262). He is a member of the Florida Worker's Advocates (V2-262). He has been a board member of that organization since 1995, and president in 2003 (V2-262). Mr. Sutter has written articles and lectured on a variety of issues in workers' compensation (V2-263). Mr. Sutter has practiced workers' compensation in Charlotte County for over eighteen years and is the only workers' compensation attorney located in Charlotte County (V2-263).

Mr. Sutter indicated he had expended a total of 84.4 hours in representing the Claimant (V1-36). The JCC specifically found 80 hours were reasonable and necessary to obtain the benefits awarded to the Claimant (V2-308).

The JCC specifically found:

> "The novelty and difficulty of the questions involved in this litigation were daunting. The requisite skill required to prevail 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. Even practitioners who specialize in workers' compensation frequently lose many cases comparable in complexity to this one. The skill required and provided by Mr. Sutter is at the high end of any scale that might be used to evaluate that criteria." (V2-308).

The JCC further found:

> "Adding to the inherent difficulty of the questions of fact in medicine in this matter is the uncertainty resulting from unsettled issues arising from the 2003 statutory changes. In addition to amendments to the attorney's fee provisions, the new statute also increases the burden of proof and degree of complexity required to prove entitlement to benefits. These changes clearly make it more difficult for a Claimant to prevail and therefore increase the contingency of Claimant's counsel receiving a fee. Several of these changes apply to the case at bar, including apportionment, exclusion of preexisting condition, issues relating to major contributing cause, the offer of judgment, and other evidentiary issues." (V2-308,309).

The JCC also found, as to this factor, in his 1/17/06 order:

> "Also adding to the difficulty of this case was the Employer/Carrier's assertion that the Claimant committed 'fraud' (a violation of Section 440.105 Florida Statutes with a resulting forfeiture of benefits pursuant to Section

> 440.09(4), Florida Statutes.) The Employer/Carrier based that misrepresentation defense on the allegation that Claimant had not told her treating workers' compensation physician about a previous history of prolapsed uterus. Although it is correct that a prior gynecologist noted a 'mildly prolapsed uterus' prior to the Claimant's industrial injury, the Claimant was able to overcome the defense of the alleged '105 violation'. . ." (V2-309).

Mr. Sutter testified that although he was only seeking $200 per hour in this case (V2-261,272,273), $250 to $300 is what is customary in Charlotte County, Florida in virtually every other analogous area of the law (V2-264).

Mr. Sutter testified that the contingency or certainty of recovering a fee was directly tied to the difficulty of the case, novelty and skill requisite to perform the legal service properly (V2-265). Concerning this factor, the JCC found:

> "This factor would mitigate towards an upward adjustment to a fee which would otherwise be awardable under Lee Engineering. As indicated above, the difficulty and novelty of the questions posed in this matter were high and contingency was correspondingly high." (V2-310).

Mr. Sutter also expended $2,098.83 in out of pocket costs in prosecuting the case (V1-26, V2-266).

Mr. Sutter further testified that the amount of $648 for something in the neighborhood of 80 hours is manifestly unfair (V2-265). It would provide not only a chilling effect on counsel for Claimant's willingness to take a case like this, but there was nobody who would take this case to receive $8.11 an hour (V2-265).

Peter Burkert, board certified attorney in workers' compensation (V2-202) and Rosemary Eure, an attorney specializing in workers' compensation for sixteen years (V2-232) testified that if there is a finding in this case that would only yield a fee in the amount of $8 to $10 per hour, a Claimant would not be able to hire an attorney to represent them (V2-202,235,236). Both testified Claimants are unable to handle a case like this themselves due to the complex workers' compensation litigation system (V2-203,236).

Cora Malloy, an attorney who has been practicing workers' compensation with a defense firm since 1996 (V1-145,146) testified it would be extremely difficult for a lay person to tackle the legal issues, the new law issues, old law issues without the assistance of competent counsel (V1-169). Ms. Malloy acknowledged counsel for the E/C, in the case at bar, invested 135 hours in defending the claim, was paid at the rate of $125 an hour, and made $16,050 for their role in defending the claim up through the date of trial (V1-185).

Keith Hanenian has been an attorney in Florida for fourteen years (V2-216,217). Mr. Hanenian was vice president and claims counsel with the Zenith Insurance Company (V2-217). Mr. Hanenian’s responsibilities included complete oversight of all workers' compensation claims that were litigated within the State of Florida (V2-217).

Mr. Hanenian testified the hourly rate in a workers' compensation case in the last five years in “District M South” was from $150 to $250 per hour prior to the 10/1/03 amendments (V2-221,228). Mr. Hanenian testified it was possible to retain board certified workers' compensation attorneys for defense at $125 per hour (V2-223). Mr. Hanenian testified he generally charges between $105 and $135 an hour when representing an insurance company on work for which there is no contingency (V2-224,225). Mr. Hanenian agreed that if a fee yielded counsel for Claimant between $8.50 to $10 an hour it would be “manifestly unfair” (V2-227). Mr. Hanenian also testified the 10/1/03 statutory changes to the workers' compensation law involved changes dealing with major contributing cause and preexisting conditions (V2-229).

A more specific reference to facts will be made during argument.

POINTS ON APPEAL

POINT I

THE JCC AND THE FIRST DISTRICT COURT OF APPEAL ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT THE DETERMINATION OF A “REASONABLE ATTORNEY'S FEE FROM A CARRIER OR EMPLOYER” AS PROVIDED BY F.S.440.34(3)(2003), IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003), EVEN WHEN IT RESULTS IN A “MANIFESTLY UNFAIR” FEE.

POINT II

IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN F.S.440.34(3)(2003) IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003) IS CORRECT, THEN F.S.440.34(1)(2003) AND F.S.440.34(3)(2003) AND F.S.440.34(7)(2003) ARE UNCONSTITUTIONAL, IN THAT THEY VIOLATE CLAIMANT'S RIGHT TO EQUAL PROTECTION, PER ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION AND ARTICLE XIV, SECTION I OF THE UNITED STATES CONSTITUTION, BECAUSE THERE IS NO CORRESPONDING ATTORNEY'S FEE "CAP" ON ANY ATTORNEY'S FEES PAID TO COUNSEL FOR THE E/C.

POINT III

IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN F.S.440.34(3)(2003) IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003) IS CORRECT, THEN F.S.440.34(1)(2003), 440.34(3)(2003) AND F.S.440.34(7)(2003) ARE UNCONSTITUTIONAL IN THAT THEY VIOLATE THE CLAIMANT'S DUE PROCESS RIGHTS UNDER THE PROVISIONS OF ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND ARTICLE XIV, SECTION I OF THE UNITED STATES CONSTITUTION.

POINT IV

IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN F.S.440.34(3)(2003) IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003) IS CORRECT, THEN F.S.440.34(1)(2003), F.S.440.34(3)(2003) AND F.S.440.34(7)(2003) ARE UNCONSTITUTIONAL IN THAT THEY VIOLATE CLAIMANT'S RIGHT TO ACCESS TO THE COURTS, AS GUARANTEED BY ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION.

POINT V

IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN F.S.440.34(3)(2003) IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003) IS CORRECT, THEN F.S.440.34(1)(2003), F.S.440.34(3)(2003) AND F.S.440.34(7)(2003) ARE UNCONSTITUTIONAL, IN THAT THEY VIOLATE THE SEPARATION OF POWERS PROVISIONS OF ARTICLE II, SECTION 3, ARTICLE V, SECTION 1 AND ARTICLE V, SECTION 15 OF THE FLORIDA CONSTITUTION.

SUMMARY OF ARGUMENT

I

F.S.440.34(3)(a)-(d)(2003) provides, inter alia, that a Claimant shall be entitled to recover a **reasonable attorney's fee from a carrier or employer** under certain enumerated circumstances, two of which have occurred in the case at bar.

In Lee Engineering and Construction Company v. Fellows, 209 So.2d 454(Fla.1968), this Honorable Court held a "reasonable attorney's fee" in a workers' compensation case was to be determined by considering various listed factors (time and labor, et al).

Effective 10/1/77, 440.34(1) was amended to include, for the first time, a statutory guideline attorney's fee, see F.S.440.34(1)(1977). The aforementioned statute also set forth other enumerated factors from this Honorable Court's decision in Lee Engineering and Construction Company v. Fellows, Supra, for the JCC to consider and the JCC could increase or decrease the guideline attorney's fee if in his judgment, the circumstances of the particular case warranted such action.

Effective 10/1/03, the Legislature amended F.S.440.34(1)(2003) by leaving in the statutory guideline fee, but by eliminating the other enumerated factors from Lee Engineering, Supra. However, the statutory language in F.S.440.34(3)(2003) which is the portion of the attorney's fee

statute that allows a Claimant to recover an “attorney's fee” from the Employer/Carrier under certain circumstances, was unchanged.

It is Claimant’s position that when a Claimant is entitled to recover an attorney's fee from the E/C as provided in F.S.440.34(3)(2003), a calculation of a Claimant’s reasonable attorney's fee should be based on the factors enumerated by this Honorable Court in Lee Engineering, Supra. It is Claimant’s further position that the limitation of an attorney's fee based on the statutory guideline set forth in F.S.440.34(1)(2003) applies only in those instances where there is a joint stipulation for lump sum settlement, or a stipulation or agreement between a Claimant and his or her attorney.

Alternatively, if a “reasonable attorney's fee” as set forth in F.S.440.34(3)(2003) is construed to be limited to the statutory guidelines set forth in F.S.440.34(1)(2003), Claimant submits a JCC, under exceptional circumstances, may nevertheless exceed the statutory guideline fee, Makemson v. Martin County, 491 So.2d 1109(Fla.1986).

II

If F.S.440.34(3)(2003) and F.S.440.34(1)(2003) are interpreted to limit a Claimant’s attorney's fee to the statutory guideline amount, even if that results in a manifestly unfair attorney's fee to the Claimant, then the aforementioned

statute violates Claimant's equal protection rights, because there is no corresponding "cap" or "limit" on the amount that the Employer/Carrier can pay their attorneys, Horn v. New Mexico Educators Federal Credit Union, 889 P. 2nd 234(N.M. CT of App. 1994).

III

In order for a statute to satisfy due process considerations, a party must be given a meaningful opportunity to present evidence and to be heard, A T & T Wireless Services Inc. v. Castro, 896 So.2d 828(Fla.1st DCA 2005). Furthermore, a Claimant's right to due process is violated by a statute that creates an irrebutable presumption, Recchi America Inc. v. Hall, 692 So.2d 153(Fla.1997).

If a Claimant's "reasonable attorney fee" paid by the E/C under F.S. 440.34(3)(2003) is limited in all circumstances (except medical only claims which do not apply in the case at bar) to the statutory guideline fee set forth in F.S.440.34(1)(2003), it violates Claimant's substantive right to due process, because it creates an irrebutable presumption that under no circumstances may counsel for Claimant be entitled to a greater fee.

Furthermore, it effectively denies the Claimant's procedural right to due process, because it precludes a Claimant from having any meaningful opportunity to present evidence and

be heard. A Claimant will be unable to obtain counsel to represent him in a workers' compensation claim involving a small amount of benefits when the attorney is only able to recover an attorney's fee of $8.11 per hour. Without competent counsel, Claimants in a workers' compensation case will be as helpless as a turtle on its back, Davis v. Keeto Inc., 463 So.2d 368(Fla.1st DCA 1985).

IV

A person’s constitutional right to access to courts, guaranteed by Article I, Section 21 of the Florida Constitution must be more than merely formal, it must be also be adequate, effective and meaningful, Chappell v. Rich, 340 F. 3rd 1279(11th Cir. 2003).

If a Claimant’s attorney's fees are arbitrarily limited to the statutory guideline amount, irregardless of how “manifestly unfair” the resultant fee is, a Claimant will not be able to retain counsel to represent them, particularly in small claims. Without adequate counsel, a Claimant is effectively denied any meaningful “access to courts” because it is highly unlikely that a Claimant would have the ability to successfully prosecute a workers' compensation claim pro se.

V

Per the provisions of Article II, Section 3, of the Florida Constitution one branch of government shall not exercise any powers appertaining to either of the other two branches of government unless expressly provided in the Florida Constitution. Under Article V, Section 15, the Supreme Court is the exclusive governmental regulator of attorneys in the practice of law.

Allowance of attorney fees is a judicial action, Lee Engineering and Construction Company v. Fellows, Supra. When a statute puts an inflexible fee cap on the amount of compensation an attorney can receive, it is unconstitutional as a violation of the doctrine of separation of powers, Makemson v. Martin County, Supra, Board of County Commissioners of Hillsborough County v. Scruggs, 545 So.2d 910(Fla.2nd DCA 1989), Irwin v. Surdyk's Liquor, 599 N.W. 132(Minn. 1999).

Judges of Compensation Claims are executive branch officers, not judicial branch officers, Jones v. Chiles, 638 So.2d 48 (Fla. 1994). However, review of any Order of a JCC is by the First DCA, F.S. 440.271(2006) and therefore the Courts retain ultimate determination of a reasonable attorney fee in a Workers Compensation case

ARGUMENT

POINT I

THE JCC AND THE FIRST DISTRICT COURT OF APPEAL ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT THE DETERMINATION OF A "REASONABLE ATTORNEY'S FEE FROM A CARRIER OR EMPLOYER" AS PROVIDED BY F.S.440.34(3)(2003), IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003), EVEN WHEN IT RESULTS IN A "MANIFESTLY UNFAIR" FEE.

The issue of statutory interpretation is a question of law, subject to de novo review, Daniels v. Florida Department of Health, 898 So.2d 61(Fla.2005).

In the case at bar, the JCC, in his order of January 17, 2006 specifically found as follows:

> "Section 440.34, Florida Statutes, as amended in 2003, is clear and unambiguous. It clearly requires on its face an award based upon the formula contained within it. Although the statute speaks of a 'reasonable fee' a reading of the section in its entirety does not suggest that the Legislature intended to readopt the criteria set forth by the Supreme Court in Lee Engineering. To the contrary, it appears the Legislature intended to repeal any such consideration. Following the Lee Engineering decision, the Legislature codified the Lee Engineering criteria into Section 440.34(1), Florida Statutes, where it remained for many years, but undergoing periodic refinement over those years. However, the 2003 Legislature repealed those criteria." (V2-306).

The JCC further found:

> "In any event, reading the entire section in pari materia, it is clear that the Legislative intent is to limit the award of attorney's fees to the formula in most situations. While there are exceptions, the case sub judice does not fall within any of those exceptions, nor has any such argument been advanced." (V2-307).

The JCC concluded:

> "It is therefore found that a 'reasonable attorney's fee' award in this case is $648.84, even though that results in an hourly rate of $8.11 and totally ignores the so called Lee Engineering factors." (V2-307).

The First DCA, in its opinion rendered in the case at bar, stated:

> "The Claimant, Emma Murray, appeals the Judge of Compensation Claims (JCC) order awarding an attorney's fee in strict accordance with the guideline formula set forth in Section 440.34(1), Florida Statutes (2005). . . . Accordingly, we are constrained to affirm the JCC's award of a reasonable attorney's fee based on the statutory guideline formula. See Wood v. Fla. Rock Industries, 929 So.2d 542(Fla.1st DCA 2006). . ." Murray v. Mariners Health, Supra at 39.

Claimant respectfully submits the JCC and the First DCA have erred, as a matter of law, in determining a "reasonable attorney's fee" to be paid by the E/C pursuant to F.S.440.34(3)(2003) is limited by the statutory guideline amount set forth in F.S.440.34(1)(2003).

F.S.440.34(3)(2003) only deals with attorney's fees to be paid for **by the E/C.** F.S.440.34(3)(2003) provides as follows:

> "(3) If any party should prevail in any proceedings before a Judge of Compensation Claims or Court, there shall be taxed against the non prevailing party the reasonable cost of such proceedings, not to include attorney's fees. 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**:
>
> (a) Against whom she or he successfully asserts a petition for medical benefits only, if the Claimant has not filed or is not entitled to file at such time a claim for disability, permanent

impairment, wage loss, or death benefits, arising out of the same accident;

(b) In any case in which the employer or carrier files a response to a 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;

(c) In a proceeding in which a carrier or employer denies that an accident occurred for which compensation benefits are payable and the Claimant prevails on the issue of compensability; or

(d) In cases where the Claimant successfully prevails in proceedings filed under s.440.24 or s.440.28.

Regardless of the date benefits were initially requested, attorney's fees shall not attach under this subsection until thirty days after the date the carrier or employer, or self insured, receives the petition."

As amended in 1941, F.S.440.34(1)(1941) required an E/C who failed to timely pay a claim for benefits, or otherwise unsuccessfully resist the payment of compensation, to pay the Claimant a "reasonable attorney's fee" to be approved by the Commission.

While the aforesaid statutory language was in effect, this Honorable Court, on April 10, 1968, issued its opinion in Lee Engineering and Construction Company v. Fellows, 209 So.2d 454(Fla.1968). In Lee Engineering and Construction Company v. Fellows, Supra, this Honorable Court stated:

". . The tendency to apply a contingent percentage to the total value of the award, in the absence of a stipulation or other evidence, is not an appropriate method for fixing a fee in workers' compensation cases. . ." Lee Engineering and Construction Company v. Fellows, Supra at 458.

This Honorable Court also stated, in Lee Engineering and Construction Company v. Fellows, Supra:

> "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or cause antagonisms, with other clients; (3) the customary charges of the bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the Claimant from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service." Lee Engineering and Construction Company v. Fellows, Supra at 458,459.

Thus, a "reasonable" fee as defined by F.S.440.34(1)(1941) was to be determined by using the factors set forth in Lee Engineering and Construction Company v. Fellows, Supra.

Effective October 1, 1977, F.S. 440.34(1)(1977) was amended to include, for the first time, a statutory guideline attorney's fee, F.S.440.34(1)(1977). F.S.440.34(1)(1977) further set forth other enumerated factors which were from Lee Engineering v. Fellows, Supra, for the Judge of Industrial Claims (JIC) to consider, and the JIC could increase or decrease the attorney's fee if in his judgment the circumstances of a particular case warranted such action. The First DCA, Okaloosa County Gas

District v. Mandell, 394 So.2d 453(Fla.1st DCA 1981), and the Industrial Relations Commission, Lawrence Nali Construction Company v. Price, IRC Order 2-3909(Fla.1979), and Florida International University v. Philips, IRC Order 2-3902(Fla.1979), held the 10/1/77 amendments to F.S.440.34(1)(1977) merely amplified the case law and altered in certain respect the burden of proof on fee issues by specifying grounds for departure from the stated schedule. In other words, the 10/1/77 amendment to F.S.440.34(1)(1977), which set forth the statutory guideline fee, did not alter the prior law, as enunciated by Lee Engineering v. Fellows, Supra, as to what constituted a reasonable fee. It simply amplified the case law.

Although the statutory guideline amount was reduced downward, and two of the Lee Engineering factors were eliminated with the 1/1/94 amendments to F.S.440.34(1), the statutory guideline attorney's fee and Lee Engineering factors remained in effect until the 10/1/03 amendments to F.S.440.34(1)(2003).

F.S.440.34(1)(2003) now provides:

> "(1) A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved as reasonable by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a Judge of Compensation Claims for benefits secured on behalf of a Claimant must equal to 20% of the first $5,000 of the amount of the benefits secured, 15% of the next $5,000 of the amount of the benefits secured, 10% of the remaining amount of the benefits secured to be provided during the first ten years after the date the

> claim was filed, and 5% of the benefits secured after ten years. **The Judge of Compensation Claims shall not approve a compensation order, a joint stipulation or 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.** The judge of compensation claims is not required to approve any retainer agreement between the claimant and his or her attorney. The retainer agreement as to fees and costs may not be for compensation in excess of the amount allowed under this section."

F.S.440.34(1)(2003) eliminated reference to the Lee Engineering factors. However, Claimant submits the elimination of the Lee Engineering factors from F.S.440.34(1)(2003) does not alter the determination of, or the definition of, a "reasonable fee" to be paid by the Employer/Carrier per the provisions of F.S.440.34(3)(2003) as previously defined by this Honorable Court in Lee Engineering for the following reasons:

(1) A "reasonable fee" prior to the 10/1/77 amendments which incorporated the statutory guideline fee and the Lee Engineering factors, was already determined, as the result of judicial interpretation, by using the Lee Engineering v. Fellows, Supra, factors.

(2) When a court interprets statutory language, and the Legislature thereafter adds a provision which codifies case law, and then deletes the provision, the deletion of the provision does not abrogate the prior judicial construction, Sam's Club v. Bair, 678 So.2d 902(Fla.1st DCA 1996) (relating to medical

mileage in a workers' compensation case). When the Legislature added the statutory guideline fee and Lee Engineering factors to the 1977 amendment to F.S.440.34(1)(1977), it was simply an amplification of case law, Okaloosa County Gas District v. Mandell, Supra. As such, by removing the Lee Engineering v. Fellows, Supra, factors with the 10/1/03 amendment to F.S.440.34(1)(2003), the Legislature did not abrogate the judicial construction of a "reasonable attorney's fee" as set for in Lee Engineering v. Fellows, Supra.

(3) It is a general cannon of statutory construction that, when the Legislature has used a term in one section of the statute but omitted the term in another section, the court will not read the term into the sections where it was omitted, Sunshine Towing, Inc. v. Fonseca, 933 So.2d 594 (Fla. 1st DCA 2006), L. K. v. Department of Juvenile Justice, 917 So.2d 919(Fla.1st DCA 2005). The Legislative use of different terms in different portions of the same statute is strong evidence that the different meanings were intended, Maddox v. State, 923 So.2d 442(Fla.2006). F.S.440.34(3)(2003), which is the statute awarding a "reasonable" attorney's fee to be paid by the **Employer/Carrier"** under certain circumstances does not include the statutory guideline attorney's fee restrictions that are found in F.S.440.34(1)(2003). It simply provides for the payment of a "reasonable" fee.

(4) A “reasonable attorney's fee” is referenced in other provisions of the Workers’ Compensation Act which could not be calculated by reference to a statutory percentage guideline fee. For example F.S.440.30(2003), provides that if no claim has been filed, and an Employer/Carrier takes the deposition of the Claimant or a witness, the E/C shall pay the Claimant’s attorney a “reasonable attorney's fee” for attending said deposition.

F.S.440.32(2)(2003) provides that if the JCC determines any claim or defense was maintained or continued frivolously, the cost of the proceedings “including reasonable attorney's fees” shall be assessed against the offending attorney. Identical terms contained in the same act should be construed to have the same meaning, U. S. v. DBB Inc., 180 F. 3rd 1277(11th Cir. Fla. 1999).

(5) F.S.440.34(1)(2003) refers to a fee “approved” as reasonable by the JCC, thereby indicating it applies to the approval of an attorney's fee in a settlement or stipulation. To the contrary, F.S.440.34(3)(2003) references the entitlement of a Claimant to “recover” a reasonable attorney's fee from Employer/Carrier, indicating it applies to situations where the JCC awards an attorney's fee to the prevailing Claimant. The Legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended, Maddox v. State, Supra.

Additionally, it is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to avoid unconstitutionality, Franklin v. State, 887 So.2d 1063(Fla.2004). Another basic tenent of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh or absurd consequences, State v. Atkinson, 831 So.2d 172(Fla.2002). A statutory construction that results in an hourly fee of $8.11 per hour in a contested workers' compensation case is a construction that would lead to absurd results, and as argued under Points II through V below, would render the statute unconstitutional.

An example of the absurd consequences that could occur can be illustrated by State Farm Fire & Casualty v. Palma, 555 So.2d 836 (Fla. 1990) wherein this Honorable Court upheld an attorney fee award of $253,500.00 as reasonable under the PIP statute for securing payment of a thermogram costing $600.00 based on 650 hours of attorney time. If a reasonable attorney fee per F.S. 440.34(3)(2003) is limited to the statutory guideline amount of F.S. 440.34(1)(2003) the attorney in Palma would have earned a fee of $120.00 or 18.5 cents per hour.

It is Claimant’s position that a calculation of a “reasonable attorney's fee” to be paid by the **Employer/Carrier** per the provisions of F.S.440.34(3)(2003) should be paid

according to Lee Engineering and Construction Company v. Fellows, Supra, which has always been the method for calculating a "reasonable" attorney's fee. If the Legislature intended an E/C paid attorney's fee to be limited to the statutory guideline amount set forth in F.S.440.34(1)(2003) the Legislature would have so stated in F.S.440.34(3)(2003). They did not.

F.S.440.34(1)(2003), which imposes the statutory guideline limitations, provides

> "The Judge of Compensation Claims shall not approve a compensation order, a joint stipulation for lump sum settlement, stipulation or agreement between a Claimant 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. . ."

F.S.440.34(1)(2003) makes no reference to, and therefore does not apply to, Employer/Carrier paid attorney's fees which are covered by F.S.440.34(3)(2003).

The First DCA in a number of cases, including the case at bar, has held an Employer/Carrier paid fee to counsel for Claimant, per the provisions of F.S.440.34(3)(2003) must be based on the value of the benefits actually obtained on behalf of the Claimant, as set forth in F.S.440.34(1)(2003), Buitrago v. Landry's, 949 So.2d 1046(Fla.1st DCA 2006), La Petite Academy v. Duprey, 948 So.2d 868(Fla.1st DCA 2007), Campbell v. Aramark, 933 So.2d 1255(Fla.1st DCA 2006), Lundy v. Four Seasons Ocean

Grand Palm Beach, 932 So.2d 506(Fla.1st DCA 2006), Wood v. Florida Rock Industries, 929 So.2d 542(Fla.1st DCA 2006).

The Honorable Judge Ervin in his concurring opinion in Lundy v. Four Seasons, Supra, stated F.S.440.34 does not clearly and unambiguously equate the reasonableness of the fee with the statutory percentage formula, which is the construction Judge Ervin would have placed on the statute were it not for the First DCA's decision in Wood v. Florida Rock Industries, Supra. Judge Ervin specifically stated:

> ". . . I find that nothing in the statute restricting a Judges determination of a fee's reasonableness to the percentage formula. . ." Lundy v. Four Seasons, Supra, concurring opinion of Judge Ervin at 512, 513.

Judge Ervin also stated in his concurring opinion in Lundy v. Four Seasons Ocean Grand Palm Beach, Supra:

> "If the Wood panel's interpretation of the statute is correct, an attorney who defends on appeal a compensation award, a motion for an order enforcing a compensation award, or a motion for an order modifying a compensation award would then be entitled to the same percentage fee previously awarded him or her during the trial of the claim, regardless of the amount of time he or she expended in the later proceeding. A duplicate fee, identical to that authorized at trial, without consideration of the labor involved, would hardly be consistent with the Legislative goal of reducing the employer's cost of workers' compensation insurance premiums, particularly in circumstances where the fee authorized by the formula is substantial, and the attorney's involvement minimal. In my judgment, the Legislature, in drafting the 2003 amendments to Section 440.34, could not have reasonably contemplated such bizarre results." Lundy v. Four Seasons Ocean Grand Palm Beach, Supra at 514.

Alternatively, Claimant would argue that even if a JCC is ordinarily limited to the statutory guideline fee set forth in F.S.440.34(1)(2003) in determining a "reasonable attorney's fee" to be paid by an Employer/Carrier, a JCC may deviate from that amount under extraordinary circumstances, Olive v. Maas, 811 So.2d 644(Fla.2002), White v. Board of County Commissioners, 537 So.2d 1376(Fla.1989), Makemson v. Martin County, 491 So.2d 1109(Fla.1986), Marion County v. Johnson, 586 So.2d 1163(Fla.5th DCA 1991), Board of County Commissioners of Hillsborough County v. Scruggs, 545 So.2d 910(Fla.2nd DCA 1989).

In Makemson v. Martin County, Supra, this Honorable Court held fee maximums are unconstitutional when applied to cases involving extraordinary circumstances or unusual representation. This Honorable Court held a Trial Court may exceed the statutory maximum in order to enable it to perform its essential judicial function of insuring adequate representation by competent counsel. As such, this Honorable Court upheld a Trial Court's award of an attorney's fee exceeding the statutory limitations for an attorney for his representation of an indigent criminal defendant. The rule in Makemson v. Martin County, Supra, is still good law, Olive v. Maas, Supra.

Additionally, in Board of County Commissioners of Hillsborough County v. Scruggs, Supra, the Second DCA specifically held that, although the right to counsel in

criminal cases emanates from the 6th Amendment, and in civil dependency and termination of parental rights proceedings from due process considerations, counsel is required in each case because fundamental constitutional interests are at stake. As such, the Second DCA in Board of County Commissioners of Hillsborough County v. Scruggs, Supra, extended the Makemson v. Martin County holding to civil cases thereby allowing a court to deviate from a statutory mandated maximum fee under extraordinary circumstances.

The Makemson rational has been applied by sister courts in workers' compensation attorney's fees cases, Irwin v. Surdyk's Liquor, 599 N.W. 132(Minn. 1999), Joseph v. Oliphant Roofing Company, 711 A. 2nd 805(Del. Super 1997).

The present case is extraordinary and unusual, because counsel for Claimant had to expend 80 hours to secure $3,244.21 in benefits for this injured worker because the E/C totally controverted the claim.

POINT II

IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN F.S.440.34(3)(2003) IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003) IS CORRECT, THEN F.S.440.34(1)(2003) AND F.S.440.34(3)(2003) AND F.S.440.34(7)(2003) ARE UNCONSTITUTIONAL, IN THAT THEY VIOLATE CLAIMANT'S RIGHT TO EQUAL PROTECTION, PER ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION AND ARTICLE XIV, SECTION I OF THE UNITED STATES CONSTITUTION, BECAUSE THERE IS NO CORRESPONDING ATTORNEY'S FEE "CAP" ON ANY ATTORNEY'S FEES PAID TO COUNSEL FOR THE E/C.

When considering a statute that abridges a fundamental right, Courts are required to apply the strict scrutiny standard to determine whether the statute denies equal protection, Level Three Communications LLC v. Jacobs, 841 So.2d 447(Fla.2003).

The JCC, in the case at bar, specifically found as follows:

> "Mr. Sutter has raised a number of constitutional arguments. As noted above, a Judge of Compensation Claims lacks jurisdiction to adjudicate the constitutionality of a statute. A JCC must interpret and apply statutes as being constitutional." (V2-307).

The First DCA, in its opinion in the case at bar stated:

> "The Appellants constitutional challenges to the statute, as significantly amended in 2003, were considered and rejected in our recent decisions in Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So.2d 506(Fla.1st DCA 2006); and Campbell v. Aramark, 933 So.2d 1255(Fla.1st DCA 2006). . ." Murray v. Mariners Health, Supra at 39.

The First DCA has also upheld the constitutionality of F.S.440.34(3)(2003) in Buitrago v. Landry's, Supra, and La Petite Academy v. Duprey, Supra.

It is Claimant's position that if the JCC's order and the First DCA's decision is correct, and the "reasonable attorney's fee" to be paid by the E/C to Claimant's attorney per the provisions of F.S.440.34(3)(2003) is limited to the statutory guideline fee set forth in F.S.440.34(1)(2003), then the aforesaid statutes are facially unconstitutional as a denial of the Claimant's equal rights protection, because they impose a cap on the amount of attorney's fees counsel for Claimant may

receive, but impose no such similar cap on the amount of attorney's fees that can be paid to Counsel for the Employer/Carrier.

Article I, Section 2, of the Florida Constitution provides as follows:

> "**Basic rights.** – All natural persons, female and male alike, **are equal before the law** and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, **to be rewarded for industry**. . ."

Additionally, Article XIV, Section I of the United States Constitution provides, inter alia:

> "No State shall. . . deny to any person within its jurisdiction the equal protection of the laws."

The constitutional right to equal protection mandates that similarly situated persons be treated alike, Level Three Communications LLC v. Jacobs, Supra. Under the strict scrutiny standard, a Court must review the legislation to ensure that it furthers a compelling State interest through the least intrusive means. The legislation is presumptively unconstitutional, North Florida Woman's Health Services v. State, 866 So.2d 612(Fla.2003).

If a fundamental right is not at stake, the Courts apply the rational basis test, Level Three Communications LLC v. Jacobs, Supra. Under the rational basis test, the party challenging the statute bears the burden of showing the

statutory classification does not bear a rational relationship to a legitimate State purpose, North Florida Woman's Health Services v. State, Supra, Level Three Communications LLC v. Jacobs, Supra.

Fundamental rights are such that neither liberty nor justice would exists if they were sacrificed, Zurla v. City of Daytona Beach, 876 So.2d 34(Fla.5th DCA 2004). Included in this category are such rights as those enumerated in the Bill of Rights, or in the Florida Constitution, such as the right to go to court to resolve disputes, De Ayala v. Florida Farm Bureau Casualty Insurance Company, 543 So.2d 204(Fla.1989), Zurla v. City of Daytona Beach, Supra, Doctors Lake Inc. v. Brand Smart USA of West Palm Beach, 819 So.2d 971(Fla.4th DCA 2002).

Imposing a statutory cap on the amount of attorney's fees that counsel for Claimant can recover, without a corresponding cap on the amount of attorney's fees that counsel for the E/C can recover affects fundamental rights of a Claimant, because such a cap handicaps workers as opposed to employers in the adjudicatory process which requires the assistance of counsel. It severely impairs, if not eliminates, the ability of the Claimants to obtain the assistance of counsel, and as such impairs or eliminates any meaningful due process or access to the courts by an injured worker, Horn v. New Mexico Educators Federal Credit Union, 889 P. 2nd 234(N.M. CT of App 1994), Wood

v. Florida Rock Industries, Supra, Concurring opinion of the Honorable J. Barfield. Furthermore, it adversely affects a Claimant's constitutional right to be rewarded for industry, Article I, Section 2, Florida Constitution, De Ayala v. Florida Farm Bureau Casualty Insurance, Supra.

The necessity of a Claimant having representation of adequate counsel in a workers' compensation proceeding has long been recognized by this Honorable Court. In Lee Engineering and Construction Company v. Fellows, Supra, this Honorable Court noted that:

> "It is obvious that fees should not be so low that capable attorneys will not be attracted. . ." Lee Engineering and Construction Company v. Fellows, Supra at 457.

In Davis v. Keeto Inc., 463 So.2d 368(Fla.1st DCA 1985), the First DCA stated:

> "Without the assistance of competent counsel, claimant would similarly have been 'helpless as a turtle on its back'." Davis v. Keto Inc., Supra at 371.

In Rivers v. SCA Services, 488 So.2d 873(Fla.1st DCA 1986), at 876, the First DCA stated:

> "Application of the provisions of Section 440.34(1) in a manner that promotes such a chilling effect on the Claimant's right to obtain legal services . . . is inconsistent with the benevolent purposes of the Workers' Compensation Act."

Claimant further respectfully submits this litigation is not about attorneys, but about Claimants. The First DCA recognized in Pilon v. Okeelanta Corporation, 574 So.2d

1200(Fla.1st DCA 1991), the true party in interest in an attorney's fee issue is the Claimant. The First DCA further indicated any barrier which would affect the ability to review a decision to award an attorney's fee could:

> "Ultimately result in a net loss of attorneys willing to represent workers' compensation Claimants. **This could ultimately result in a chilling affect on Claimant's ability to challenge Employer/Carrier decisions to deny claims for benefits and disrupt the equilibrium of the party's rights intended by the Legislature in enacting Section 440.34.**" Pilon v. Okeelanta Corporation, Supra at 1201.

The JCC in the case at bar, found, inter alia that:

> ". . . The case was vigorously prosecuted and vigorously defended. It involved difficult and complex factual, legal and medical issues." (V2-305).

Despite the difficulty of the issues involved in this case, and despite the fact that counsel for Claimant expended 80 hours of reasonable and necessary time in obtaining the benefits awarded (V2-305), Claimant was awarded a total attorney's fee of $648.84 for an hourly rate of $8.11 per hour (V2-306). On the other hand, counsel for the E/C expended 135 hours defending the claim for which he was paid $125 per hour for a total of $16,050 (V1-185). There is no basis, under any standard of review, that would support a statute which caps the amount of attorney's fees counsel for Claimant can receive, but imposes no such cap upon the amount of attorney's fees counsel for the Employer/Carrier can receive. A Claimant is not even free to contract with an

attorney to pay an attorney's fee in excess of the statutory guideline amount, F.S.440.34(1)(2003).

In Horn v. New Mexico Educators Federal Credit Union, Supra, the New Mexico Court of Appeals held the Workers' Compensation Statute which capped an attorney's fee at $12,500 for a Claimant's attorney was unconstitutional as a denial of the Claimant's equal protection rights because there was no corresponding cap on the amount of the attorney's fee an Employer/Carrier could pay their attorney. The New Mexico Court in Horn, Supra, stated, inter alia:

> "The attorney's fee handicaps one side of an adversarial proceeding and thus imposes the risk of appearing without representation solely upon a 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. . ." Horn v. New Mexico Educators Federal Credit Union, Supra at 243.

The Honorable Judge Barfield in his concurring opinion in Wood v. Florida Rock Industries, Supra, stated:

> ". . . The validity of the statute which severely impairs if not eliminates the ability of Claimants to obtain the assistance of counsel has not been raised." Wood v. Florida Rock Industries, Supra at 545.

That issue is being raised on this appeal.

The First DCA, in Lundy v. Four Seasons Ocean Grand Palm Beach, Supra, found F.S.440.34(1) does not violate the equal protection clause or due process clause because F.S.440.34(1)(2003) bears a reasonable relationship to the

State's interest in regulating fees so as preserve the benefits awarded to the Claimant. Claimant respectfully submits the "rational basis" test employed in Lundy, Supra, is not the appropriate test, because a fundamental right is at stake requiring a "strict scrutiny" review, North Florida Woman's Health Services v. State, Supra.

Furthermore, imposing a statutory guideline fee on Employer/Carrier paid attorney's fees under F.S.440.34(3)(2003) does not in anyway preserve the benefits awarded to the Claimant, because it is a payment made over and above the benefits to which the Claimant is entitled. However, by capping the amount of the E/C paid attorney's fees, irregardless of the defenses raised by the E/C, completely defeats the Legislative intent of interpreting the Workers' Compensation Statute in a manner to ensure the quick and efficient delivery of needed benefits to the Claimant, F.S.440.015(2003).

The E/C is only required to pay a Claimants attorney's fee if they fail to provide benefits within thirty days after an E/C receives a Petition for Benefits, F.S.440.34(3)(2003). One of the purposes of requiring the E/C to pay Claimant's attorney for successfully prosecuting a claim is because an E/C's conduct in failing to pay benefits seriously interferes with the self executing process of the statute, Rivers v. SCA Services of Florida Inc., 488 So.2d 873(Fla.1st DCA 1986).

The First DCA in Lundy v. Four Seasons, Supra, also found that F.S.440.34(1)(2003) is not discriminatory, arbitrary or oppressive because it applies to all Claimants in a workers' compensation proceeding. Claimant contends F.S.440.34(1)(2003) is a violation of Claimant's equal protection rights because there is no corresponding limitation on the amount that an Employer/Carrier can pay their attorney.

F.S.440.105(3)(c)(2003) makes it unlawful for any attorney or other person to receive any fee or other consideration from a person on account of services rendered for a person in connection with any proceedings arising out of Chapter 440 unless such fee, consideration or gratuity is approved by a JCC. That statute also does not seem to apply to Employer/Carriers.

POINT III

IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN F.S.440.34(3)(2003) IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003) IS CORRECT, THEN F.S.440.34(1)(2003), 440.34(3)(2003) AND F.S.440.34(7)(2003) ARE UNCONSTITUTIONAL IN THAT THEY VIOLATE THE CLAIMANT'S DUE PROCESS RIGHTS UNDER THE PROVISIONS OF ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND ARTICLE XIV, SECTION I OF THE UNITED STATES CONSTITUTION.

The standard of review for a statute subject to a substantive due process challenge that infringes fundamental rights is the strict scrutiny standard of review, Smith v. Fisher, 965 So.2d 205(Fla.4th DCA 2007), Haire v. Florida

Department of Agriculture and Consumer Services, 870 So.2d 774(Fla.2004).

Article I, Section 9, of the Florida Constitution provides:

> "**Due process** – No person shall be deprived of life, liberty or property without due process of law. . ."

Similarly, Article XIV, Section I of the United States Constitution provides, inter alia:

> ". . . Nor shall any State deprive any person of life, liberty or property without due process of law. . ."

The term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals, Ramirez v. State, 902 So.2d 386(Fla.1st DCA 2006). To satisfy due process considerations, parties must be given a meaningful opportunity to present evidence and to be heard, A T & T Wireless Services Inc. v. Castro, 896 So.2d 828(Fla.1st DCA 2005). It includes the right to introduce evidence at a meaningful time and in a meaningful manner, Hinton v. Gold, 813 So.2d 1057(Fla.4th DCA 2002). The opportunity to be heard must be full and fair, not merely colorable or illusive, Smith v. Smith, 964 So.2d 217(Fla.2nd DCA 2007), Ernie Haire Ford Inc. v. Galley, 903 So.2d 956(Fla.2nd DCA 2005).

The opportunity to be represented by counsel in both civil and criminal proceedings is equated with due process, Times Publishing Company v. Burke, 375 So.2d 297(Fla.2nd DCA 1979).

Claimant respectfully submits that if F.S.440.34(1)(2003), F.S.440.34(3)(2003) and F.S.440.34(7)(2003) was correctly interpreted by the JCC and the First DCA in the case at bar and the other previously cited cases of the First DCA, then it constitutes a violation of Claimant's procedural and substantive due process rights. As previously indicated, if a Claimant's attorney's fee to be paid by the E/C is limited to the statutory guideline amount in all cases, including those which result in a "manifestly unfair" fee, the statute severely impairs, if not eliminates, the ability of Claimants to obtain the assistance of counsel, Wood v. Florida Rock Industries, Supra, concurring opinion of the Honorable Judge Barfield.

By severely impairing, if not eliminating the ability of Claimants to obtain the assistance of counsel, a Claimant's due process right to be heard, and to present evidence in a meaningful way, is eliminated. Any remaining due process rights of an injured worker is illusory, in that it is highly unlikely that an injured Claimant would possess the necessary legal skills to successfully prosecute a workers' compensation claim. As noted by the New Mexico Court in Horn v. New Mexico Educators Federal Credit Union, Supra, imposing the statutory cap on a Claimant's attorney's fee, particularly when it results in a manifestly unfair fee, imposes the risk of appearing without representation solely upon one class of litigants, the class

that traditionally has been thought of as disadvantaged in these kinds of proceedings, and the class in whose interest the workers' compensation legislation has been created, Horn v. New Mexico Educators Federal Credit Union, Supra at 243.

(Under one limited set of circumstances, not applicable herein, it was held Claimant did not have a Constitutional right to an attorney in a Workers Compensation case, McDermott v. Miami Dade County, 753 So.2d 729 (Fla.1st DCA 2000).

Additionally, the JCC's determination, and the First DCA's determination, that a Claimant's "reasonable attorney's fee" paid by the E/C per the provisions of F.S.440.34(3)(2003), is limited by the statutory guideline fee set forth in F.S.440.34(1)(2003), results in a facial violation of the Claimant's substantive due rights, by creating an irrebutable presumption which severely and unduly restricts a Claimant's attorney's fees in all cases. Prior to the 10/1/03 statutory amendment, the JCC could depart from the statutory guideline fee, when the presumptive fee produced by the statutory formula is "manifestly unfair", Davis v. Bonn Secours-Maria Manor, 892 So.2d 516(Fla.1st DCA 2004). Under the current interpretation of F.S.440.34(1)(2003), F.S.440.34(3)(2003) and F.S.440.34(7)(2003), there is no deviation from the statutory guideline fee. There is an irrebutable presumption that the statutory guideline fee produces a "reasonable fee".

This Honorable Court, in Recchi America Inc. v. Hall, 692 So.2d 153(Fla.1997), held a Claimant's constitutional rights to due process were violated by a workers' compensation statute which created an irrebutable presumption that the Claimant's injury in a drug free workplace was occasioned primarily by the Claimant's intoxication if the Claimant had positive confirmation of drug or blood alcohol level of .10% or more by weight at the time of the injury.

F.S.440.34(1)(2003) by creating an irrebutable presumption that the statutory guideline fee is, in all cases, a "reasonable fee" is also an unconstitutional denial of a Claimant's substantive due process rights. See also Olive v. Maas, Supra (statutory maximum fees may be unconstitutional when they are inflexibly imposed in cases involving unusual or extraordinary circumstances.)

POINT IV

IF THE DETERMINATION BY THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN F.S.440.34(3)(2003) IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003) IS CORRECT, THEN F.S.440.34(1)(2003), F.S.440.34(3)(2003) AND F.S.440.34(7)(2003) ARE UNCONSTITUTIONAL IN THAT THEY VIOLATE CLAIMANT'S RIGHT TO ACCESS TO THE COURTS, AS GUARANTEED BY ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION.

The right to go to court to resolve disputes is a fundamental right, Doctors Lake Inc. v. Brand Smart USA, 819 So.2d 971(Fla.4th DCA 2002). As such, a statute which impairs a

Claimant's ability to go to court to resolve disputes must be reviewed under the strict scrutiny standard, North Florida Woman's Health Services v. State, Supra.

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."

It is the responsibility of this Honorable Court to insure that every citizen has access to the courts, Lussy v. Fourth District Court of Appeal, 828 So.2d 1026(Fla.2002).

The pass constitutional muster, access to the courts must be more than merely formal, it must also be adequate, effective and meaningful, Chappell v. Rich, 340 F. 3rd 1279(11th Cir. 2003).

The provision of the State constitution governing access to courts is violated if the statute obstructs or infringes the right to access to the court to any significant degree, Mitchell v. Moore, 786 So.2d 521(Fla.2001).

If the JCC's order, and the First DCA's decision in the case at bar, is accepted, then the provisions of F.S.440.34(1)(2003), F.S.440.34(3)(2003) and F.S.440.34(7)(2003) are unconstitutional as applied, because they severely impair, if not eliminate, the ability of a Claimant to obtain the assistance of counsel, particularly in cases involving small monetary amounts. As such, the Claimant has been denied any effective and meaningful access to the courts. Clearly, no

attorney wants to undertake a contingent fee case when they will receive $8.11 an hour if they prevail. No attorney would be willing to risk $2,098.83 of their own money as advanced costs as did counsel for Claimant in the case at bar (V1-26), when all they can recover, if they prevail is $8.11 per hour.

In Lundy v. Four Seasons, Supra, the First DCA found F.S.440.34(1)(2003) does not deny access to the court because the argument lacked evidentiary support. In the case at bar, Claimant presented unrefuted testimony that if there is a finding in this case that would only yield a fee in the amount of $8 to $10 per hour, a Claimant would not be able to hire an attorney to represent them (V2-202,235,236). In the case at bar, Claimant presented testimony that it would be extremely difficult for a lay person to tackle the legal issues, the new law issues, the old law issues without the assistance of competent counsel (V1-169, V2-203,236).

Unquestionably an attorney is not going to be willing to accept representation of a Claimant in a contingent fee case, when the successful prosecution of that claim nets $8.11 per hour.

POINT V

IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN F.S.440.34(3)(2003) IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN F.S.440.34(1)(2003) IS CORRECT, THEN F.S.440.34(1)(2003), F.S.440.34(3)(2003) AND F.S.440.34(7)(2003) ARE UNCONSTITUTIONAL, IN THAT THEY VIOLATE THE SEPARATION OF POWERS PROVISIONS OF ARTICLE II, SECTION 3, ARTICLE V, SECTION 1 AND ARTICLE V, SECTION 15 OF THE FLORIDA CONSTITUTION.

Determination of an unconstitutional violation of separation of powers is de novo, Peninsular Properties Braden River LLC v. City of Bradenton, 965 So.2d 160(Fla.2nd DCA 2007).

Article II, Section 3 of the Florida Constitution provides as follows:

> **"Branches of government.** – 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 ascertaining to either of the other branches unless expressly provided herein."

Additionally, Article V, Section 15 of the Florida Constitution provides:

> "Section 15. **Attorney; admission and discipline.** – The Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

Claimant submits per the provisions of Article V, Section 15, of the Florida Constitution, this Honorable Court is the exclusive governmental regulator of attorneys and the practice of law. In Lee Engineering and Construction Company v. Fellows, Supra, this Honorable Court noted that "allowance of fees is a judicial function" Lee Engineering and Construction Company v.

Fellows, Supra at 457. In the exercise of that power, this Honorable Court has adopted Rule 4-1.5(b)(1)(A)-(H) of the Rules of Professional Conduct setting forth the factors for the determination of reasonable attorney's fees. The factors are similar to those factors enunciated by this Court in Lee Engineering and Construction Company v. Fellows, Supra, when this Honorable Court fined what constituted a "reasonable attorney's fee" in a workers' compensation case.

In Makemson v. Martin County, Supra, this Honorable Court held fee maximums are unconstitutional when applied to cases involving extraordinary circumstances or unusual representation. This Honorable Court stated:

> "While they are facially valid, we find the statute unconstitutional when applied in such manner as to curtail the Court's inherent power to ensure the adequate representation of the criminally accused. At that point, the statute loses its usefulness as a guide to Trial Judges in calculating compensation and becomes an oppressive limitation. As so interpreted, therefore, the statute impermissibly encroaches upon a sensitive area of judicial concern, and therefore violates Article V, Section 1 and Article II, Section 3 of the Florida Constitution." Makemson v. Martin County, Supra at 1112.

This Honorable Court in Makemson v. Martin County, Supra also stated:

> "We find that the Trial Court has here met its burden of showing that its actions in exceeding the statutory maximums was necessary in order to enable it to perform its essential judicial function of ensuring adequate representation by competent counsel. . ." Makemson v. Martin County, Supra at 1113.

Finally, this Honorable Court in Makemson v. Martin County, Supra, stated:

> "In summary, we hold that it is within the inherent power of the Florida Trial Courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents." Makemson v. Martin County, Supra at 1115.

The rationale of this Honorable Court in Makemson v. Martin County, Supra, has extended to certain civil proceedings in Florida. For example, the second DCA in Board of County Commissioners of Hillsborough County v. Scruggs, Supra, held, consistent with Makemson v. Martin County, Supra, that a statutory fee limit imposed by Section 39.415 is unconstitutional as applied to extraordinary and unusual civil dependency proceedings.

The rationale utilized by this Honorable Court in Makemson v. Martin County, Supra, has been applied by Sister Courts in workers' compensation proceedings, Irwin v. Surdyk's Liquor, 599 N.W. 132(Minn.. in 1999), Joseph v. Oliphant Roofing Company, 711 A. 2nd 805(Del. 1997).

In Minnesota, the Legislature enacted an inflexible fee cap in 1995 that was similar to the 2004 version of F.S.440.34 that is at issue here. Applying the same reasoning used by the Florida Supreme Court in Makemson, Supra, the Minnesota Supreme

Court struck down the fee cap on separation of powers grounds, Irwin v. Surdyk's Liquor, Supra.

In Irwin v. Surdyk's Liquor, Supra, the Minnesota Supreme Court recognized that delegation of quasi judicial functions to executive branch agencies, including regulation of attorney's fees, was permissible in legislative specialty areas such as taxation and workers' compensation "but only so long as the expansion of that delegation did not result in a significant impingement on the judicial branch", Irwin v. Surdyk's Liquor, Supra at 140.

The Minnesota court stated:

> "Thus, actions by the Commission, including regulation of attorney's fees, are permissible only so long as they lack judicial finality and are subject to judicial review. Accordingly, we do not take issue with the actual percentage or dollar limitations adopted by the Legislature in Minn. Stat. Section 176.081(1998). The Legislature has been vested with wide discretion in making laws and determining issues of public policy, even when those issues involve establishing attorney's fee guidelines. However, in order for the legislative guidelines to be constitutionally permissible, we must retain final authority over attorney's fee determinations." Irwin v. Surdyk's Liquor, Supra at 141.

The Minnesota Court went on to state legislation that prohibits any deviation from the precise statutory amount of awardable fees "impinges on the Judiciary's inherent power to oversee attorneys and attorney's fees by depriving this Court of a final independent review of attorney's fees." Irwin v. Surdyk's Liquor, Supra at 141,142. As such, the Minnesota court

in Irwin v. Surdyk's Liquor, Supra, held the inflexible fee cap was unconstitutional as it violated the doctrine of separation of powers contained in the Minnesota Constitution.

The First DCA in Lundy v. Four Seasons, supra at 509 held the legislature did not encroach upon the powers of the judiciary by amending section 440.34(1) to restrict the payment of fees to a percentage of benefits secured, because the state has a legitimate interest in regulating attorney's fees in workers compensation cases.

Claimant submits F.S.440.34(1)(2003), which prohibits any deviation from the precise statutory amount of awardable fees under any circumstance impinges on this Honorable Court's inherent power to oversee attorneys and attorney's fees by depriving this Honorable Court of a final independent review of attorney's fees. Claimant the inflexible fee cap in F.S.440.34(1)(2003) is unconstitutional because it violates the doctrine of separation of powers contained in the Florida Constitution.

Judges of Compensation Claims are executive branch officers, not judicial branch officers, Jones v. Chiles, 638 So.2d 48 (Fla. 1994). However, review of any Order of a JCC is by the First DCA, F.S. 440.271(2006) and therefore the Courts retain ultimate determination of a reasonable attorney fee in a Workers Compensation case.

CONCLUSION

Claimant that when a Claimant is entitled to an Employer/Carrier paid attorney's fee, Claimant is entitled to a "reasonable" fee per F.S.440.34(3)(2003) to be determined utilizing the Lee Engineering factors. Alternatively, Claimant submits a JCC, under exceptional circumstances, may exceed a statutory guideline fee.

If Employer/Carrier paid attorney's fees per the provisions of F.S.440.34(3)(2003) are capped at the statutory guideline amount set forth in F.S.440.34(1)(2003), then F.S.440.34(2003) is an unconstitutional denial of Claimant's equal protection, due process, access to the courts, and separation of powers.

Wherefore, Claimant respectfully requests this Honorable Court enter an order reversing the First DCA's opinion of 10/16/06, that this Honorable Court remand this matter back to the JCC for determination of a "reasonable" attorney's fee for counsel for Claimant, based on the Lee Engineering criteria, or alternatively find that F.S.440.34(2003) is unconstitutional.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPE FACE COMPLIANCE

I HEREBY CERTIFY that this Initial Brief on Jurisdiction for Petitioner was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.

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