

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

EMMA MURRAY,

Petitioner,

CASE NO.: SC07-244

vs.

Lwr Tribunal: 1D06-475

MARINER HEALTH/ACE USA,

Respondent.

_____ /

AMENDED PETITIONER'S REPLY BRIEF ON THE MERITS

BRIAN O. SUTTER, ESQUIRE
2340 Tamiami Trail
Port Charlotte, Florida 33952
Counsel for Claimant/Petitioner

BILL MCCABE, ESQUIRE
1450 SR 434 West,
Suite 200
Longwood, Florida 32750
Co-Counsel for
Claimant/Petitioner

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

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS . . . . .	.iii,iv
ARGUMENT	
POINT I	1
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 <u>F.S.440.34(3)(2003)</u> , IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN <u>F.S.440.34(1)(2003)</u> , EVEN WHEN IT RESULTS IN A "MANIFESTLY UNFAIR" FEE.	
POINT II	7
IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN <u>F.S.440.34(3)(2003)</u> IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN <u>F.S.440.34(1)(2003)</u> IS CORRECT, THEN <u>F.S.440.34(1)(2003)</u> AND <u>F.S.440.34(3)(2003)</u> AND <u>F.S.440.34(7)(2003)</u> 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 FEE PAID TO COUNSEL FOR THE E/C.	
POINT III	11
IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN <u>F.S.440.34(3)(2003)</u> IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN <u>F.S.440.34(1)(2003)</u> IS CORRECT, THEN <u>F.S.440.34(1)(2003)</u> , <u>F.S.440.34(3)(2003)</u> AND <u>F.S.440.34(7)(2003)</u> 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	14
IF THE DETERMINATION OF THE JCC AND THE FIRST DCA THAT A "REASONABLE ATTORNEY'S FEE" AS SET FORTH IN <u>F.S.440.34(3)(2003)</u> IS LIMITED TO THE STATUTORY GUIDELINE FEE SET FORTH IN <u>F.S.440.34(1)(2003)</u> IS CORRECT, THEN <u>F.S.440.34(1)(2003)</u> , <u>F.S.440.34(3)(2003)</u> AND <u>F.S.440.34(7)(2003)</u> 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 14

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 2, SECTION 3, ARTICLE 5, SECTION 1 AND
ARTICLE 5, SECTION 15 OF THE FLORIDA CONSTITUTION.

CONCLUSION15

CERTIFICATE OF SERVICE16

CERTIFICATE OF TYPE FACE COMPLIANCE18

TABLE OF CITATIONS

	Page
<u>Board of County Commissioners of Hillsborough County v. Scruggs,</u> 545 So.2d 910(Fla.2 nd DCA 1989).	6
<u>Campbell v. Aramark,</u> 933 So.2d 1255(Fla.1st DCA 2006), Rev. Den., 944 So.2d 986(Fla.2006).	3
<u>Corn v. New Mexico Educators Federal Credit Union,</u> 889 P. 2 nd 234(N.M. Court of App 1994).	7,8
<u>Florida Erection Services Inc. v. McDonald,</u> 395 So.2d 203(Fla.1st DCA 1981).	4
<u>Irwin v. Surdyk's Liquor,</u> 599 N. W. 132(Minn 1999).	7,15
<u>Isaac v. Green Iguana, Inc.</u> 871 So.2d 1005 (Fla. 1 st DCA 2004	13
<u>Jones v. Chiles,</u> 638 So.2d 48 (Fla. 1994)	15
<u>Joseph v. Oliphant Roofing Company,</u> 711 A. 2 nd 805(Del Supp 1997).	7
<u>La Petite Academy v. Duprey,</u> 948 So.2d 868(Fla.1st DCA 2007), Rev. Den. 963 So.2d 277(Fla.2007).	3,12
<u>Lee Engineering and Construction Company v. Fellows,</u> 209 So.2d 454(Fla.1968).	2,4,6,15
<u>Level Three Communications, LLC v. Jacobs</u> 841 So.2d 447 (Fla. 2003)	11
<u>Lundy v. Four Seasons Ocean Grand Palm Beach,</u> 932 So.2d 506(Fla.1st DCA 2006), Rev. Den., 939 So.2d 93(Fla.2006).	3
<u>Makemson v. Martin County,</u> 491 So.2d 109(Fla.1986).	6
<u>Medina v. Gulf Coast Linen Services,</u> 825 So.2d 1018(Fla.1st DCA 2002).	7

<u>Pilon v. Okeelanta Corporation,</u> 574 So.2d 1200(Fla.1st DCA 1991)	. . . . .	.1,6
<u>Polote Corp. v. Meredith,</u> 482 So.2d 515 (Fla. 1 st DCA 1986)	. . . . .	.10
<u>Recchi America, Inc. v. Hall</u> 692 So.2d 153 (Fla. 1997)	. . . . .	12
<u>Rucker v. City of Ocala</u> 684 So.2d 836 (Fla. 1 st DCA 1996)	. . . . .	.13
<u>What an Idea Inc. v. Citgo,</u> 505 So.2d 497(Fla.1st DCA 1987)	. . . . .	6
<u>Wood v. Florida Rock Industries,</u> 929 So.2d 542 (Fla. 1 st DCA 2006)	. . . . .	.13

FLORIDA STATUTES

440.015(2003)	. . . . .	.10
440.09(4)(a)(2003)	. . . . .	7
440.105(4)(f)(2003)	. . . . .	.7
440.271(2006)	. . . . .	15
440.34(1)(2003)	. . . . .	4,8,9,12
440.34(3)(2003)	. . . . .	4,8,9,10,12,13
40.34(3)(a) through (d)	. . . . .	.1
440.34(3)(b)(2003)	. . . . .	9
440.34(5)(2003)	. . . . .	12
440.34(7)(2003)	. . . . .	.5

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 E/C argue the interested party who would be affected by any decree issued by this Honorable Court is trial counsel, Brian Sutter (AB-1). Claimant disagrees, in Pilon v. Okeelanta Corporation, 574 So.2d 1200(Fla.1st DCA 1991), the First DCA held it was the employee, not the attorney, who was the "true party in interest" in an appeal of an attorney's fee award. As stated by the First DCA:

". . . Although any funds at issue in this appeal would not reach Claimant Pilon directly, the payment of a fee to his counsel by the Employer/Carrier is, in effect, a benefit. The legislative determination that a fee is payable by the Employer/Carrier and the circumstances enumerated in Section 440.34(3)(a) through (d) reflects a public policy decision that Claimants **are entitled to and are in need of counsel under those conditions**. As Appellant argued below, and in this Court, a barrier to review a decision to award a fee below the statutory schedule could ultimately result in a net loss of attorneys willing to represent workers' compensation Claimants. This could ultimately result in a chilling effect on Claimant's ability to challenge Employer/Carrier decisions to deny claims for benefits and disrupt the equilibrium of the parties' rights intended by the Legislature in enacting Section 440.34." Pilon v. Okeelanta Corporation, Supra at 1201. (emphasis mine).

Contrary to the E/C's assertion (AB-1), Claimant is not arguing that attorneys representing injured workers should be

compensated for their time by the hour. Claimant contends per the provisions of F.S.440.34(3)(2003) Claimant is entitled to a "reasonable" attorney's fee from an Employer/Carrier. In determining what constitutes a "reasonable" fee there are many factors to consider, as set forth by this Honorable Court in Lee Engineering and Construction Company v. Fellows, 209 So.2d 454(Fla.1968).

The E/C argue an offer of settlement had been tendered in this case prior to trial and had the offer of settlement been accepted by Claimant she would have received more money than she was awarded and her attorney would have received a greater fee (AB-2).

The Offer of Settlement filed by the E/C in this case did not admit the compensability of the condition claimed (V1-77). The JCC found, in addition to numerous technical deficiencies in the "Offer of Settlement", the document was ineffectual (V2-311). The JCC found Claimant's recovery exceeded the amount offered because her case was found to be compensable at trial which preserved her right to seek future medical and indemnity benefits that may arise (V2-311). Unlike the proceeds of a negotiated settlement, the award of benefits to Claimant at trial is not subject to any lien held by the group health carrier for payments made for Claimant's surgery (V2-311). Had the offer been accepted Claimant would have potentially

subjected herself to another lawsuit by the group carrier's attempt to recover that lien (V2-311). The Offer of Settlement did not specify the amount of costs to be reimbursed (V2-311).

The E/C argue, based on the minimal damages ultimately at issue and the hours required to secure an award, it is obvious this case was selected especially for this constitutional challenge (AB-3). Claimant disagrees. Claimant did not seek counsel until 12/12/03 (V1-29), which was one day after the E/C totally controverted Claimant's entitlement to benefits on 12/11/03 (V1-15).

The E/C argue trial counsel was not a novice attorney caught unaware by an unfair statutory scheme (AB-3). When counsel for Claimant accepted this case on 12/12/03, there was no Appellate decision which interpreted the phrase "a reasonable attorney's fee" to equate to an hourly fee of \$8.11 per hour.

The E/C argue this Honorable Court has previously been presented with the constitutional challenges raised by Claimant 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). In those cases, this Honorable Court denied review based on the question certified by the First DCA

as one of great public importance. This Honorable Court, however, has not rendered any decision governing the interpretation of F.S.440.34 as amended effective 10/1/03.

E/C argues Claimant strains the clear and unambiguous language of the statute in arguing that a later provision found at F.S.440.34(3)(2003) which entitles a prevailing Claimant to recover a "reasonable" attorney's fee from a carrier or employer supersedes the section set forth above, which is F.S.440.34(1)(2003) (AB-8). Claimant disagrees. F.S.440.34(3)(2003) which is the only subsection involving recovery an award of an attorney's fee to be paid by the E/C under one of four circumstances, entitles the Claimant to recover a "reasonable" attorney's fee. This Honorable Court in Lee Engineering and Construction Company v. Fellows, 209 So.2d 454(Fla. 1968), defines what constitutes a "reasonable" attorney's fee in a workers' compensation case. Claimant submits nothing has occurred since Lee Engineering, Supra, which would alter the definition of the word "reasonable".

The E/C argue 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). Florida Erection Services Inc. v. McDonald, Supra, dealt strictly with the definition of "bad faith" which was one ground a Claimant had to establish at the time in order to be entitled

to recover a "reasonable" fee from the E/C. The requirement that Claimant establish "bad faith" as a ground for securing a reasonable fee from the E/C was eliminated by the laws of Florida in 1989, see Chapter 89-289 Section 19 effective October 1, 1989.

The E/C argue that, as to fairness, the Legislature made an accommodation for those cases involving medical benefits unjustly denied to the Claimant (AB-10). The E/C argues in those cases the E/C can be assessed an hourly fee up to \$1,500 per Florida Statute 440.34(7)(2003). The E/C argue it is only indemnity issues for which a statutory fee formula strictly applies (AB-10). Claimant disagrees. F.S.440.34(7)(2003) provides as follows:

(7) If an attorney's fee is owed under paragraph (3)(a), the Judge of Compensation Claims may approve an alternative attorney's fee not to exceed \$1,500 only once per accident, based on a maximum hourly rate of \$150 per hour, if the Judge of Compensation Claims expressly finds that the attorney's fee amount provided for in subsection (1) based on benefits secured fails to compensate the attorney for disputed medical only claims as provided in paragraph (3)(a) and the circumstance of the particular case warrants such action."

The E/C argues, 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 (AB-10). The E/C argue the current legislation provides the employee with a

payment of a attorney's fees so that they can net the total amount of benefits secured (AB-10).

Claimant submits the purpose of F.S.440.34 is to create an equilibrium between the parties, Pilon v. Okeelanta Corporation, Supra. As this Honorable Court noted in Lee Engineering and Construction Company v. Fellows, Supra,

"It is obvious that fees should not be so low that capable attorneys will not be attracted, nor so high as to impair the compensation program." Lee Engineering and Construction Company v. Fellows, Supra at 457.

The E/C argue in the case of What an Idea Inc. v. Citgo, 505 So.2d 497(Fla.1st DCA 1987) guidelines sought by Claimant's counsel amounted to \$2,700 per hour (AB-11). In What an Idea Inc. v. Citgo, Supra, the JCC deviated downward from the statutory guideline fee after considering the factors enunciated in Lee Engineering, Supra, which at the time, were codified. In that case counsel for Claimant secured \$17.6 million dollars of benefits for the Claimant in a contested case.

The E/C argue 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, cases relied upon by Claimant in her Initial Brief (IB-29,30), are applicable to their limited statutory construction. 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 Supp 1997).

Claimant would also note one of the defenses raised by the E/C in controverting Claimant's entitlement to compensation benefits in the case at bar, was that Claimant engaged in fraud per the provisions of F.S.440.105(2003). That statute, in addition to operating as a complete bar to workers' compensation benefits, Medina v. Gulf Coast Linen Services, 825 So.2d 1018(Fla.1st DCA 2002), F.S.440.09(4)(a)(2003), also carries with it criminal sanctions, F.S.440.105(4)(f)(2003). Claimant, through counsel, was able to overcome the defense of the alleged 440.105 violation (V2-309).

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 FEE PAID TO COUNSEL FOR THE E/C.

Under this point on appeal, the E/C does not discuss the case of Corn v. New Mexico Educators Federal Credit Union, 889 P. 2nd 234(N.M. Court of App 1994), wherein 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 in the amount of attorney's fees an Employer/Carrier could pay their attorney.

The E/C argue 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 (AB-14). Claimant disagrees. As stated by the New Mexico court in Corn, Supra:

"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. . ." Corn v. New Mexico Educators Federal Credit Union, Supra at 243.

The E/C argue the Legislature, by using the specific words "must" and "shall not" in F.S.440.34(1) set forth a clear and unambiguous mandate to eliminate the award of hourly attorney's fees payable by the E/C to the Claimant (IB-16). F.S.440.34(1)(2003) does not involve payment of attorney's fees from the E/C to the Claimant, 440.34(3)(2003) which mandates payment of a "reasonable attorneys fee" does.

The E/C argue the real issue here involves equal protection for injured workers' attorneys (AB-17). Claimant disagrees. The real issue here involves a Claimant's ability to secure counsel. A statute which can be interpreted to allow an attorney's fee of

\$8.11 per hour would severely impair, if not eliminate, the ability of Claimants to obtain the assistance of counsel. Without counsel, it is highly unlikely an injured Claimant would possess the necessary legal skills to successfully prosecute a workers' compensation claim. The only evidence presented in this case establishes Claimants are unable to handle a case like this themselves due to the complex workers' compensation litigation system (V1-169, V2-203,236).

The E/C argue by amending the fee provisions of F.S.440.34(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 insurers (AB-19,20). There is a difference between the amount of an attorney's fee a Claimant pays his attorney per the provisions of F.S.440.34(1)(2003) versus a reasonable attorney's fee to be paid by the Employer/Carrier per the provisions of F.S.440.34(3)(2003). A Claimant is not entitled to recover attorney's fees from an Employer/Carrier per the provisions of F.S.440.34(3)(b)(2003) unless one of four enumerated events occurs, and only if the E/C fails to provide the requested benefits for more than thirty days after the date the E/C receives the Petition for Benefits, F.S.440.34(3)(2003). When an E/C denies a request for benefits for more than thirty days, the E/C is now taking a position contrary to the legislative intent

expressed in F.S.440.015(2003) 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". Under such circumstances, a Claimant should have the same ability to retain counsel as does the E/C. It is a denial of Claimant's equal protection rights if a statutory cap is imposed on the amount of attorney fees counsel for Claimant can recover, but no such corresponding cap is imposed upon counsel for the E/C.

The E/C argue the legislature, in amending F.S. 440.34(3)(2003) even handedly extended the same guidelines for fees injured workers had been using to pay their attorneys to the fee awards entered against carriers. Claimant submits the legislature has imposed a mandatory cap on the amount of attorney fees a Claimant's counsel can receive without imposing any such cap upon the amount of fees an E/C's counsel can receive, thereby violating a Claimant's equal protection rights.

The E/C, relying on Polote Corp v. Meredith, 482 So.2d 515 (Fla. 1st DCA 1986) argue that even in those cases where the claimant had been paid indemnity benefits under the statutory maximum, an award of attorneys fees would be ordered. In Polote, supra, Claimant's attorney had to litigate the compensability of the injury, then litigate the permanency of

the disability and as such counsel for Claimant was entitled to an attorney fee from the E/C.

The E/C argue the rational basis standard should apply. Claimant disagrees and submits the strict scrutiny standard should apply because F.S. 440.34(2003) abridges a fundamental right, Level Three Communications LLC v. Jacobs, 841 So.2d 447 (Fla. 2003). However, even if the rational basis standard applies, Claimant submits there is no rational basis to cap the amount of fees counsel for claimant may be paid, with no such cap on the amount of fees counsel for the E/C may be paid.

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), F.S.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 E/C argue the appeal itself demonstrates the fee guidelines found in F.S. 440.34(2003) presented no obstacle to Claimant obtaining attorneys to handle her case at both the trial and the appellate levels (AB-26). Claimant retained Trial Counsel on 12/12/03, prior to any Appellate ruling restricting a "reasonable fee" to an inflexible statutory guideline regardless of the circumstances. Additionally, not all JCC's interpreted F.S. 440.34(3)(2003) in the manner the JCC and the First DCA

interpreted it in the case at bar. For example, in La Petite Academy v. Duprey, , supra, the JCC interpreted F.S. 440.34(3)(2003) to provide for a reasonable fee for Counsel for Claimant, not one restricted to the statutory guideline found in F.S. 440.34(1)(2003).

The Appellate attorney fee found in F.S. 440.34(5)(2003) was not affected by the 10/1/2003 amendments to F.S. 440.34(1)(2003) and is not at issue in this case.

The E/C argue the analysis set forth in Recchi America, Inc. v. Hall, 692 So.2d 153 (Fla. 1997), a case relied on by Claimant in her Initial Brief (AB-15,42) clearly supports the conclusive presumption that a "reasonable fee" as defined by Florida statutes is not violative of due process. Claimant respectfully disagrees. In Recchi America, Inc. v. Hall, supra, This Honorable Court stated an irrebutable (conclusive) presumption violates the constitutional right to due process.

Using the three pronged analysis stated by this Honorable Court in Recchi, supra for determining the constitutionality of a conclusive presumption, the E/C argue the legislature has prevented abuse of excessive payment of fees by the claimant and a resulting reduction of his or her benefits, thereby satisfying the initial prong of the Recchi test. There is no abuse of excessive payment of fees to prevent. Counsel for Claimant is only entitled to recover a "reasonable fee" from the E/C and

only when the E/C fails to timely provide benefits to an injured worker and the Claimant's attorney successfully prosecutes a Claim for those benefits. Additionally, a Claimant's benefits are not in any way reduced when the E/C pays Claimant's attorney fees per F.S. 440.34(3)(2003).

The E/C argue 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, satisfying the second prong. If a reasonable fee is conclusively presumed to be the statutory guideline under all circumstances, 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, 929 So.2d 542 (Fla. 1st DCA 2006), concurring opinion of the Honorable Judge Barfield. An injured employees right to receive workers' compensation benefits is a property right protected by procedural Due process safeguards, Isaac v. Green Iguana, Inc., 871 So.2d 1005 (Fla. 1st DCA 2004), Rucker v. City of Ocala, 684 So.2d 836 (Fla. 1st DCA 1996). Without assistance of counsel, Claimant's due process right to be heard and present evidence in a meaningful way is eliminated.

The E/C argue the third prong is satisfied as the legislative goal of reducing premiums paid by employers has no direct impact on the benefits awarded to the Claimant. The

Claimant submits without assistance of counsel, there could be a substantial impact on the benefits awarded Claimant. The Claimant in the case at bar most likely would have received no benefits if not for assistance of counsel.

The E/C argue F.S. 440.34(2003) does not create a presumption as that term is usually referenced, but rather is a mandatory guideline for fees (AB-33). Claimant disagrees. It creates an irrebutable presumption that the statutory guideline fee is a "reasonable fee" under all circumstances.

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.

The E/C state there is nothing in this record indicating Claimant had difficulty securing counsel. Counsel for Claimant was retained on 12/12/03 before any appellate decision interpreting F.S. 440.34(3)(2003) had been issued.

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 2, SECTION 3, ARTICLE 5, SECTION 1 AND ARTICLE 5, SECTION 15 OF THE FLORIDA CONSTITUTION.

Claimant acknowledges 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). Claimant submits, pursuant to Article V, Section 15, of the Florida Constitution, this Honorable Court is the exclusive governmental regulator of attorneys and the practice of law. Allowance of Fees is a judicial function, Lee Engineering v. Fellows, supra.

The E/C does not discuss in their Answer Brief, under this Point, Irwin v. Surdyk's Liquor, 599 N.W. 132 (Minn. 1999), a case relied on by Claimant in her Initial Brief (IB 47-49) wherein the Minnesota Supreme Court held 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".

CONCLUSION

Claimant adopts and re-alleges the conclusions set forth in the Initial Brief of Petitioner (IB-50).

Bill McCabe, Esquire
1450 SR 434 West,
Suite 200
Longwood, Florida 32750
(407)830-9191
Fla. Bar No.: 157067

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this 19th day of February, 2008 to: Brian O. Sutter, 2340 Tamiami Trail, Port Charlotte, Florida 33952 (Attorney for Petitioner), and John R. Darin, II, P. O. Box 2753, Orlando, Florida 32802-2753 (Attorney for Respondent), Wendy S. Loquasto, 314 West Jefferson Street, Tallahassee, Florida 32301 (Attorneys for Voices, Inc.), William H. Rogner, 1560 Orange Avenue, Suite 500, Winter Park, Florida 32789-5552 (Attorney for Zenith Insurance Co.), Roy D. Wasson, 5901 SW 74th Street, Suite 205, Miami, Florida 33143-5150 (Attorney for David Singleton), Richard A. Sicking, 1313 Ponce de Leon Boulevard, Suite 300, Coral Gables, Florida 33134 (Attorney for Florida Professional Firefighters, Inc., International Association of Firefighters and AFL-CIO), Susan W. Fox, 112 N. Delaware Avenue, Tampa, Florida 33606 (Attorney for Voices), Rayford H. Taylor, P. O. Box 191148, Atlanta, Georgia 31119-1148 (Attorney for Florida Insurance Council FIC), L. Barry Keyfetz, 44 West Flagler Street, Suite 2400, Miami, Florida 33130 (Attorney for Florida Justice Association), Barbara Wagner, 2101 N. Andrews Avenue, Suite 400, Fort Lauderdale, Florida 33311-3940 (Attorney for Florida Workers' Advocates), Marcia Lippincott, P. O. Box 953693, Lake Mary,

Florida 32795-3693 (Attorney for Seminole County School Board), Scott B. Miller, 1560 Orange Avenue, Suite 500, Winter Park, Florida 32789-5552 (Attorney for Florida Association of Self Insurance), George N. Meros, Jr. and Andy V. Bardos, P. O. Box 11189, Tallahassee, Florida 32302, (Attorneys for Florida Justice Reform Institute; Association Builders and Contractors, Inc.; the Florida Transportation Builders Association; the Florida Retail Federation; the National Federation of Independent Business Legal Foundation, The Chamber of Commerce of the United States of America and the Florida Chamber of Commerce), Todd J. Sanders, 807 West Morse Boulevard, Suite 201, Winter Park, Florida 32789 (Attorney for PBA), Mary Ann Stiles, P. O. Box 460, Tampa, Florida 33601 (Attorney for Florida Insurance Council), Thomas A. Koval, 6300 University Parkway, Sarasota, Florida 34240 (Attorney for Florida Insurance Council), Mark L. Zientz, 9130 South Dadeland Boulevard, Suite 1619, Miami, Florida 33156 (Attorney for Workers' Compensation Section of the Florida Bar), Cheryl L. Wilke, One East Broward Boulevard, Suite 1010, Fort Lauderdale, Florida 33301, Carol M. Folson, 50 N. Laura Street, Suite 3900, Jacksonville, Florida 32202-3622 (Attorney for Florida Hospitality Mutual Ins. Co.), Richard W. Ervin, III, 1201 hays Street, Suite 100, Tallahassee, Florida 32301 (Attorney for Voices, Inc.), Tamela Ivey Perdue, P.O. Box 1140, Tallahassee, Florida 32302-1140 (Attorney for

Associated Industries of Florida, Inc.), Robin S. Conrad,
National Chamber Litigation Center, Inc., 1615 H Street, N.W.,
Washington, D.C. 20062.

Bill McCabe, Esquire
Shepherd, McCabe & Cooley
1450 SR 434 West,
Suite 200
Longwood, Florida 32750
(407) 830-9191
Fla. Bar No.: 157067
Co-Counsel for Petitioner

CERTIFICATE OF TYPE FACE COMPLIANCE

I HEREBY CERTIFY that this Reply Brief on the Merits 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.

Bill McCabe, Esquire
1450 SR 434 West,
Suite 200
Longwood, Florida 32750
(407) 830-9191
Fla. Bar No.: 157067