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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

BRADLEY WESTPHAL,

Petitioner,

vs.

CITY OF ST. PETERSBURG/
CITY OF ST. PETERSBURG
RISK MANAGEMENT and
STATE OF FLORIDA,

Respondents. /

CASE NO.: SC13-1930

Lwr. Tribunal: 1D12-3563
OJCC Case No. 10-019508SLR

INITIAL BRIEF OF PETITIONER, BRADLEY WESTPHAL, ON THE MERITS

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A. THE MAJORITY CREATED TEMPORARY PERMANENT TOTAL DISABILITY, A DIFFERENT CATEGORY OF BENEFITS NOT PROVIDED FOR BY THE LEGISLATURE;

1. THIS VIOLATES SEPARATION OF POWERS;

2. THIS VIOLATES DUE PROCESS OF LAW, SINCE

a. IT IS PREDICATED ON THE EMPLOYEE REACHING STATUTORY MAXIMUM MEDICAL IMPROVEMENT AT 104 WEEKS AFTER THE ACCIDENT AS A MATTER OF LAW, WHICH IS AN INVALID CONCLUSIVE PRESUMPTION;

b. IT IS PREDICATED UPON THE TREATING PHYSICIAN RATING THE EMPLOYEE'S PERMANENT IMPAIRMENT 6 WEEKS BEFORE THE 104 WEEKS ANNIVERSARY OF THE DATE OF ACCIDENT, EVEN THOUGH THE EMPLOYEE HAS NOT FACTUALLY REACHED MAXIMUM MEDICAL IMPROVEMENT;

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A. IT IS NOT AN ADEQUATE REMEDY COMPARED TO THE 350 WEEKS AVAILABLE IN THE 1967 FLORIDA WORKERS' COMPENSATION LAW WHEN THE PEOPLE VOTED FOR THE ACCESS TO COURTS PROVISION;

B. IT IS NOT AN ADEQUATE REMEDY IN TERMS OF NATURAL JUSTICE AND FUNDAMENTAL FAIRNESS -- DUE PROCESS OF LAW;

C. IT IS NOT AN ADEQUATE REMEDY COMPARED TO THE DURATION OF TEMPORARY TOTAL DISABILITY IN OTHER STATES;

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STATEMENT OF THE CASE AND FACTS

The petitioner, Bradley Westphal, was the appellant in the appeal before the Florida First District Court of Appeal and the claimant/employee before the Judge of Compensation Claims in this workers' compensation case. The respondent, City of St. Petersburg, was an appellee before the First District Court of Appeal and the employer before the Judge of Compensation Claims. The City of St. Petersburg Risk Management was a party alongside the City. The other respondent is the State of Florida, which was an appellee before the First District Court of Appeal.

Bradley Westphal was a firefighter employed by the City of St. Petersburg. He was injured fighting a fire on December 11, 2009. (R. 447). He had three surgeries; one to his left knee and two to his low back. The second was a five-level lumbar fusion on April 11, 2012, just some 8 months before the 104 weeks anniversary of his accident on December 11, 2009. (R. 448). He was paid temporary total disability for this period of time. (R. 45, 62, 448). However, the City stopped paying workers' compensation after the 104 weeks anniversary of the accident. (R. 45, 62). About 9 months later, the City accepted that Westphal was permanently totally disabled. *Westphal II*, 449, 451.

Westphal filed a petition for benefits (PFB) claiming further

temporary disability or permanent total disability. (R. 38, 44-45). After hearing, the Judge of Compensation Claims denied the claim for total disability, finding that it was premature to determine permanent total disability because the claimant had not reached maximum medical improvement. In this regard, he relied on *Matrix Employee Leasing, Inc. v. Hadley*, 78 So. 3d 621 (Fla. 1st DCA 2011). (R. 448-449).

Westphal appealed to the First District Court of Appeal, contending inter alia, that the 104 weeks statutory limitation on temporary total disability was unconstitutional. The panel decision of the First District Court of Appeal agreed and held that the 104 weeks limitation on temporary total disability was invalid as applied to the facts of this case. *Westphal I.*

The panel decision, *Westphal I*, relied on the en banc decision in *Matrix Employee Leasing, Inc. v. Hadley*, supra, that it was premature to award permanent total disability when the employee had not reached factual maximum medical improvement and that the statutory provision of maximum medical improvement at 104 weeks after the accident did not allow an award of further temporary total disability. *Westphal I* pointed out that there was no constitutional question presented or decided in *Hadley*. The panel decision held that the 104 weeks limitation on temporary total disability was an inadequate remedy compared to the 350 weeks available

when the people voted for the Access to Courts provision in the 1968 Florida Constitution, relying on *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). *Westphal I* also pointed out that the 104 weeks limitation on temporary total disability was the lowest in the United States and that it did not comport with 14th Amendment due process of law as determined by the U.S. Supreme Court in *N.Y. Cent. R. R. Co. v. White*, 243 U.S. 188, at 202, 37 S. Ct. 247, 61 L. Ed. 667 (1917). The panel decision held that the amendment providing for the 104 weeks limitation was unconstitutional prospectively as applied. Therefore, the limitation was 260 weeks contained in the previous statute. *Westphal I* at D508.

The City and the State filed motions for rehearing en banc. The First District Court of Appeal granted rehearing en banc in *Westphal II* which involved a majority of eight judges, with separate concurring opinions, a concurring and dissenting opinion, and a dissenting opinion.

The majority withdrew the panel decision and held that the Court receded from the previous en banc decision in *Matrix Employee Leasing, Inc. v. Hadley*, 78 So. 3d 621 (Fla. 1st DCA 2011). On this basis, the case was remanded to the Judge of Compensation Claims to allow Westphal to claim temporary permanent total disability because the statute provides for maximum medical improvement as a matter of law at the 104 weeks

anniversary of the date of accident, even though Westphal had not factually reached maximum medical improvement. The majority noted that the City later had accepted that Westphal was permanently totally disabled, leaving some nine months gap in benefits. However, the First District Court of Appeal certified the following question to the Supreme Court of Florida:

> Is a worker who is totally disabled as a result of a workplace accident, but still improving from a medical standpoint at the time temporary total disability benefits expire, deemed to be at maximum medical improvement by operation of law and therefore eligible to assert a claim for permanent and total disability benefits?

Westphal II, 448.

Both Westphal and the City have filed a notice to invoke the Supreme Court's jurisdiction, which the Supreme Court accepted.

"*Westphal I*" refers to *Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management and State of Florida*, 2013 WL 718653 (Fla. 1st DCA Feb. 28, 2013); 38 Fla. L. Weekly D504 (Fla. 1st DCA Feb 28, 2013).

"*Westphal II*" refers to *Westphal v. City of St. Petersburg*, en banc, 122 So. 3d 440 (Fla. 1st DCA 2013).

"Appendix" refers to the Appendix to the Supplemental Brief of Appellant filed in *Westphal v. City of St. Petersburg*, Fla. 1st DCA Case No. 1D12-3563, and contained in the Brief Record.

SUMMARY OF ARGUMENT

POINT ONE

The majority en banc decision is incorrect. It is judicial legislation in violation of separation of powers. Fla. Const., Art. II, §3. It creates a category of disability that the Legislature did not create. It even has a name, called "temporary permanent total disability", which is a mismatch of terms.

It omits the vocational test for real permanent total disability -- the 50-mile radius work search required by the Legislature.

Temporary permanent disability is based on statutory maximum medical improvement (MMI) at the 104 weeks anniversary of the industrial accident. The Legislature has determined that everyone gets as well as they will ever get at the 104 weeks anniversary of the industrial accident, if they had not factually done so earlier. This is a conclusive presumption not based on fact. It is actually contrary to fact in the present case and cannot be rebutted. This is contrary to due process of law.

Temporary permanent total disability is based on a physician rating permanent impairment 6 weeks before the 104 weeks anniversary of the accident, even though the employee has not reached MMI. This is contrary to the statutory definition of maximum medical improvement. The compulsory rating of permanent impairment prior to maximum medical

improvement violates due process of law.

POINT TWO

The panel decision is correct that 104 weeks limitation on temporary total disability is unconstitutional as applied to the facts of this case and unconstitutional prospectively.

Further, the current Florida Workers' Compensation Law is unconstitutional in total, as it is not an adequate remedy in terms of access to courts and due process of law.

The access to courts provision in the 1968 Florida Constitution, Art. I, §21, concerns what voters knew the common law and statutory remedies to be when they voted. The 1967 Workers' Compensation Law had a 350 weeks limitation on temporary disability (now 104); permanent total disability was for life (now to age 75); there was full medical care without apportionment and no co-pay (now apportionment and co-pays); there was a workplace safety act (now repealed); the employee had some rights in connection with the selection of a physician (now none); there were scheduled injuries and impairment benefits or loss of earning capacity for permanent partial disability (now none for loss of earnings); there were presumptions by statute (now repealed); there was no limitation of one IME per accident; there was no EMA provision, which makes one expert medical

witness' opinion better than all others as a matter of law; there was no 1% impairment limitation on psychiatric injury; there was no clear and convincing burden of proof, and so on. Since 1968, there have been numerous other substantial take-aways. The current law is completely different and inadequate by comparison to the 1967 law.

Workers' compensation laws are an example of early social/economic legislation, which were enacted following the Triangle Shirtwaist Factory Fire in 1911. Such laws became a national policy, state by state, prior to 1920, except for eight states. Florida's was enacted in 1935. Now, all states have workers' compensation laws to assist injured workers.

Kluger vs. White, infra, holds that the test of constitutional validity in terms of access to courts is a comparison of a current statutory remedy to the common law and statutory remedies that existed in 1968 when the people voted for access to courts. The Supreme Court gave an example of such a statutory remedy: workers' compensation laws. The comparison is not the current workers' compensation law to the common law because that was a statutory substitution that was made a hundred years ago and approved of by the Supreme Court of the United States in 1917. The common law remedies for employees simply did not exist in 1968, so that is not the comparison.

The 104 weeks limitation on temporary total disability is not an

adequate remedy compared to other states. Florida is tied for dead last according to the U.S. Dept. of Labor comparison table cited in Larson and the panel decision. It also compares badly to the sister southern states.

The 104 weeks limitation on temporary total disability is not adequate according to the *Thompson* case, infra, in which the Florida Supreme Court recommended that the Legislature increase the 350 weeks limitation. Instead, the Legislature reduced it to 260 weeks, and then 104 weeks. The Supreme Court said that it could not do anything about this at that time, *Thompson*, infra. However, this was before *Kluger vs. White*, infra. Now it can be done.

Florida does not have full medical benefits anymore according to the U.S. Dept. of Labor comparison table cited in Larson and the panel decision. Earlier workers' compensation/constitutional law cases like *Acton*, infra, *Sasso*, infra, *Martinez vs. Scanlon*, infra, and *Bradley*, infra, rationalized reductions in indemnity as being constitutionally valid because the law still provided for full medical care. Now, there is an employee co-pay after maximum medical improvement. More importantly, current law has the employee's burden to prove major contributing cause. This was borrowed from Oregon, but the Oregon Supreme Court has declared it unconstitutional as applied in Oregon. Here is how it works: If the need for medical

treatment or disability is caused by a compensable injury, by less than 50%, the employer gets full immunity from suit and the employee gets nothing. If the need for medical treatment or disability is caused by a compensable injury, by more than 50% but less than 100%, the employer gets full immunity from suit and the employee has to pay a portion of the medical expenses (presumably out of his also reduced indemnity payment). The employee's burden of proof in regard to major contributing cause must be based on medical opinion evidence only, excluding lay evidence. However, selection of medical witnesses is limited to physicians authorized by the employer/carrier, but the employee can only have one IME per accident.

Florida is the only state with a repealed workplace safety act. The federal OSHA does not apply to state and local government and employers of less than 10 employees. Florida employers have immunity from suit but there is no requirement under Florida law to do anything to prevent accidents.

The lack of full medical benefits and the repeal of the Florida Occupational & Safety Health Act cannot be used to counter balance the inadequacy of the 104 weeks limitation on temporary total disability. Considered together with other numerous and substantial take-aways, the law has become unconstitutional as an inadequate remedy taken as a whole.

ARGUMENT

POINT ONE

THE EN BANC DECISION IS INCORRECT AS,

A. THE MAJORITY CREATED TEMPORARY PERMANENT TOTAL DISABILITY, A DIFFERENT CATEGORY OF BENEFITS NOT PROVIDED FOR BY THE LEGISLATURE;

1. THIS VIOLATES SEPARATION OF POWERS;

2. THIS VIOLATES DUE PROCESS OF LAW, SINCE

a. IT IS PREDICATED ON THE EMPLOYEE REACHING STATUTORY MAXIMUM MEDICAL IMPROVEMENT AT 104 WEEKS AFTER THE ACCIDENT AS A MATTER OF LAW, WHICH IS AN INVALID CONCLUSIVE PRESUMPTION;

b. IT IS PREDICATED UPON THE TREATING PHYSICIAN RATING THE EMPLOYEE'S PERMANENT IMPAIRMENT 6 WEEKS BEFORE THE 104 WEEKS ANNIVERSARY OF THE DATE OF ACCIDENT, EVEN THOUGH THE EMPLOYEE HAS NOT FACTUALLY REACHED MAXIMUM MEDICAL IMPROVEMENT;

c. IT DOES NOT INCLUDE THE VOCATIONAL TEST FOR REAL PERMANENT TOTAL DISABILITY REQUIRED BY STATUTE;

d. IT DOES NOT WORK GOING FORWARD.

The standard of review is de novo (application of the law to facts); *Braun v. Brevard County*, 44 So. 3d 1216, 1217 (Fla. 1st DCA 2010); (constitutional validity of statutes); *Sunset Harbour Condo. Ass'n v.* Robbins, 914 So. 2d 925 (Fla. 1st DCA 2005); *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

This point is based on the certified question, which is:

> Is a worker who is totally disabled as a result of a workplace accident, but still improving from a medical standpoint at the time temporary total disability benefits expire, deemed to be at maximum medical improvement by operation of law and therefore eligible to assert a claim for permanent and total disability benefits?

In a special session in 1993, the Legislature amended a number of provisions in Section 440.15, Fla. Stat., effective January 1, 1994:

1. The available number of weeks for temporary total disability was reduced from 260 to 104 weeks in Section 440.15(2)(a), Fla. Stat. Ch. 93-415, §20, at 120, Laws of Fla.

2. The following language was added to Section 440.15(2)(a), Fla. Stat.; Ch. 93-415, §20, at 120, Laws of Fla.:

> Once the employee reaches the maximum number of weeks allowed, or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined.

3. The following language was added to Section 440.15(3)(d), Fla. Stat.; Ch. 93-415, §20, at 122, Laws of Fla.:

> After the employee has been certified by a doctor as having reached maximum medical improvement or 6 weeks before the expiration of temporary benefits, whichever occurs earlier, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating, using the impairment schedule referred to in paragraph (b).

4. Permanent total disability was limited to the definition of catastrophic injury as defined in Section 440.02, Fla. Stat., [paralysis, amputation, blindness, etc., or entitlement to social security disability] amending Section 440.15(1), Fla. Stat.; Ch. 93-415, §20, at 118, Laws of Fla. However, this was further changed, effective October 1, 2003, by Ch. 2003-412, §18, at 3917, Laws of Fla., amending Section 440.15(1)(b), Fla. Stat., by inclusion of the named permanent injuries formerly contained in the Section 440.02, Fla. Stat., definition of catastrophic injury. The social security disability test was deleted. A vocational test (work search) was added in all other cases:

> In all other cases, in order to obtain permanent total disability benefits, the employee must establish that he or she is not able to engage in at least sedentary employment, within a 50-mile radius of the employee's residence, due to his or her physical limitation.

Ch. 2003-412, §17, at 110, Laws of Fla.

There was a precursor to the present case, which was not cited in the opinion below. *Emanuel v. David Piercy Plumbing*, 765 So. 2d 761 (Fla. 1st DCA 2000).

However, the starting point is *City of Pensacola Firefighters v. Oswald*, 710 So. 2d 98 (Fla. 1st DCA 1998), in which the First District Court of Appeal decided that an employee could claim permanent total disability at the expiration of temporary total disability benefits at 104 weeks after the accident, if he could prove that he was totally disabled at that point and would be permanently totally disabled when he reached factual maximum medical improvement at some time in the future. Oswald failed to prove this.

In the years after *Oswald*, the First District Court of Appeal grappled with this problem many times. E.g., *Chan's Surfside Saloon v. Provost*, 764 So. 2d 700 (Fla. 1st DCA 2000); *McDevitt Street Bovis v. Rogers*, 770 So. 2d 180 (Fla. 1st DCA 2000); *Metropolitan Title & Guar. Co. v. Muniz*, 806 So. 2d 637 (Fla. 1st DCA 2002); *Rivendell of Ft. Walton v. Petway*, 833 So. 2d 292 (Fla. 1st DCA 2002); *Matrix Employee Leasing, Inc. v. Hadley*, 78 So. 3d 621 (Fla. 1st DCA 2011).

It is in *Hadley*, infra, that we find this benefit described by the term "temporary permanent total disability". *Hadley*, at 623. This is a mismatch of terms, of course. Nothing can be "temporary permanent".

Hadley was an en banc decision in which the court abandoned the rule of *Oswald* and held that Section 440.15(2), Fla. Stat., meant that entitlement to temporary disability expired at 104 weeks and that Section 440.15(1), Fla. Stat., would not permit a claim for permanent total disability until the employee had reached factual maximum medical improvement. This created a "gap" in total disability benefits.

However, until *Westphal I*, at D505, none of these cases contained a challenge to the constitutional validity of the 104 weeks limitation on temporary disability. While the panel decision in *Westphal I* was that the 104 weeks limitation was unconstitutional as applied to the facts of this case prospectively, the majority in the en banc decision, *Westphal II*, took a different turn.

Rather than declare a severable provision of the Florida Workers' Compensation Law unconstitutional (the number 104) the majority in the en banc decision chose to violate the Florida Constitution themselves by judicial legislation contrary to separation of powers.

Florida Constitution, Article II, Section 3, provides:

> 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 appertaining to either of the other branches unless expressly provided herein.

Judicial legislation invading the powers of the Legislature is a rare occurrence.

In a workers' compensation case, the First District Court of Appeal relied on a Supreme Court of Florida decision:

> Under the separation of powers requirement of our state's constitution, when interpreting a statute, it is not the judiciary's prerogative to question the merit of a policy preference or to substitute its preference for the legislature's judgment. Art. II, § 3, Fla. Const. As the supreme court stated in *State v. Rife*,
>
> > [w]hen faced with an unambiguous statute, the courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.' This principle is 'not a rule of grammar; it reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature.'

Fast Tract Framing, Inc. v. Caraballo, 994 So. 2d 355, at 357 (Fla. 1st DCA 2008); quoting *State v. Rife*, 789 So. 2d 288, at 292 (Fla. 2001).

The First District Court of Appeal was grappling with three unreasonable statutory provisions: (1) the 104 weeks limitation on temporary disability benefits, which was inadequate; (2) the statutory provision that maximum medical improvement is reached at the 104 weeks anniversary of the industrial accident, which is impossible; and (3) the statutory requirement that the treating physician must rate the permanent impairment 6 weeks before the 104 weeks anniversary of the industrial accident, which is impossible.

Maximum medical improvement is defined:

> 'Date of maximum medical improvement' means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability.

§440.02(10), Fla. Stat.

E.g., *Corral v. McCrory Corp.*, 228 So. 2d 900 (Fla. 1969).

In other words, it is the point in time when the employee got as well as he was ever going to get.

The Legislature's legal determination in Section 440.15(2)(a), Fla. Stat., that all employees reach maximum medical improvement at the 104 weeks anniversary of the accident (if not earlier, factually) is an

impermissible conclusive presumption. It is not based on fact. In the present case, it is contrary to fact. There is no opportunity to rebut it.

> The test for the constitutionality of statutory presumptions is twofold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. Second, there must be a right to rebut in a fair manner.

Straughn v. K&K Land Management, Inc., 326 So. 2d 421, at 424 (Fla. 1976).

Plainly, statutory maximum medical improvement violates due process of law.

This violation of due process of law is further implemented by Section 440.15(3)(d), Fla. Stat., requiring the treating physician to rate the permanent impairment 6 weeks before the 104 weeks anniversary of the accident, even though the employee has not reached maximum medical improvement. He is to determine something is permanent which is not permanent at that point. This is another violation of due process of law.

The foundation for the majority in the en banc decision for creating "temporary permanent total disability" is a constitutionally invalid "statutory maximum medical improvement" and a constitutionally invalid "permanent rating" of impairment that is not yet permanent.

The majority in the en banc decision has created a category of indemnity, a category of disability benefits, that the Legislature did not create. This is forbidden by separation of powers.

It is flawed in still another way. In Section 440.15(1), Fla. Stat., the Florida Legislature set forth a two-part test for permanent total disability. Either the employee must have suffered a catastrophic injury (paralysis, amputation, blindness, etc.) or in all other cases, the employee must prove that the employee is not able to engage in at least sedentary employment within a 50-mile radius of the employee's residence, in other words, a work search. While temporary total disability is a medical test (active medical treatment and no work status), permanent total disability is both a medical test and a vocational test.

In legislating temporary permanent total disability, the en banc decision below omitted the vocational test required by the Legislature.

Not every case is a gap case looking backward from an acknowledged permanent total disability. The en banc decision would apply to any employee who is still under active medical care and unable to work for medical reasons at the 104 weeks anniversary. When he reaches factual MMI in the future, he may likely have a permanent impairment, but he may be able to work at his same job or other employment. He is not a PT.

He just needed more than 104 weeks for temporary total disability.

Moreover, if the employee has an order from the Judge of Compensation Claims after 104 weeks that he is temporarily permanently totally disabled, the employer/carrier will have difficulty changing that when he reaches factual MMI in the future. In order to change or cut off benefits, they would have to file a petition for modification under Section 440.28, Fla. Stat., and they would have to pay during the pendency of the proceedings until the order is modified. See *A.D.H. Building Contractors v. Steele*, 171 So. 2d 184 (Fla. 1965).

Still another complication of "statutory MMI" is that under the co-pay provision of Section 440.13(14), Fla. Stat., the claimant would now have to co-pay for remedial care after 104 weeks. Not everyone is at the maximum compensation rate. An employee earning minimum wage would find a $10 co-payment a heavy burden, especially for remedial care, which would be frequent. Co-pays for remedial treatment do not work.

In order to be constitutionally valid, a substituted remedy has to work. *Aldana v. Holub,* 381 So. 2d 231 (Fla. 1980). "Temporary permanent total disability" and "statutory MMI" and rating permanent impairment 6 weeks before the 104 week anniversary of the accident, do not work.

Westphal II, the en banc decision, should be reversed.

POINT TWO

THE 104 WEEKS LIMITATION ON TEMPORARY TOTAL DISABILITY IN SECTION 440.15(2), FLA. STAT., IS UNCONSTITUTIONAL AS IT IS NOT AN ADEQUATE REMEDY IN VIOLATION OF THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION:

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D. IT IS NOT AN ADEQUATE REMEDY SINCE FULL MEDICAL CARE IS NO LONGER AVAILABLE;

E. IT IS NOT AN ADQUATE REMEDY SINCE THE FLORIDA OCCUPATIONAL SAFETY & HEALTH ACT HAS BEEN REPEALED.

The standard of review is de novo (application of the law to facts); *Braun v. Brevard County*, 44 So. 3d 1216, 1217 (Fla. 1st DCA 2010); (constitutional validity of statutes); *Sunset Harbour Condo. Ass'n v.* Robbins, 914 So. 2d 925 (Fla. 1st DCA 2005); *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

Workers' Compensation laws originated in Germany in the late 19th century.[1]

> The necessity for workers' compensation legislation arose out of the coincidence of a sharp increase in industrial accidents attending the rise of the factory system and a simultaneous decrease in the employee's common-law remedies for his or her injuries.
>
> Workers' compensation is not an outgrowth of the common law or of employers' liability legislation; it is the expression of an entirely new social principle having its origins in nineteenth-century Germany.[2]

The first workers' compensation law in the United States was the New York Act of 1910. It was declared unconstitutional by the New York Court of Appeals[3] in *Ives v. South Buffalo Ry.*, 201 N.Y. 271; 94 N.E. 431 (1911), on substantive due process grounds. Government did not have the power to

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[1] Vol. I, "Larson's Workers' Compensation Law", §2.06, p.p. 2-9 to 2-12, Matthew Bender & Co., Inc.(2013)

[2] Larson, op. cit. supra, at 2-1.

[3] The highest appellate court in New York.

require employers to provide medical care and disability benefits to their employees who were injured at work regardless of fault, just because they were employees. Years later, the New York Court of Appeals in *Montgomery v. Daniels*, 378 N.Y.S. 2d 41, 340 N.E. 2d 444 (1975), acknowledged that *Ives* would not be decided the same way today. The theory of substantive due process involved has been relegated to obscurity.[4]

However, based on *Ives*, it appeared that the United States could not have workers' compensation laws like the German model.

Then, on March 25, 1911, an historical event took place which changed everything: "The Triangle Shirtwaist Factory Fire" in which 146 women were killed, including 14 and 16-year old girls.[5]

The social/economic consciousness of the nation was completely changed by this event.[6]

A number of states passed workers' compensation laws following the fire. The first was Wisconsin in 1911. The people of New York amended their constitution and the Assembly re-passed the workers' compensation

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[4] Larson, op.cit. supra, at 2-14.

[5] Von Drehle, "Triangle The Fire That Changed America", Grove Press, New York (2003); Appendix, List of Victims, at 271-283.

[6] United States Department of Labor, Office of the Secretary. The Triangle Shirtwaist Factory Fire of 1911 (http://www.dol.gov/shirtwaist/)

law in 1913.[7] In 1917, the Supreme Court of the United States reviewed the constitutionality of this act in *New York Central R.R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917). The court explained in great detail why workers' compensation laws were constitutionally valid, quite different from the New York Court of Appeals in *Ives*. While *White* is considered the leading case, the U.S. Supreme Court also approved of the Iowa statute in *Hawkins v. Bleakley*, 243 U.S. 210, 37 S. Ct. 255, 61 L. Ed. 678 (1917); and the Washington state statute in *Mountain Timber Co. v Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed 685 (1917).

To understand the importance of *New York Central Railroad v. White*, supra, holding that a workers' compensation law was constitutionally valid, we need only compare it to other social/economic legislation of the day. One year later in 1918, the U.S. Supreme Court decided in *Hammer v. Dagenhart*, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918), that the government did not have the power to regulate child labor! It would be decades before the Supreme Court of the United States would acknowledge that a state social/economic program must be administered in accordance with 14th Amendment due process of law. *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Workers' compensation, of course,

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[7] *New York Central R.R. Co. v. White*, infra, at 195-196.

is not a mere entitlement. It is a constitutional compromise that was made at the time of World War I by which common law property rights were abolished and exchanged for statutory property rights. E.g., *Florida Forest & Park Service v. Strickland*, 18 So. 2d 251, at 254 (Fla. 1944).

It should be noted that the U.S. Supreme Court in *White*, described the benefits in the New York Act to be adequate and reasonable in terms of natural justice in the section of the opinion under Fourteenth Amendment due process of law. Such was the term of 1917 in accord with the later phrase "fundamental fairness". *New York Central R.R. Co. v. White*, supra, at 202-203, 205-206.

By 1920, workers' compensation was a national policy, albeit state by state by state. At that time all but 8 states had workers' compensation laws.[8] Florida was one of the last. It was passed in 1935. Now all states have workers' compensation laws to assist injured workers.

The workers' compensation scheme is simple enough. The employer is immune from suit. The common law remedies formerly available to the employee are abolished. So are the common law defenses abolished by which the employer usually won. In place of this common law remedy based on fault, the employer must provide the employee with needed

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[8] Larson, op. cit. supra, at 2-08.

medical care and disability benefits regardless of fault for injuries occurring at work, "industrial accidents". This obligation is secured in some manner, "industrial insurance". Workers' compensation laws are supposed to be simple, sure and swift. The morality involved is completely different from the common law. Those of us who live lives of pleasure and comfort do so because others have been killed or injured to make the products we enjoy or perform the services we receive. We owe it to them.[9]

In the original 1935 Florida Workers' Compensation Law, the number of available weeks for temporary disability was 350. §440.15(2), Fla. Stat. (1935).

In *Thompson v. Florida Industrial Commission*, 224 So. 2d 286 (Fla. 1969), the Supreme Court of Florida decided that the original 350 weeks limitation on temporary total disability was inadequate in that case. However, the Court stated it was not able to remedy this. Thompson's accident was in 1961 (*Hadley*, supra, at 638), which was prior to the adoption of the Access to Courts provision in the Florida Constitution in 1968 and, of course, the *Thompson* case was prior to *Kluger v. White*, infra. Now, in keeping with *Kluger v. White*, infra, the Florida Supreme Court can deal with this inadequacy. More importantly, in *Thompson*, the Florida

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[9] See Larson, op. cit. supra, 2-10.

Supreme Court requested the Legislature to increase the number of available weeks for temporary disability. Instead, the Legislature lowered the number of weeks to 260 in 1991 and then to 104 in 1993. As 350 weeks was inadequate in the opinion of the Florida Supreme Court in *Thompson*, 104 weeks is surely inadequate.

We can judge whether 104 weeks available for temporary total disability is inadequate by comparison to other jurisdictions. The majority (30) have unlimited periods of time available. Others have double to quintuple plus, the number of weeks available. Only 6 states have 104 weeks: Texas, California, Wyoming, North Dakota, West Virginia and Florida. Wyoming has an escape clause that for good cause, it can be unlimited, so probably it should not be included, leaving 5 states. North Dakota has an escape clause for up to 7 years. California has several escape clauses. Texas has one that would have covered Westphal -- spinal surgery. Only Florida and West Virginia have 104 weeks without an escape clause.[10] As *Westphal I*, at D507, pointed out, all the southern sister states have many more weeks available for temporary total disability than Florida.

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[10] Vol. 10 "Larson's Workers' Compensation Law", Appendix B, Table 6, at App B-10 through App B-19 (2006) [duration of temporary total disability]; Appendix 25-34.

104 weeks is simply not adequate for serious injuries. There may be multiple surgeries for multiple injuries with multiple periods of recuperation in between. This takes time, which the Legislature used to recognize when it was 350 weeks.

KLUGER v. WHITE

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.

This provision is commonly referred to by its title: "Access to Courts".

The people of Florida voted in 1968 to adopt the 1968 Florida Constitution, including the Access to Courts provision. At that time, the people knew what the remedy was for employees injured at work. It was the 1967 Florida Workers' Compensation Law. (The Legislature met only once every 2 years at that time). The remedy for employees injured at work was not the common law. That had been abolished for employees decades earlier and workers' compensation substituted as a statutory right.

The 1967 Florida Workers' Compensation Law had 350 weeks available for temporary total disability. It had lifetime benefits for permanent total disability. It had full medical benefits available without

apportionment or a co-pay. the employee had some rights in regard to the selection of a physician. There were many other rights that employees who had been injured had under the Florida Workers' Compensation Law. This is what the people knew the remedy to be for employees injured at work when they voted for Access to Courts in 1968. Now, it is different and inadequate.

In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Supreme Court of Florida decided the validity of a no-fault automobile accident liability act under the Access to Courts provision. The Supreme Court of Florida adopted this rule:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided **by statutory law predating the adoption of the Declaration of Rights** of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. §2.-01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. (Emphasis added).

Kluger v. White, supra, at 4.

It is important to note that the Supreme Court of Florida included the statutory remedies that existed in 1968. Indeed, after stating the rule, the

Court gave, as an illustration of such a statute, which in 1973 satisfied the rule:

> Workmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury. (Emphasis added).

Kluger v. White, supra, at 4.

There is no Florida citation for this statement by the Court. There is no citation at all. It should be *New York R.R. Co. v. White*, supra, because that is the holding of the Supreme Court of the United States in approving of the 1913 New York Workmen's Compensation Law. That Act did not limit the duration of temporary total disability. (Appendix, 22). It is still New York law today.[11] It did limit the total amount of dollars at $3,500 (Appendix, 22), a significant amount of money in 1913. Also, there was no cap on the maximum weekly rate of temporary total disability. It was 66 2/3 percent of the average weekly wage. (Appendix, 22).

The present case is not the first challenge to a provision of the Florida Workers' Compensation Law. The earlier cases had a common thread for

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[11] Vol. 10 "Larson's Workers' Compensation Law", Appendix B, Table 6, at App B-16 (2006) [duration of temporary total disability]; contained in notice of supplement authority dated February 8, 2013.

justification of reduced indemnity benefits. They were decided at a time when the Florida Workers' Compensation Law still provided for full medical benefits. Now, it does not. "State Workers' Compensation Laws" (January 2006, compiled by the U.S. Department of Labor, Employment Standards Administration, and Office of Workers' Compensation Programs contained in Vol. 10 "Larson's Workers' Compensation Law", Appendix B, Table 5, at App B-5 and App B-6 (2006) [full medical states].

Beginning with *Acton v. Ft. Lauderdale Hospital*, 418 So. 2d 1099 (Fla. 1st DCA 1982), affirmed; 440 So. 2d 1282 (Fla. 1983); then *Sasso v. Ram Products*, 431 So. 2d 204 (Fla. 1st DCA 1983); 452 So. 2d 932 (Fla. 1984); then *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991), the Supreme Court of Florida has held and then the 1st DCA has held in *Bradley v. Hurricane Restaurant*, 670 So. 2d 162 (Fla. 1st DCA 1996), that reductions in indemnity benefits could be sustained on a constitutional basis because the Florida Workers' Compensation Law did provide for disability and "full medical care". *Acton*, supra, at 1284; *Martinez*, supra, at 1172; and *Bradley*, supra, at 164-165. Now it does not.

The first case is *Acton v. Ft. Lauderdale Hospital,* 418 So. 2d 1099 (Fla. 1st DCA 1982), affirmed; 440 So. 2d 1282 (Fla. 1983). It concerned the 1979 change from scheduled injuries and unscheduled injuries as a

percentage of 350 weeks to a wage loss system of 350 to 525 weeks. §440.15(3)(b) and (c), Fla. Stat. (1979) [since repealed]. The Supreme Court of Florida held:

> On the other hand, the new system offers greater benefits to injured workers who still suffer a wage loss after reaching maximum medical recovery. The Workers' Compensation Law continues to afford substantial advantages to injured workers including full medical care... *Acton*, at 1284. (Emphasis added).

The present law does not provide for any wage loss consideration for permanent partial injury, only payments for physical impairment. §440.15(3), Fla. Stat.

The main Supreme Court of Florida case of this kind is *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991). It reads:

> "It [the Florida Workers' Compensation Law] continues to provide injured workers with full medical care..." *Martinez v. Scanlan*, supra, at 1172. (Emphasis added).

A Florida First District Court of Appeal case is *Bradley v. Hurricane Restaurant*, 670 So. 2d 162 (Fla. 1st DCA 1996). It reads:

> The workers' compensation law remains a reasonable alternative to tort litigation. It provides injured workers with full medical care and benefits for disability and permanent impairment regardless of fault, without the delay and uncertainty of tort litigation. (Emphasis added).

Bradley v. Hurricane Restaurant, supra, at 164-165.

The Florida Workers' Compensation Law does not provide for full medical care for injured workers since the 2003 amendments because: (1) Section 440.15(5)(b), Fla. Stat., provides for apportionment of medical care; (2) Section 440.09(1), Fla. Stat., requires that the compensable accident at work is the major contributing cause of the need for treatment; (major contributing cause being more than 50 percent as established by medical evidence only) and (3) Section 440.13(14)(c), Fla. Stat., requires that employees receiving medical care after maximum medical improvement must make a $10 co-pay for each visit to a medical provider.

The major contributing cause rule is a red flag for invalidity. Section 440.09(1), Fla. Stat., was enacted in 2003. It provides that the employee has the burden to prove by medical opinion evidence only (excluding lay evidence) to a degree of reasonable medical certainty based on objective relevant findings, that the compensable injury is the major contributing cause of the need for treatment and disability. By major contributing cause is meant 50%. Thus, if the employee can only prove less than 50%, say 40%, the employer gets full immunity from suit and the employee gets nothing, even though it is a compensable accident. If the employee can only prove more than 50% but less than 100%, then the employer gets full

immunity from suit, but the employer only has to pay a portion of the medical care and disability, say 75%, for example. The employee then has to pay the other portion of the medical expenses -- presumably out of his also reduced disability payments. Florida borrowed this concept from Oregon. The Oregon Supreme Court has already declared it unconstitutional as applied in *Smothers v. Gresham Transfer, Inc.*, 23 P. 3d 333 (Or. 2001).

So, full medical care cannot be used to counter balance reduced indemnity benefits anymore.

In 1968, when the people voted for Access to Courts, the 1967 Florida Workers' Compensation Law contained a workplace safety provision. Section 440.56, Fla. Stat. (1967). It's purpose was to provide employees with a safe place to work. There were safety rules, safety inspections and penalties for violations. This predated the Federal OSHA. Eventually, Section 440.56, Fla. Stat., was repealed in 1993, but it was transferred at that time into Chapter 442 of the Florida Statutes and given the name "The Florida Occupational Safety and Health Act". This was important because OSHA does not apply to state and local government and has very limited application to employers with less than 10 employees. 29 USC §652(5); 29 CFR §1904.1 and §1904.2.

Sadly, the Florida Occupational Safety and Health Act was repealed in 1999. Ch. 99-240, §14, p.p. 2165-2166. Thereby, Florida became unique among the states with a repealed workplace safety act.

Florida employers have immunity from suit by their employees for injuries at work. §440.11, Fla. Stat. The repeal of the Florida Occupational Safety & Health Act means that state and local governments and small employers are no longer required by Florida law to make any effort, spend any money, or do anything to prevent accidents.

In holding that a statutory workmen's compensation scheme was constitutionally valid, the U.S. Supreme Court stated that it expected that there were other laws providing for accident prevention measures. *New York Central R.R. Co. v. White*, 243 U.S. 188, at 207, 37 S. Ct. 247, 61 L. Ed. 667)1917).

Thus, a serious question of access to courts and due process of law is presented by the repeal of the Florida Occupational Safety and Health Act.

More importantly, Florida's not having an occupational safety and health act cannot be used to counter balance the 104 weeks limitation on temporary total disability, just the same as the lack of full medical care cannot be used to counter balance the 104 weeks limitation.

There are many take-aways from the 1967 Florida Workers' Compensation Law over the years. It is no longer adequate nor what the people knew the Florida Workers' Compensation Law to be when they voted for Access to Courts.

NOTABLE TAKE-AWAYS FROM THE 1967 FLORIDA WORKERS' COMPENSATION LAW BY THE CURRENT FLORIDA WORKERS' COMPENSATION LAW

1967	§440.26, Fla. Stat. "Presumptions" In any proceeding it is presumed that the claim comes within the provisions of the chapter; that sufficient notice of claim was given and that the injury was not occasioned primarily by intoxication or the willful intent of the employee to injure or kill himself.
Current Law	§440.015, Fla. Stat. "Legislative Intent" Neither the facts nor the law in workers' compensation cases shall be liberally interpreted in favor of the employee or the employer. Ch. 91-1, §6, p. 28, Laws of Fla.; Ch. 93-415, §1, p. 6, Laws of Fla. The presumptions formerly contained in §440.26, Fla. Stat., were repealed. Ch. 91-1, §26, p. 79, Laws of Fla.
1967	§440.02(19), Fla. Stat. "Accident" Temporary disability and medical benefits were not subject to apportionment.
Current Law	§440.02(1), Fla. Stat. "Accident" All benefits subject to apportionment and burden of proof for injury caused by exposure to toxic substance increased to clear and convincing evidence. Ch. 2003-412, §1, p. 3861, Laws of Fla.

1967	§440.09(1), Fla. Stat. "Coverage" No major contributing cause rule, nor a burden of proof.
Current Law	§440.09(1), Fla. Stat. "Coverage" Creates major contributing cause rule: Employee has burden to prove by medical opinion evidence only (excluding lay evidence) to a degree of reasonable medical certainty based on an objective relevant findings, that the compensable injury is the major contributing cause of the need for medical care and disability. By "major contributing cause" is meant more than 50%. For occupational disease or repetitive exposure, additionally, this test is by clear and convincing evidence. Ch. 2003-412, §6, p. 3876, Laws of Fla.
1967	§440.093, Fla. Stat. Did not exist
Current Law	§440.093(1), Fla. Stat. "Mental and Nervous Injuries" A physical injury resulting from a mental injury, without physical trauma, is not compensable. Ch. 2003-412, §7, p. 3877, Laws of Fla.
Current Law	§440.093(2), Fla. Stat. "Mental and Nervous Injuries" A mental injury resulting from a physical injury must be demonstrated by clear and convincing evidence and the major contributing cause rule applies. Ch. 2003-412, §7, p. 3878, Laws of Fla.
Current Law	§440.093(3), Fla. Stat. "Mental and Nervous Injuries" Temporary disability compensation for mental injury cannot be paid for more than 6 months after MMI for physical injury and is subject to 104 weeks limitation overall. Ch. 2003-412, §7, p. 3878, Laws of Fla.
1967	§440.11, Laws of Fla. "Liability for Compensation" No special provision for intentional tort by employer or negligent safety inspection by carrier or consultant.

Current Law	§440.11(1)(b), Fla. Stat. "Exclusiveness of Liability" Whenever an employer injures an employee by committing an intentional tort, the employee must prove his case by clear and convincing evidence. Ch. 2003-412, §14, p. 3891, Laws of Fla.
	§440.11(3), Fla. Stat. "Exclusiveness of Liability" Workers' compensation carriers and safety consultants are immune from suit for negligent safety inspections. Ch. 2003-412, §14, p. 3891-3892, Laws of Fla.
1967	§440.13(2), Fla. Stat. "Medical Services and Supplies; Penalty for Violations" It was unlawful (a misdemeanor) for any employer/carrier to coerce or attempt to coerce an employee in the selection of a medical provider.
Current Law	§440.13(2) and (3)(a), Fla. Stat. "Medical Treatment; Duty of Employer to Furnish" The employer/carrier designates the medical provider and the course of treatment, except in emergency situations. Ch. 90-201, §18, p. 92, Laws of Fla. Ch. 91-1, §16, p. 47, Laws of Fla. Ch. 93-415, §17, p. 101, Laws of Fla.
1967	§440.13(2). Fla. Stat. "Medical Services and Supplies; Penalty for Violations" If the employee objected to the medical care provided, it was the duty of the employer/carrier to select another medical provider, unless the Commission determined that a change was not in the best interest of the employee.
Current Law	§440.13(2)(f), Fla. Stat. "Medical Treatment; Duty of Employer to Furnish" If the employee makes a written request, he may have the opportunity for a one-time change of physician selected by the employer. Ch. 2001-91, §12, p. 723, Laws of Fla.

1967	§440.13(2)), Fla. Stat. "Medical Services and Supplies; Penalty for Violations" There was no limitation on chiropractic care.
Current Law	§440.13(2), Fla. Stat.. "Medical Treatment; Duty of Employer to Furnish" Chiropractic treatment limited to 24 treatments or for 12 weeks from the initial treatment whichever comes first, unless the carrier authorizes additional treatment or the employee is catastrophically injured. Ch. 2003-412, §15, p.p. 3894-3895, Laws of Fla.
1967	§440.13, Fla. Stat. No special provision for IME's
Current Law	§440.13(5), Fla. Stat. "Independent Medical Examinations" An IME may be a treating physician only if the parties agree. Ch. 2003-412, §15, p. 3899, Laws of Fla. The employee and the employer are entitled to only one IME per accident and not one IME by specialty. Ch. 2003-412, §15, p. 3899, Laws of Fla.
1967	§440.13, Fla. Stat. "Medical Services and Supplies; Penalty for Violations" No provision for EMA's.
Current Law	§440.13(9), Fla. Stat. "Medical Services and Supplies; Penalty for Violation; Limitations... Expert Medical Advisors" When there is a disagreement in opinion of two healthcare providers regarding employee's medical needs and employment status, the Judge of Compensation Claims shall appoint an Expert Medical Advisor (EMA), whose opinion is presumed correct, unless there is clear and convincing evidence to the contrary. Ch. 93-415, §17, p.p. 106-107, Laws of Fla.

1967	§440.13, Fla. Stat. "Medical Services and Supplies; Penalty for Violations" There was no provision for an employee co-pay for medical services.
Current Law	§440.13(14), Fla. Stat. "Payment of Medical Fees" After maximum medical improvement, an employee is obligated to co-pay $10 per visit for medical services, except for emergencies. Ch. 93-415, §17, p. 110, Laws of Fla.
1967	§440.15(1), Fla. Stat. "Permanent Total Disability" No special statutory provision for permanent total disability; case decision: *Port Everglades Terminal Co. v. Canty*, 120 So. 2d 596 (Fla. 1960): Whenever employee shows that he cannot perform light work uninterruptedly, burden shifts to employer to show such a job is available. Entitlement to permanent total disability was for duration of disability (for life).
Current Law	§440.15(1), Fla. Stat. "Permanent Total Disability" Employee must prove he that he has a "catastrophic injury" (paralysis, amputation, blindness, etc.) and in all other cases, employee must prove that employee is not able to engage in at least sedentary employment within 50 mile radius of employee's residence. Ch. 2003-412, §18, p. 3917, Laws of Fla. Entitlement to permanent total disability ends at age 75. Ch. 2003-412, §17, p. 3917, Laws of Fla.
1967	No supplemental benefit (COLA) for permanent total disability. 5% COLA created in 1974. Ch. 74-197, §9, p. 548, Laws of Fla.
Current Law	§440.15(1), Fla. Stat. "Permanent Total Disability" Cuts off the supplemental benefit (3% COLA) for permanent total disability at age 62 if employee is

	eligible either for Social Security disability or old age (early) retirement. Previous statute required both Social Security disability entitlement and old age retirement for there to be a cut-off. There was no cut-off prior to 1990. Ch. 90-201, §18, p. 58, Laws of Fla. Ch. 90-201, §20, p. 935, Laws of Fla. Ch. 91-1, §18, p. 58, Laws of Fla. Ch. 2003-412, §15, p. 3919, Laws of Fla.
1967	§440.15(2), Fla. Stat. "Temporary Total Disability" Limitation on duration of temporary total disability was 350 weeks.
Current Law	§440.15(2), Fla. Stat. "Temporary Total Disability" Limitation on duration of temporary total disability is 104 weeks. Ch. 93-415; §20, p. 120, Laws of Fla.
1967	§440.15(2), Fla. Stat. "Temporary Total Disability" No provision for statutory MMI.
Current Law	§440.15(2)(a), Fla. Stat. "Temporary Total Disability" Temporary disability ends when the employee reaches maximum medical improvement or the maximum number of weeks allowed (104), whichever occurs earlier and permanent impairment shall be determined at that time. Ch. 93-415, §20, p.120, Laws of Fla.
1967	§440.15(3), Fla. Stat. "Permanent Partial Disability" There was a schedule of permanent injuries, mainly involving the extremities, loss of hearing or loss of vision, such that a percentage of the total impairment was paid accordingly, up to 200 weeks for loss of an arm, for example. For all other cases compensation for permanent injury was for permanent impairment or loss of wage earning capacity, whichever was greater as a percentage of 350 weeks. Compensation was paid at the employee's full compensation rate.

Current Law	§440.15(3), Fla. Stat. "Permanent Impairment Benefits" There is no compensation for permanent partial disability for loss of earning capacity. All compensation for permanent injury is for permanent impairment according to the 1996 Florida Impairment Guide: 2 weeks of benefits for 1% to 10%, 3 weeks for 11% to 15%, 4 weeks for 16% to 20% and 6 weeks for 21% and above. Compensation is paid at 75% of the employee's full compensation rate or 50% if he is earning the equivalent of the average weekly wage. Ch. 2003-412, §18, p.p. 3921, 3924, Laws of Fla.
1967	§440.15(3), Fla. Stat. "Permanent Partial Disability" No special provision for amount of permanent partial disability for mental injury due to physical injury.
Current Law	§440.15(3), Fla. Stat. "Permanent Impairment Benefits" Impairment benefits are payable for physical impairment only. If there is objective evidence of permanent psychiatric impairment, it is limited to 1%. Ch. 2003-412, §15, p. 3921, Laws of Fla.
1967	§440.15(3), Fla. Stat. "Permanent Partial Disability" No provision for treating physician to rate permanent impairment prior to the date of maximum medical improvement.
Current Law	§440.15(3)(d), Fla. Stat. "Permanent Impairment Benefits" 6 weeks before the 104 week anniversary of the date of accident, the treating physician shall rate the permanent impairment according to the 1996 Florida Impairment Guide, if the employee did not reach maximum medical improvement earlier. Ch. 93-415, §20, p. 122, Laws of Fla.
1967	§440.15(5), Fla. Stat. "Compensation for Disability" Previous disability did not preclude benefits for a later injury or death.

Current Law	§440.15(5), Fla. Stat. "Compensation for Disability" If injury, disability or need for medical care are partly due to a pre-existing condition, the employer/carrier need only pay for that part due to the industrial accident and shall deduct the other part. Ch. 2003-412, §15, p. 3925, Laws of Fla.
1967	§440.15(6), Fla. Stat. "Obligation to Rehire" This provision did not exist in 1967. It was created in 1993. Ch. 93-415, §20, p.p. 129-130, Laws of Fla.
Current Law	§440.15(6), Fla. Stat. "Obligation to Rehire" The obligation of the employer to make a good faith effort to the rehiring of the employee after maximum medical improvement was repealed in 2003. Ch. 2003-412, §18, p. 3926, Laws of Fla.
1967	§440.151, Fla. Stat. "Occupational Diseases" Occupational disease is treated the same as injury by accident when there is attached to the nature of the employment a particular hazard of such disease. However, presumptions established by 440.26, Fla. Stat., that apply to accidents do not apply to occupational diseases.
Current Law	§440.151(1), Fla. Stat. "Occupational Diseases" Employee must prove causation by medical evidence alone, that employment was the major contributing cause of occupational disease; also, causation and exposure must be shown by clear and convincing evidence. Apportionment applies subject to the major contributing cause rule. Ch. 2003-412, §19, p. 3929, Laws of Fla.
1967	§440.151(3), Fla. Stat. "Occupational Diseases" "Disablement" means that the employee is partially or totally incapacitated from performing his work.
Current Law	§440.151(3), Fla. Stat. "Occupational Diseases"

	Disability for occupational diseases means the inability to earn the average weekly wage (AWW). Since the only compensation for permanent injury of a partial nature is for permanent impairment, there is no compensation for permanent injury of a partial nature for an occupational disease; case decision: *Port Orange v. Sedacca*, 953 So. 2d 727 (Fla. 1st DCA 2007). Ch. 2003-412, §19, p. 3930, Laws of Fla.
1967	§440.19, Fla. Stat. "Time and Procedure for Filing Claims" Claim must be filed with the Division within 2 years of the accident, or the date of the last payment of compensation, or the date of the last medical treatment paid for by the employer/carrier.
Current Law	§440.19(1) and (2), Fla. Stat. "Time Bars to Filing Petitions for Benefits" Petitions for Benefits (PFB's) must be filed within 2 years of the accident. Payment of compensation or medical benefits tolls the time for filing a petition for 1 year thereafter. This tolling does not apply to issues of compensability, date of maximum medical improvement or permanent impairment. Ch. 93-415, §23, p. 135, Laws of Fla.
1967	§440.20(10), Fla. Stat. "Payment of Compensation" The complete settlement of a claim (called a washout) required approval by the Deputy Commissioner (now JCC) that it was for the best interest of the employee.
Current Law	§440.20(11), Fla. Stat. "Time for Payment of Compensation and Medical Bills; Penalties for Late Payment" The complete settlement of a claim (called a washout) requires approval by the Judge of Compensation Claims only when the claimant is not represented by counsel. When he is represented by counsel, no approval by the Judge is required. Ch. 2002-194, §33, p.p. 1236, 1238-1239, Laws of Fla.

1967	§440.34(2), Fla. Stat. "Attorney's Fees; Costs; Penalty for Violations." Costs were taxable against the employer/carrier when the claimant prevailed. No provision for taxing costs against the claimant.
Current Law	§440.34(3), Fla. Stat. "Attorney's Fees; Costs" Costs are taxable by the prevailing party against the non-prevailing party, including by the employer/carrier against the claimant. Ch. 2003-412, §26, p. 3944, Laws of Fla. In *Fredrick v. Monroe County School Board*, 99 So. 2d 983 (Fla. 1st DCA 2012), the Court recommended that the Legislature repeal taxing costs against the employee.
1967	§440.34(1), Fla. Stat. "Attorney's Fees; Costs; Penalty for Violations." Claimant's reasonable attorney's fees payable by employer/carrier for denial of benefits or delay in payment under certain circumstances. No schedule for determination of amount.
Current Law	§440.34(1) and (2), Fla. Stat. "Attorney's Fees; Costs" Claimant's attorney's fees payable by employer/carrier for denial of benefits or delay in payment under certain circumstances. Amount of fee determined by a mandatory schedule: 20% of the first $5,000 of benefits secured, 15% of the next $5,000 and 10% of the remaining amount during the first 10 years after the claim is filed and 5% after 10 years, except for only 5 years of medical benefits secured after the claim is filed. Ch. 2009-94, §1, p.p. 1351-1353, Laws of Fla. §440.34(7), Fla. Stat. "Attorney's Fees; Costs" If the claim is for medical benefits only, the JCC may approve an alternative attorney's fee of $1,500 only once per accident, not to exceed $150 per hour. Ch. 2003-412, §26, p. 3945, Laws of Fla.

1967	§440.39 Fla. Stat. "Compensation for Injuries where Third Persons are Liable" Employee injured due to fault of third person may accept workers' compensation benefits and sue third party. Employer/carrier was entitled to a pro rata share based on equitable distribution.
Current Law	§440.39, Fla. Stat. "Compensation for Injuries where Third Persons are Liable" Employee injured due to fault of third person may accept workers' compensation benefits and sue third party. Employer/carrier is entitled to 100% subrogation of what it has paid and future benefits, unless the employee did not receive full value. Ch. 77-290, §11, p. 1295, Laws of Fla.
1967	§440.49 Fla. Stat. "Rehabilitation of Injured Employees; Special Disability Fund." This was a reinsurance scheme for 2nd injuries for employers who had knowingly hired the handicapped. It provided reimbursement to the employer from the Workers' Compensation Trust Fund when the pre-existing condition magnified the effects of the 2nd injury.
Current Law	§440.49(11), Fla. Stat. "Limitation of Liability for Subsequent Injury through Special Disability Trust Fund" The Special Disability Fund was repealed and reimbursement was abolished for injuries occurring after January 1, 1998. Ch. 97-262, §1, p. 4722, Laws of Fla.
1967	§440.56, Fla. Stat. "Safety Rules and Provisions; Penalty" Required employers to provide employment which shall be safe for the employees. Industrial Commission authorized to adopt safety rules. There were inspectors for enforcement and penalties for violations.

Current Law	§440.56, Fla. Stat. [repealed] Transferred to Ch. 442, Fla. Stat., and titled "Florida Occupational Safety and Health Act". Ch. 93-415, §§62-69, pp. 184-189, Laws of Fla. Ch. 93-415, §109, p. 214, Laws of Fla. The Florida Occupational Safety & Health Act, Ch. 442, Fla. Stat., was repealed effective July 1, 2000. Ch. 99-240, §14, pp. 2165-2166, Laws of Fla.

Note: Ch. 90-201, Laws of Fla., was declared unconstitutional in its entirety prospectively in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991). While the case was on appeal, the Legislature passed Ch. 91-1, Laws of Fla.

There are other take-aways. The take-aways since 1968 are so numerous and substantial that the other provisions of the Florida Workers' Compensation Law cannot be used to counter balance the inadequacy of 104 weeks of temporary disability.

An even greater question arises whether the Florida Workers' Compensation Law remains an adequate remedy in total. It does not compare to the 1967 Florida Workers' Compensation Law at all in terms of Access to Courts. Yet, it provides that it is an exclusive remedy. §440.11, Fla. Stat. How can this be constitutional when the benefits are inadequate?

The last Florida Workers' Compensation Law before the deluge of take-aways is the 1976 Act. The change in subrogation in §440.39, Fla. Stat., in 1977, was the beginning of take-aways. Ch. 77-290, §11, Laws of Fla.

CONCLUSION

The Supreme Court of Florida should reverse the en banc decision in *Westphal II* and either reinstate the panel decision in *Westphal I*, or its equivalent, that the 104 weeks limitation on temporary disability, "statutory MMI" and physicians rating permanent impairment 6 weeks before "statutory MMI", are unconstitutional as applied to the facts of this case and do so prospectively. Alternatively, the Court should hold that the current Florida Workers' Compensation Law is no longer an adequate remedy for injury to employees at work as understood by the people when they voted for Access to Courts in the 1968 Constitution. Thus, the law should revert to the 1976 Workers' Compensation Law as it read prior to the impermissible take-aways; or the Court should declare the Florida Workers' Compensation Law to be no longer an exclusive remedy.

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By: 
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CERTIFICATE OF SERVICE

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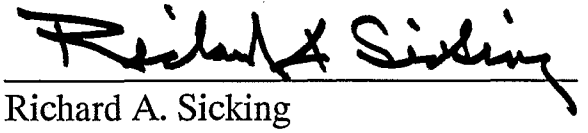

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CERTIFICATE OF FONT SIZE AND STYLE

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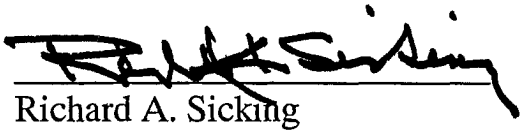

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