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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

BRADLEY WESTPHAL,

CASE NO.: SC13-1930

Petitioner,

L.T. Case Nos.:
1D12-3563
OJCC No: 10-019508SLR

vs.

CITY OF ST. PETERSBURG, ETC,

Respondents.
_____/

BRIEF OF FLORIDA WORKERS ADVOCATES, AMICUS CURIAE, IN SUPPORT OF PETITIONER BRADLEY WESTPHAL

RICHARD W. ERVIN, III, Esq.
Florida Bar No. 022964
Fox & Loquasto, P.A.
1201 Hays Street, Ste, 100
Tallahassee, FL 32301
Ph: (850) 425-1333
Fax: (850) 425-3020
E-mail: richardervin@flappeal.com
& admin2@flappeal.com

Attorney for Florida Workers Advocates, Amicus Curiae

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STATEMENT OF INTEREST

Florida Workers Advocates (FWA) is a statewide organization composed of attorneys who represent the interests of injured employees in workers' compensation proceedings. As such, FWA has an interest in the issue of the validity and interpretation of section 440.15(2)(a), Florida Statutes (2009), whose effect has been construed as limiting injured workers to no more than 104 weeks of temporary disability benefits regardless of whether they remain disabled after the expiration of the 104-week period.

Although FWA recognizes that the First District Court, acting in its en banc capacity (*Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management*, 122 So. 3d 440 (Fla. 1st DCA 2013) (*Westphal II*)), attempted to fix the constitutional problem previously addressed by the panel in *Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management*, No.1D12-3563 (Fla. 1st DCA Feb. 28, 2013) *(Westphal I),* by interpreting the statute to permit claimant to apply for "temporary permanent total disability benefits" on the theory that the statute authorizes by operation of law an injured worker achieving maximum medical improvement (MMI) status at the expiration 104 weeks, despite evidence showing that he in fact had not actually reached MMI, amicus agrees with petitioner that the court's interpretation of the statute collides with the separation of powers provision of the Florida Constitution

by creating a category of disability benefits which the Florida Legislature did not enact (initial brief at 18-19).

The brief of this amicus is offered particularly in support of the arguments made under Point Two of petitioner's initial brief to the extent they assert that section 440.15(2)(a) and other provisions of the Workers' Compensation Law, as currently enacted, provide inadequate compensation benefits to injured workers under the access to courts provision of the Florida Constitution when compared with benefits that were made available to such workers as of the time of the 1968 revision of the Florida Constitution, with the result that the entire act in its present form is an unconstitutional violation of the access to courts provision, guaranteed to every person by Article I, section 21 of the Florida Constitution.

SUMMARY OF ARGUMENT

Because the court's revised opinion represents an unconstitutional judicial intrusion into a legislative function that is prohibited by Article II, section 3, the brief of amicus follows the general approach utilized by the panel in *Westphal I* in support of its argument that the current version of the Workers' Compensation Law has, since the 1968 adoption of the Florida Constitution, so drastically reduced benefits formerly provided to injured workers as to make the entire act an unreasonable alternative to tort litigation, once the benefits then provided are compared with those presently

furnished, with the result that the entire act must be considered an unconstitutional denial of the employee's right of access to courts.

In addition to the substantial reductions in temporary total disability benefits, mentioned in *Westphal I*, reducing them from a total of 350 weeks in 1968 to a total now of 104 weeks, for the combination of both temporary total disability and temporary partial disability benefits, we find similar decreases in all other classes of benefits, most of which have occurred in the past 20 years. Some of the most profound changes are those which effectively eliminate any choice by the injured worker in selecting his or her physician, and apportion from all awards of indemnity or medical benefits the degree thereof attributable to the worker's preexisting condition.

Because the current law no longer operates in conformity with the purpose for which it was created: to assure the quick and efficient delivery of non-illusory benefits to injured workers regardless of fault and without the uncertainty of tort litigation, it is submitted that the time has now come for this court to re-evaluate the validity of the entire act.

ARGUMENT

This Court, in Exercising Its Review Jurisdiction, Should Approve the First District's Panel Decision to The Extent it Decided that Section 440.15(2)(a), Florida Statutes (2009), is Unconstitutional in its Application; In Addition, the Court Should Hold Chapter 440,

Florida Statutes, In Its Current Version, Unconstitutional in its Entirety Because the Compensation Benefits Now Afforded Injured Workers Have Been So Drastically Reduced Since the Date of the 1968 Revision to the Florida Constitution as to Cause Them to be Effectively Eliminated or Illusory.

Standard of Review: As the above issue involves a constitutional challenge, it is governed by the *de novo* review standard. See *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

Analysis: In deciding the issue of whether section 440.15(2)(a), Florida Statutes (2009), is as applied a violation of the access to courts provision, Article I, section 21 of the Florida Constitution, *Westphal I* did not confine its analysis solely to the question of the statute's validity, but compared other provisions of chapter 440, Florida Statutes, available to injured employees at the time of the adoption of the Florida Constitution on November 5, 1968, with those furnished when claimant suffered his compensable injuries in 2009. Among other things, the court noted as of such date workers had the right to full medical benefits, the right to veto the carrier's selection of the physician, 350 weeks of temporary total benefits, and a common law right to sue in tort and recover for the full amount of his or her damages, including lost wages and non-economic damages. *See Westphal I* (slip op'n at 11).

The court continued that as a result of incremental legislative reductions over the following years, an injured worker is now entitled to recover a total of only 104

weeks of temporary disability benefits, which is a 71 percent reduction compared with the amount furnished in 1968. *Id.* at 12. It further observed that under the current statutory version, the law gives "employers and insurance carriers the nearly unfettered right to select treating physicians in workers' compensation cases." *Id.* Most notably the court pointed out that an injured worker such as Westphal, who remains totally disabled and still recovering from his or her compensable injuries, is ineligible to receive any further indemnity benefits once the 104-week period expires. *Id.* at 12-13.

Notwithstanding the court's acknowledgment that the present incarnation of the Law is far from adequate, and that "[a] system of redress for injury that requires the injured worker to legally forego any and all common law right of recovery for full damages for an injury, and surrender himself or herself to a system which, whether by design or permissive incremental alteration, subjects the worker to the known conditions of personal ruination to collect his or her remedy, is not merely unfair, but is fundamentally and manifestly unjust[,]" *id.* at 19, the panel declined to hold the provisions of the Law so inseparable as to require the invalidity of the entire act.

It is respectfully submitted that after nearly 46 years of successive legislative reductions to compensation benefits since the 1968 revision to the Florida Constitution, this court should now decide whether the act remains, as it then

concluded in *Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991): "[A] reasonable alternative to tort litigation." The reason given by *Scanlan* for upholding the law against a denial of access to courts challenge was that "[i]t continues to provide injured workers with *full medical care* and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation." *Id.* at 1172 (emphasis added).

Scanlan's rationale for approving the 1990 legislation mirrored that previously stated by the First District in 1982: "Although we note the benefits under the new wage-loss provisions may result in reduced benefits, the right to recover for industrial injuries has not been so reduced as to be *effectively eliminated*." *John v. GDG Services, Inc.*, 424 So.2d 114, 116 (Fla. 1st DCA 1982) (emphasis added). A frequent judicial reason given in the past for upholding the act is the mutual tradeoffs and advantages accorded to both the employer and employee. The following passage in *Florida Game & Fresh Water Fish Commission v. Driggers*, 65 So.2d 723, 725 (Fla. 1953), is typical:

> One purpose of the Workmen's Compensation Act, among other purposes, is to make available promptly medical attention, hospitalization and compensation commensurate with the injury sustained in the course of employment; to place on the industry served and not on society the burden of providing for injured or killed workmen and their families. *Keene Roofing Co. v. Whitehead*, Fla., 43 So.2d 464; *Weathers v. Cauthen*, 152 Fla. 420, 12 So.2d 294. . . . Such Acts are mutually advantageous to both workmen and employers, and have a

stabilizing influence on business and the general economy.

The reasons given in the past for rejecting access to courts challenges no longer appear relevant today. The mutual advantages mentioned by the supreme court in 1953 have since become so significantly eviscerated as to reduce many disabled employees, such as claimant, to a subsistence level of compensation. The undersigned attorney cannot express the present status of the law any better than Judge Van Nortwick's dissent in *Matrix Employee Leasing, Inc. v. Hadley*, 78 So.3d 621, 634 (Fla. 1st DCA 2011) (en banc), as to the "gap" created by the statutory cessation of temporary total disability benefits following the payment of same for 104 weeks, as provided in section 440.15(2)(a), Florida Statutes (2006). The following comments by him are particularly relevant to the question of whether the act in its entirety remains a viable alternative to a common law action in tort:

> [I]n the case of a totally disabled claimant whose rights to temporary disability benefits has [sic] expired, but who is prohibited from receiving permanent disability benefits, the elimination of disability benefits may reach a point where the claimant's cause of action has been effectively eliminated. In such a case, the courts might well find that the benefits under the Workers' Compensation Law are no longer a reasonable alternative to a tort remedy and that, as a result, workers have been denied access to courts.

Matrix Employee Leasing, Inc. v. Hadley, 78 So.3d 621, 634 (Fla. 1st DCA 2011) (en banc) (Van Nortwick, J., dissenting).

It is amicus's position that the warnings uttered by Judge Van Nortwick have

now come to pass and that this court should decide whether the act, considered as a whole, remains a viable alternative to an injured worker's action at law for damages. Any such judicial determination requires the application of the *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), test, used by *Westphal I* in reaching its decision that section 440.15(2)(a) is unconstitutional in its application. This test involves a comparison between the benefits available to workers under the Law in existence at the time of the adoption of the Florida Constitution on November 5, 1968, with those currently provided. *See Westphal I* at 11.

Current Availability of Benefits Compared With Those Provided in 1968

In addition to the reduction of temporary total and temporary partial disability benefits from the maximum amount of 350 weeks, formerly available to injured workers in 1968, to the current amount of 104 weeks, there have been similar decreases in medical and other categories of indemnity benefits. The remainder of this brief will focus primarily on the medical benefits provided in the current act for the purpose of showing that the former rationale given by *Scanlan* for upholding the law – the availability of full medical benefits – no longer exists. As a result, this court, in the exercise of its review jurisdiction, should not only approve the panel's decision in *Westphal I*, but give serious consideration to the question of whether the Workers' Compensation Law, as currently enacted, remains a realistic alternative to

a tort remedy. In other words, at what point do compensation benefits formerly provided injured workers become so reduced, so attenuated, that the entire Law should be struck down?

As for medical benefits, the 1967 workers' compensation statute, section 440.13, occupied three-quarters of a page. It succinctly stated that the employer was obligated to furnish treatment under the care of a qualified medical provider as the process of recovery might require.

In 1990, the legislature began the process of eroding the power of JCCs to resolve disputes in medical claims by creating a "super doc" panel of appointed physicians to resolve medical disputes, giving superior weight to the testimony of these physicians. Three years later it amended the Workers' Compensation Law with changes made effective for industrial accidents occurring on or after 1/1/94. Most importantly, it imposed the requirement that the compensable injury be the major contributing cause of a claimant's disability and need for treatment. § 440.09(1)(b), Fla. Stat. Additionally, the right to full medical benefits became further diminished by requiring all injured workers to make a $10 co-payment for all office visits after the date of maximum medical improvement (MMI). § 440.13(14)(c). This change appeared to be designed to dissuade injured workers from seeking needed care after the date of MMI, and, when it was coupled with the additional 1/1/94 change that

reduced the statute of limitations from two years to one year, it seems clear the goal of the legislature was to increase the likelihood that injured workers would find their claims barred by the statute of limitations.

Included among the 1993 statutory amendments was the repeal of the provision in section 440.13(3), existing in the 1967 version of the statute, making it unlawful for an employer or carrier to "coerce or attempt to coerce a sick or injured worker in the selection of a physician...." Section 440.13(2) and (3)(a) currently provide instead that the carrier shall authorize such care. Additionally, the legislature created the expert medical advisor (EMA) procedure for the purpose of resolving disagreements in the opinions of two or more health care providers. § 440.13(9). This change virtually eliminated the power of the JCCs to resolve such disputes. Not only was this amendment an affront to the concept of judicial independence because it denied the JCC the authority to use his or her familiarity with the respective credentials, training, length of involvement with the claimant, and reputation of the physicians whose opinions form the basis of the dispute, but it also created a method by which the carrier could attempt to avoid its obligation to timely provide needed benefits.

As an example, under the current statutory procedure, if an authorized, carrier-selected physician recommends surgery, the carrier has the option of not providing the surgery and instead can simply request an IME. § 440.13(2)(d) and

(5)(a). If the carrier-selected IME, who evaluates the claimant one time, opines the claimant does not need the recommended surgery, the carrier will more than likely choose not to provide it by declaring a conflict exists in medical opinions and seeking the appointment of an EMA, who typically possesses no greater degree of expertise than the treating or IME physicians. He or she will evaluate the claimant only once; however, the EMA's opinion is given a presumption of correctness under the statute that cannot be set aside in the absence of clear and convincing evidence to the contrary.

Thus, under the current statutory procedure, a JCC is, for all practical purposes, denied the right to decide whether the opinion of the carrier-selected physician, with whom the claimant may have established a lengthy client/patient relationship and who may possess credentials superior to those of the EMA, should be accepted.

(a) <u>Change in Physicians</u>

In the period between 1997 and 2001, managed care was the mandatory system for the delivery of medical treatment to injured workers. It required carriers to maintain a list of providers within each medical specialty and county. However, effective 2001, managed care became optional, and the legislature substantially reduced the right of claimants to select a physician. Section 440.13(2)(f) was amended to provide, as for injuries occurring on or after 10/1/03, one change of

physician during the course of treatment for any one compensable accident and the carrier was given the right to authorize the physician.

The 2003 legislative changes have resulted in the elimination of any degree of choice or control a claimant previously had over the medical care he was provided in connection with an injury. Such amendments have effectively made claimant's right to a change in physicians illusory, in that the former purpose of such enactments was to allow the claimant the choice of making the change from the original physician selected by the carrier.

There can be no legitimate argument that a carrier is not motivated to select a physician who will further its financial interests in reducing its expenditures for indemnity and medical benefits. If the carrier is permitted also to select the physician who will be designated the one-time change in care, there is no incentive for it to do other than choose a physician who will likely assist it in achieving its primary goal of reducing medical expenses.

While section 440.13(2)(f) provides claimant the right to select a physician if the carrier fails to name the physician within five days of his or her request, such default occurs in very few cases. Carriers are generally aware of the stakes associated with the selections of treating physicians and remain vigilant in complying with their obligation to authorize physicians in a timely fashion.

(b) 2003 Changes to the IME Procedure.

The 2003 changes also restrict the right of an injured worker to one IME per accident, rather than one per specialty. *See* § 440.13(5)(a). This means that if a claimant is receiving orthopedic care from a carrier-selected orthopedic surgeon and psychiatrist, he can only change from one of them, regardless of the quality of care provided. One of the original purposes for creating the IME procedure was to give the claimant an avenue for challenging the opinions given by authorized physicians; however, by limiting the claimant to one IME per accident, the claimant's right to establish entitlement to needed medical or indemnity benefits has now become drastically eroded, with the result that the current statutory enactments constitute a denial of injured workers' right to access of courts.

The current statutory right to a single IME can often be an illusory option because the 2003 amended statute requires employees to pay for their own evaluations. § 440.13(5)(a). In the present era when a typical neurosurgical IME costs in the range of $1500-$2000, a claimant already suffering financially as the result of a compensable accident is unlikely to be able to afford the expense of such evaluation.

(c) 2003 Changes Affecting the Apportionment of Benefits.

The 2003 law also ushered in a substantial change to long-established concepts of apportionment. *See* § 440.15(5). Prior to 2003, neither temporary disability nor

medical benefits were subject to apportionment. Consequently, during the period from 1/1/94 through 9/30/03, the carrier was obligated to provide full medical care as long as the injuries sustained in the compensable accident remained the major contributing cause (MCC) of the claimant's need for treatment. § 440.09(1). For compensable injuries – essentially those for which the employment was more than 50 percent responsible for the injury – occurring on or after 10/1/03, the carrier can refuse to pay for any portion of the treatment associated with a preexisting condition, even if the condition did not necessitate treatment prior to the industrial accident. As an example, consider an individual who sustained a non-compensable low-back injury in connection with an automobile accident in 1999, and required limited, non-surgical care for one year after the accident. He thereafter worked ten years without medical care for the low-back condition before suffering a work-related low-back injury in 2010. If the carrier-selected physician opines that surgery is now required, 60 percent of the need for which is work-related, and 40 percent due to the 1999 injury, the claimant would be required to pay 40 percent of the surgical costs.

Moreover if, as is most likely, the claimant were temporarily totally disabled for a period of time following the compensable accident, the same percentage of apportionment applicable to medical benefits would also apply to claimant's temporary indemnity payments, thereby reducing claimant's ability to pay for the

needed surgery during the critical time he or she is out of work. Under these circumstances the care provided the employee by the Workers' Compensation Law can no longer be said to entitle him or her to full medical care, and the result makes the statute unconstitutional in its application as the benefits provided are illusory in that injured workers in most cases lack the funds necessary to satisfy such expenses.

The combined effect of the severe reductions in both indemnity and medical benefits, together with the enactment of amendments establishing procedures leading to further reductions, has now resulted in a workers' compensation act that no longer functions in conformity with the long-expressed purpose for the act's creation: a system of mutual advantages to both employers and employees that ensures the quick and efficient delivery of benefits to injured workers regardless of fault and without the delay and uncertainty of tort litigation. As the present case illustrates, there is often no assurance of when an injured employee suffering from a disabling injury will receive benefits. Moreover, the current system is so heavily weighted in favor of the employer/carrier that it can hardly be said to operate for the purpose for which it was originally designed: to place on industry served and not on society the burden of providing for injured or killed workers and their families. If, as it appears, industry is no longer willing or able to support the expense of a workers' compensation system that functions for the benefit of both the employer and employee, amicus submits that

the time has now come for the court's re-evaluation of the validity of the entire act.

(d) <u>2003 Changes Affecting the Payment of Psychiatric Benefits</u>.

In 2003 the legislature amended section 440.15(3)(c) by restricting permanent psychiatric impairments to no more than one percent, while otherwise allowing permanent physical impairments to be paid for each percentage point of impairment from one percent to 21 percent and higher. § 440.15(3)(g). In the same session, the legislature created section 440.093(3), restricting the payment of temporary benefits for compensable mental injuries to no more than six months after the date of MMI reached for an injured worker's physical injury.

The legislature apparently questions the compensability of work-related mental injuries. While requiring proof of such injuries by clear and convincing evidence, and denying compensation for same if the mental injury arises from depression caused by the worker becoming unemployed, section 440.093(2), the legislature deems permanent mental injury trivial, and, if the worker, otherwise entitled to a total of 104 weeks of temporary indemnity benefits as a result of a compensable physical injury, see section 440.15(2) and (4), does not reach temporary disability status as to a mental injury until after the MMI date of a physical injury, he or she is limited thereafter to no more than six months of such benefits.

The 2003 amendments represent a substantial departure from the benefits

available to injured workers in 1968 when no distinctions were made between the provision of benefits caused by physical or mental work-related injuries. The present status of such benefits now can best be described as illusory.

CONCLUSION

As Mr. Westphal's situation graphically demonstrates, nearly 46 years of systematic and unrelenting legislative reductions in compensation benefits have left their devastating impact. The *Westphal* panel courageously recognized that a system which brings about "potential economic ruination" to an injured worker cannot comport with any reasonable understanding of natural justice, and, as a result, it held section 440.15(2)(a), Florida Statutes (2009), unconstitutional in its application as a denial of access to courts. The panel's decision has since been replaced with a distorted interpretation of the statute by the full court which creates a category of benefits never envisioned by the legislature – temporary permanent total disability benefits.

It is likely that if this court approves the decision in *Westphal II*, the legislature will follow a similar path taken by it after *Murray v. Mariner Health,* 994 So. 2d 1051 (Fla. 2008), was decided by repealing the court's construction of the statute. Given the present status of the Workers' Compensation Law, it is respectfully requested that this court should not only hold section 440.15(2)(a) invalid, but go one step further:

Strike down the entire Law and give injured employees the option of pursuing either an action in tort for damages or a workers' compensation claim under the provisions of the Law preceding the invalid provisions.

Respectfully submitted,

RICHARD W. ERVIN, III, ESQ.
Florida Bar No. 22964
FOX & LOQUASTO, P.A.
1201 Hays Street, Suite 100
Tallahassee, FL 32301
Ph: (850) 425-1333
Fax: (850) 425-3020
richardervin@flappeal.com

Attorney for Florida Workers Advocates, Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail this 22nd day of January 2014 to Richard A. Sicking, Esq., 1313 Ponce De Leon Blvd., # 300, Coral Gables, Florida 33134, (sickingpa@aol.com); Kimberly D. Proano, Esq. (kimberly.proano@stpete.org). Office of the City Attorney, counsel for respondent, City of st. Petersburg, P. O. Box 2842, St. Petersburg, FL 33731; Allen C. Winsor, Chief Deputy Solicitor General (allen.winsor@myfloridalegal.com) and Rachel E. Nordby, Esq., (rachel.nordby@myfloridalegal.com), co-counsel for the respondent State of Florida,

Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050; William H. Rogner, Esq., (wrogner@hrmcw.com), Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A., 1560 Orange Avenue., Suite 500, Winter Park, FL 32789; Andre M. Mura, Esq., (andre.mura@cc1firm.com), Center for Constitutional Litigation, P.C., 777 6th Street, N.W., Suite 520, Washington, DC 20001; Bill McCabe, Esq., (billjmccabe@earthlink.net), 1250 South Highway 17/92, Suite 210, Longwood, FL 32750; Geoffrey Bichler, Esq., (geoff@bichlerlaw.com) , Bichler, Kelley, Oliver & Longo, PLLC, 541 South Orlando Avenue, Suite 310, Maitland, FL 32751; Matthew J. Mierzwa, Jr., Esq., (mmierzwa@mierzwalaw.com) Mierzwa & Associates, P.A., Suite 212,3900 Woodlake Blvd., Lake Worth, FL 33463; Noah Scott Warman, Esq., (Nwarman@sugarmansusskind.com), Sugarman & Susskind, P.A., 100 Miracle Mile, #.300, Coral Gables, Florida 33134; Jason Fox, Esq., (JayfoxEsq@aol.com) Law Offices of Carlson and Meissner, co-counsel for petitioner, 250 N.Belcher Rd., Suite 102, Clearwater, FL 33765; George T. Levesque, General Counsel (Levesque.George@flsenate.gov) ,Florida Senate, 404 South Monroe Street, Tallahassee, FL 32399; and Daniel E. Nordby, General Counsel (Daniel.Nordby@myfloridahouse.gov), Florida House of Representatives, Suite 422, The Capitol, Tallahassee, FL 32399-1300, Jeffrey E. Appel, Esq., 625 Commerce Drive, Suite 104, Lakeland, FL 33813, Ciappel@jealaw.net) , and Barbara Wagner,

Esq., 1 Financial Plaza, Floor 7, Ft. Lauderdale, FL 33394-0015 (Barbw@sportsinjurylaw.com).

Richard W Irwin III
Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font, which complies with the font requirements as set forth in Florida Rule of Appellate Procedure 9.210.

Richard W Irwin III
Attorney