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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

BRADLEY WESTPHAL,	
Petitioner,	CASE NO.: SC13-1930
vs.	L.T. Case Nos.: 1D12-3563 OJCC No: 10-019508SLR
CITY OF ST. PETERSBURG, ET AL,	
Respondents.	

AMENDED BRIEF OF AMICUS CURIAE* THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS FILED ON BEHALF OF PETITIONER BRADLEY WESTPHAL

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I. INTRODUCTION

This brief is filed on behalf of the International Association of Fire Fighters (hereinafter "IAFF"), amicus curiae, in support of Petitioner Bradley Westphal. By Order dated December 31, 2013, this Court granted IAFF's motion seeking leave to appear as amicus curiae in support of Petitioner.

II. STATEMENT OF IDENTITY AND INTEREST

The IAFF is an organization representing more than 300,000 professional fire fighters, paramedics, and other emergency responders in the United States and Canada. More than 3,200 IAFF affiliates protect the lives and property of over 85 percent of the continent's population in nearly 6,000 communities in every state in the United States and in Canada. The IAFF represents fire fighters throughout Florida with respect to collective bargaining, health and safety, training, and various other issues.

Due to the dangerous working environment that fire fighters confront on a daily basis, fire fighter safety and protections for individuals hurt in the line of duty — *the subject matter at issue in this case* — are a significant area of concern for the IAFF. The IAFF has a substantial interest in the issue of the validity and interpretation of Florida Statutes § 440.15(2)(a), and the potential limitations the statute places on injured fire fighters' right to receive disability benefits at the expiration of the statutory benefit period.

III. SUMMARY OF ARGUMENT

The First District Court of Appeals *en banc* decision is a clear example of judicial legislation in violation of the separation of powers provision of the Florida Constitution. Allowing the decision to stand would be permitting the court to step into the shoes of the Florida Legislature — a position which has been repeatedly rebuffed by this Court. The *en banc* decision's improper attempt to salvage the unconstitutional temporary total disability benefits provided in Florida Statutes § 440.15(2), is additional evidence of the inadequacy of the current benefits as a replacement for tort litigation.

When it comes to fire fighters, work place injuries can be extremely serious and require an extensive recovery period. While the majority of the country recognizes these concerns, and has appropriately adopted workers' compensation laws that provide benefits for the duration of an employee's disability, the Florida Legislature has slowly eroded employee benefit entitlements. Coupled with the repeal of Florida's workplace safety laws, employees —*particularly fire fighters* — are lacking the protections they previously possessed under Florida law as well as an adequate remedy for workplace injuries.

IV. ARGUMENT

A. The First District Court of Appeals En Banc Decision Amounts to Improper Judicial Legislation

This Court has acknowledged that "[t]he standard of review for . . . pure questions of law . . . is de novo." *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003). As a result, the decisions of the lower courts are afforded no deference. *Id.*

The Florida Constitution has expressly adopted the theory of separation of powers. *See* Art. II, § 3, Fla. Const. Specifically, "[t]he 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 therein." *Id.* This Court has recognized this constitutional limitation stating "'[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.'" *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001) (quoting *State v. Cohen*, 696 So. 2d 435, 436 (Fla. 4th DCA 1997)) (internal quotations and citations omitted).

The Florida Legislature defined the "Date of maximum medical improvement" as "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. (2013). The First District's *en banc* decision alters this statutory definition by concluding that an injured employee reaches maximum medical improvement at the time temporary disability benefits expire. *Westphal v. City of St. Petersburg*, 122 So. 3d 440, 444 (Fla. 1st DCA 2013) (*Westphal II*). Despite this conclusion, the court acknowledges that an employee's injury may continue to improve to the point that he or she will later be able to return to work even after he or she has reached the court's newly defined date of maximum medical improvement. *Id.*

The First District's *en banc* decision is a blatant example of judicial legislation wherein the court is attempting to substitute its judgment for that of the legislature. The decision in *Westphal II* violates the principles of separation of powers and should be reversed.

B. Current Florida Law Governing Temporary Total Disability Benefits Denies Employees an Adequate Remedy to Seek Redress for Injuries Sustained in the Course of Their Employment

This Court has stated that the "[d]etermination of whether a statute is constitutional is a pure question of law which is reviewed de novo." *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013).

The Florida Constitution was amended in 1968 to ensure that "[t]he courts shall be open to every person for redress of any injury, and injustice shall be

administered without sale, denial or delay." Art. I, § 21, Fla. Const. This Court has explained the rights created by this constitutional provision as follows:

> 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.

Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973). At the time the Court expressed this rule, it considered whether Florida's workers' compensation laws were in violation of this constitutional provision. *See id.* While the Court concluded at that time that the Legislature had "provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job," *id.*, those protections and safeguards have now been significantly diminished to the point that they no longer offer adequate protection to employees' rights.

At the time that Article I, section 21 was enacted, Florida law provided injured employees with 350 weeks of temporary total disability benefits. §§ 440.13(1)–(2), .15(2), Fla. Stat. (1967). Currently those benefits have been reduced to a maximum of 104 weeks. § 440.15(2), Fla. Stat. (2013). As was the case for Petitioner, the current iteration of Florida law on temporary total disability benefits can cause a seriously injured employee who continues to be unable to

work to be denied benefits without permitting that employee any recourse. *See Westphal v. City of St. Petersburg*, 38 Fla. L. Weekly D 504 (Fla. 1st DCA Feb. 28, 2013) (*Westphal I*) (noting that "Westphal spent nine months without receiving any disability payments before the E/C agreed that he was entitled to permanent total disability benefits").

C. *Florida Temporary Total Disability Benefits are Grossly Inadequate and Deny Employees Sufficient Time to Recover from Workplace Injuries*

Petitioner was subjected to a state of limbo where he continued to be unable to work, but was denied benefits due to his having exhausted the statutory period provided to employees with temporary total disabilities. *See Westphal I*, 38 Fla. L. Weekly D 504. This problem is the direct result of the Legislature having reduced temporary total disability benefits to the point that they no longer offer the protections that supported the restriction of an employee's right to sue his or her employer for a workplace injury.

1. The Majority of States Provide Temporary Total Disability Benefits for the Duration of the Disability

The overwhelming majority of states place no limitation on the duration that an employee may continue to receive temporary total disability ("TTD") benefits. *See, e.g.*, Ala. Code § 25-5-57(a)(1) (2013) (TTD benefits will be paid so long as the disability continues, unless it is determined that the disability has become permanent); *see* Alaska Stat. § 23.30.155 (2013) (no limit on the duration of TTD

benefits); Ariz. Rev. Stat. Ann. § 23-1045 (LexisNexis 2013) (TTD benefits to be paid for the duration of the disability); *see* Ark. Code Ann. §§ 11-9-802, 11-9-803 (2013) (absent an employer's controversion request, TTD benefit payments will continue so long as the person remains disabled); Colo. Rev. Stat. § 8-42-105(1), (3) (2013) (TTD benefits will continue until the employee reaches maximum medical improvement, returns to regular or modified work, physician releases to regular work, or employee is released to modified work but refuses the offer for this type of employment); *see* Conn. Gen. Stat. § 31-307 (2013) (no limitation placed on the duration of TTD benefits); Del. Code Ann. tit. 19, § 2324 (2013) (placing no limitation on the duration of TTD benefits); D.C. Code § 32-1508(2) (2013) (TTD benefits are payable during the continuance of the disability); Haw. Rev. Stat. § 386-31(b) (2013) (TTD benefits must be paid for the duration of the disability); Idaho Code Ann. § 72-408(2) (2013) (TTD benefits payable during the period of recovery); 820 Ill. Comp. Stat. 305/8(b) (2013) (TTD benefits will continue as long as the total disability still exists); Iowa Code § 85.33(1) (2013) (TTD benefits paid until the employee has returned to work or is medically capable of returning to work); Kan. Stat. Ann. § 44-510c(b)(1) (2012) (TTD benefits continue while the disability exists); Ky. Rev. Stat. Ann. § 342.730(1)(a) (LexisNexis 2013) (TTD benefits continue for the duration of the employee's disability); La. Rev. Stat. Ann. § 23:1221(1)(a) (2013) (TTD benefits continue

until the physical condition has resolved itself to the point where "continued, regular treatment by a physician is not required"); Me. Rev. Stat. Ann. tit. 39-A § 212(1-A) (2013) (TTD benefits last for the duration of the disability); Md. Code Ann., Lab. & Empl. § 9-621(b) (LexisNexis 2013) (TTD benefits are paid for the duration of the employee's disability); Minn. Stat. § 176.101(e) (2013) (TTD benefits cease when the employee returns to work); Mont. Code Ann. § 39-71-701(3) (2013) (TTD benefits must be paid for the duration of the worker's temporary disability); *see* Neb. Rev. Stat. § 48-121(1) (2013) (TTD benefits payable for the duration of the disability); Nev. Rev. Stat. § 616C.475(1) (2013) (TTD benefits payable for the period of the temporary disability); *see* N.H. Rev. Stat. Ann. § 281-A:28 (LexisNexis 2013) (TTD benefits payable until the employee can either return to work or has reached maximum medical improvement); *see* N.J. Rev. Stat. § 34:15-38 (2013) (TTD benefits are available from the time the employee is unable to work until the time that the employee can permanently return to work); *see* N.M. Stat. § 52-1-25.1(A) (2013) (TTD benefits are available until the employee reaches maximum medical improvement); N.Y. Workers' Comp. Law § 204(1) (Consol. 2013) (TTD benefits continue while the disability continues); Or. Rev. Stat. § 656.210(1) (2012) (TTD benefits received throughout the time that the disability exists); Pa. Stat. Ann. § 511(1) (2013) (TTD benefits paid for the duration of the total disability); R.I. Gen. Laws. § 28-33-

17(a)(1) (2013) (TTD benefits provided while disability remains total); *see* S.D. Codified Laws § 62-4-3 (2013) (TTD benefits provided for the duration of the disability); *see* Tenn. Code Ann. § 50-6-207(1) (2013) (TTD benefits provided until the employee is able to return to work); Vt. Stat. Ann. tit. 21, § 642 (2013) (TTD benefits provided while the disability still exists); Va. Code Ann. § 66.2-500(A) (2013) (TTD provided for the duration of the total disability); Wash. Rev. Code § 51.32.090(1) (2013) (TTD benefits are provided as long as the total disability continues); Wis. Stat. § 102.43(1) (2013) (TTD benefits provided weekly during the disability).

Even where states have not seen fit to ensure an employee receives TTD benefits for the duration of the disability, a number of the remaining states have adopted statutory periods greatly exceeding that provided by the Florida Legislature. *See, e.g.*, Ga. Code Ann. § 34-9-261 (2013) (placing a 400 week limit on TTD benefits unless the injury is determined to be catastrophic at which point the employee will receive benefits until the condition improves); Ind. Code § 22-3-3-8 (2013) (TTD benefits provided for 500 weeks); Mass. Gen. Laws. ch. 152, § 34 (2013) (TTD benefits provided for 156 weeks); Mich. Comp. Laws. § 418.351 (2013) (TTD benefits shall not be provided for more than 800 weeks, thereafter a determination of permanent total disability is made); Miss. Code Ann. § 71-3-17(b) (2013) (TTD benefits provided for 450 weeks); Mo. Rev. Stat. § 287.170(1) (2013)

(TTD benefits provided for 400 weeks); N.C. Gen. Stat. § 97-29(b) (2013) (TTD benefits provided for 500 weeks); Ohio Rev. Code Ann. § 4123.56(A) (LexisNexis 2013) (TTD benefits provide for 200 weeks at which point the employee will be considered for permanent disability); Okla. Stat. tit. 85, § 332(A) (2013) (TTD benefits provided for 156 weeks with the ability for a court to extend them for an additional 52 weeks if the injury is determined to be consequential); S.C. Code Ann. § 42-9-10(A) (2012) (TTD benefits provided for 500 weeks); Utah Code Ann. § 34A-2-410(1)(b) (2013) (TTD benefits provided for 312 weeks).

The nature and duties of a fire fighter demand that he or she place himself in harms way to preserve and protect both the property and lives of the community in which they serve. As a result, and as was the case for Petitioner, when they are injured in the course of their employment, the injuries can be quite severe and require an extensive recovery period. The majority of the states, including many of Florida's neighbors, have adopted benefit periods that provide their employees the time they need to recover from injuries sustained in the performance of their duties.

2. States Sharing Florida's Base Benefit Period Provide Additional Benefits and Protections to Employees

Five states share Florida's base TTD benefit period of 104 weeks. *See, e.g.*, Cal. Lab. Code § 4656(c) (Deering 2014); N.D. Cent. Code § 65-01-02(29) (2013); Tex. Lab. Code Ann. §§ 401.011(30)(B), 408.102 (Vernon 2013); W. Va. Code §

23-4-6(b)–(c) (2013); Wyo. Stat. Ann. § 27-14-404(a) (2013). While these states have adopted the same base benefit period as Florida, some of them have also adopted provisions that allow for the expansion of this benefit period.

For example, Texas law allows an injured employee to continue receiving benefits beyond 104 weeks until that employee reaches maximum medical improvement when that employee has suffered a spinal injury or has been approved for spinal surgery prior to the expiration of the 104 week benefit period. Tex. Lab. Code Ann. § 408.104(a) (Vernon 2013). Additionally, Wyoming law allows for TTD benefits to be extended for an undetermined amount of time "in the event of extraordinary circumstances . . . ." Wyo. Stat. Ann. § 27-14-404(a) (2013).

More importantly, each of the states have adopted workplace safety laws. *See, e.g.*, Cal. Lab. Code § 6300 (Deering 2014); N.D. Cent. Code § 65-01-01 (2013); Tex. Lab. Code Ann. § 411.101 (Vernon 2013); W. Va. Code § 21-3A-1a (2013); Wyo. Stat. Ann. § 27-11-102 (2013). While workers' compensation benefits compensate employees after they have already suffered an injury, workplace safety laws attempt to prevent injuries from occurring in the first place. Florida had previously enacted such a law; however, it was repealed in 1999, thereby removing Florida employers' requirements to undertake efforts to prevent workplace injuries. *See* Ch. 99-240, § 14, at 2165–66, Laws of Fla.

The lack of any workplace safety laws is particularly troubling for Florida fire fighters. As discussed above, these individuals accept exceptional risk to their lives to protect and serve the public. When injuries do occur that are frequently substantial and potentially life threatening. The lack of laws and regulations seeking to limit the occurrence of injuries, coupled with the inadequate benefits provided when they do occur, demonstrate that the 104 week limitation on TTD benefits is an inadequate remedy in violation of the Florida Constitution.

V. CONCLUSION

The IAFF respectfully requests that this Court reverse the First Circuit's *en banc* decision in *Westphal II* and either reinstate the panel decision in *Westphal I*, or alternatively make a finding that the 104 week limitation on temporary total disability benefits is unconstitutional as it is a violation of the rights employees are entitled to pursuant to Article I, section 21 of the Florida Constitution.

Dated: January 27, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief has been typed in 14 point proportionately spaced Times New Roman.

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Matthew J. Mierzwa, Jr.