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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Bradley Westphal,

Petitioner, SCN: SC13-1930

v. LTN: 1D12-3563

City of St. Petersburg/City of St. Petersburg Risk Management and State of Florida, DOAH: 10-019508SLR

Respondents,
_________________________________/

AMICUS CURIAE BRIEF OF VOICES, INC., IN SUPPORT OF PETITIONER, BRADLEY WESTPHAL

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INTRODUCTION

In this brief, Petitioner, Bradley Westphal will be referred to as Claimant or Petitioner. Respondents, City of St. Petersburg/City of St. Petersburg Risk Management will be referred to as the Employer/Carrier or E/C, and the State of Florida will be referred to as the State. The Judge of Compensation Claims will be referred to as the JCC and the Office of the Judge of Compensation Claims as the OJCC. Voices, Inc., will be referred to as Voices.

IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THE CASE

Statement of Amicus Interest:

Voices, Inc., is a non-profit advocacy group for injured workers in Florida and their supporters. The purpose of Voices is to guide injured workers and their families through the workers' compensation system and educate them as to their rights under the law. The matter before the Court will significantly impact an injured workers' worker's right to receive indemnity benefits after 104 weeks of disability but prior to maximum medical improvement. Accordingly, Voices, has an interest in the outcome of this matter as it pertains to avoiding financial devastation for injured workers' caught in the gap between the exhaustion of 104 weeks of temporary benefits and achieving the appropriate medical status to garner entitlement to permanent total disability benefits.

SUMMARY OF THE ARGUMENT

Voices contends the majority ruling of the First District Court of Appeal violates theFlorida's separation of powers provision in Article II, Section 3 of the Florida Constitution by enacting a new substantive law creating a new class of workers' compensation benefits. Voices endorses the dissent written by Judge Thomas in the opinion issued below on this topic. Voices joins Petitioner in his arguments concerning this issue. Voices also suggests the majority opinion disregards the definition of maximum medical improvement and creates an unworkable class of benefits, causing which will cause injured workers to be caught in a legal twilight zone, increase litigation, and frustrate the legislative intent of a self-executing efficient workers' compensation system.

ARGUMENT

Standard of Review

The standard of review for a pure question of law before this Court is *de novo*. *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla. 2003).

Point I

THE EN BANC DECISION IS INCORRECT AS THE COURT CREATED A CATEGORY OF BENEFITS NOT PROVIDED FOR BY THE LEGISLATURE IN VIOLATION OF THE SEPARATION OF POWERS PROVISION IN THE FLORIDA CONSTITUTION.

Voices contends the majority ruling of the First District violates Florida's the separation of powers provision in Article II, Section 3 of the Florida Constitution. As Judge Thomas recognized in his dissent, "The majority opinion enacts new substantive law that creates a legal entitlement to permanent total disability benefits at the expiration of temporary total disability benefits, regardless of whether the claimant will remain totally disabled when reaching maximum medical improvement." In other words, the majority ruling has created temporary permanent total disability benefits – an apparently oxymoronic class of benefits.

Article II, Section 3 of Florida's Constitution provides:

> 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.

Florida has traditionally applied a strict separation of powers doctrine. *Bush v. Schiavo*, 885 So.2d 321, 329 (Fla. 2004). If a court extends, modifies or limits an otherwise unambiguous statute, any such ruling is considered an abrogation of legislative power. *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984). The majority opinion below did not merely extend, modify or limit an unambiguous statute. The ruling created an entire new class of benefits worthy of its own section within the statute. This new class of benefits also would require administrative rules to guide employers, carriers and claimants in its implementation. Finally, this new class of benefits would impact other areas of the law without the opportunity to modify other conflicting or related statutory sections, For example, is an employer/carrier entitled to a social security disability benefits offset for "temporary" permanent total disability benefits? More examples will follow in the second point of argument in this brief; however, for now, Voices contends this patchwork fix of the gap between temporary and permanent benefits will only lead to other holes additional issues and confusion in the Act, which is why the Constitution delegates law making to the legislature who can tackle perceived problems in the law holistically as opposed to performing battlefield surgery in the dark with limited instruments.

Furthermore, Voices contends that if the concept of a "spectrum of strictness" applies to the separation of powers doctrine, then the Workers' Compensation Act should fall at the strictest end of such a spectrum because it is purely a creature of

statute. The "strictest of strictest" separation of powers analysis urged by Voices herein is not a new concept. This Court has previously recognized the position Voices takes in *City of Hollywood v. Lombardi* when it cited the oft quoted *Travelers Ins. Co. v. Sitko* with approval and harkened to a 1962 case on the topic from this Court, *J.J. Murphy & Son, Inc. v. Gibbs*:

> Because workers' compensation benefits are a creature of statute, *see Travelers Ins. Co. v. Sitko*, 496 So.2d 920, 921 (Fla. 1st DCA 1986), our answer to the certified question must be based on statutory interpretation guided by this Court's prior case law interpreting the applicable statutes. *See J.J. Murphy & Son, Inc. v. Gibbs*, 137 So.2d 553, 562 (Fla. 1962) (Work[er's] compensation is entirely a creature of statute and must be governed by what the statutes provide, not by what deciding authorities feel the law should be.). *City of Hollywood v. Lombardi*, 770 So.3d 1196, 1200 (Fla. 2000).

Thus, with this backdrop in mind, the Court should consider whether the majority opinion in the current case departed from the duties of an appellate body in an apparent attempt to connect the interstitial space in the law between temporary disability benefits and permanent total disability benefits. As Judge Thomas pointed out in his dissent, this Court "decided more than forty years ago that only the legislature, not the judiciary, has the authority to write the law imposing limits on temporary total disability indemnity benefits." citing *Thompson v. Fla. Indus. Comm'n*, 224 So.2d 286, 287 (Fla. 1969) (stating: "The Florida Workmen's Compensation Act is inadequate in failing to provide for a situation such as this. However, the remedy lies with the Legislature and not with the Florida Industrial

Commission or the Court."). In addressing the issue of the gap between temporary and permanent total disability benefits, the First District Court of Appeal noted correctly in *Matrix Employee Leasing, Inc. v. Hadley*, 78 So.3d 621 (Fla. 1st DCA 2012) that the court does not "have the authority to rewrite the statutes to eliminate the potential 'gap' in disability benefits; that remedy lies with the Legislature, not the courts." Despite its own acknowledgment of its limits, the court has now stepped into the legislative arena and rewritten several portions of the statute – those dealing with duration of disability benefits, as well as the definitions of maximum medical improvement, permanent impairment and permanent total disability.

Voices urges that the *en banc* decision is also incorrect and inappropriate because argues that this logic can be taken a step further because this exact issue has already been interpreted by past appellate court decisions and the Legislature has reenacted the statute subsequent to those decisions. *See e.g., City of Pensacola Firefighters v. Oswald*, 710 So.2d 95, 98 (Fla. 1st DCA 1998). Voices suggests that this Court should conclude the lower court's majority opinion does not comport with prior, legislatively approved, case law. *Gulfstream Park Racing Ass'n v. Dep't of Bus. Regulation*, 441 So.2d 627, 628 (Fla. 1983) ("When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary."). Therefore, the majority opinion not only violates the

separation of powers doctrine of the Florida Constitution, it also violates an important foundation of Florida law, the combination of *stare decisis* and the Legislative incorporation of preexisting case law into reenacted statutes. If this lofty bar can be overcome because of a tribunal's discontent with prior rulings, then Voices is concerned that its membership of injured workers cannot count on past case law interpreting the right to any of the benefits promised in the Act. Voices also finds it disconcerting that a reviewing tribunal can simply sidestep constitutional issues by reversing prior case law directly on point, interpreting a statute in a manner clearly conflicting with the plain meaning of the statute. This essentially makes a constitutional challenge to any section of the Act illusory.

Because the majority opinion violates the separation of powers provision in the Florida Constitution, this Court should void the *en banc* decision *Westphal v. City of St. Petersburg*, 122 So.3d 440 (Fla. 1st DCA 2013) and analyze the constitutional questions raised by the legislative cap of temporary indemnity benefits at 104 weeks as addressed in the initial panel opinion. Voices supports the position of Petitioner and other *amici* supporting Petitioner regarding the constitutional issues raised in this matter.

Point II

THE EN BANC DECISION IS INCORRECT AS IT DISREGARDS THE MEANING OF MAXIMUM MEDICAL IMPROVEMENT AND CREATES A CONFUSING, UNWORKABLE SYSTEM WHICH WILL INCREASE LITIGATION.

Not only did the appellate court's majority violate the separation of powers provision of the Florida Constitution, but they also created a confusing, unworkable method for an injured worker to obtain disability benefits at the end of 104 weeks of temporary disability which defeats completely the stated legislative intent of "an efficient and self-executing system…which is not an economic or administrative burden." See Sec. 440.015, Fla. Stat. As an organization of injured workers and their support group members, Voices is concerned that the *en banc* decision will place injured workers in a "legal twilight zone" while creating uncertainty in the law and instability in the workers' compensation system (as noted aptly by Judge Thomas in *Westphal*, 122 So. 3d at 455).

The majority decision creates a concept of "maximum medical improvement by operation of law" which disregards and contradicts the statutory definition of MMI as well as years of case law explaining it. Maximum medical improvement is a **medical** determination which must be based on a clear, explicit expression in medical records or medical opinion testimony. *Lemmer v. Urban Electrical, Inc.*, 947 So.2d 1196 (Fla. 1st DCA 2007) (emphasis added). "Because the question of

whether a claimant has reached MMI is essentially a medical question, it should be answered by medical experts." *Id.* A claim for permanent total disability benefits is not ripe or appropriate until a claimant reaches MMI. This makes sense because that is when a doctor has opined that the employee has reached a plateau of recovery, and when permanent restrictions and impairment can be determined with reasonable medical probability, not speculation or a crystal ball.

In their tortuous effort to avoid acknowledging the unconstitutionality of the 104 week limit on temporary disability benefits (as was addressed so articulately in the initial panel decision), the *en banc* majority redefined MMI so as to allow a claim for permanent total disability benefits at the end of 104 weeks of temporary disability, regardless of a claimant's actual medical status or stage of recovery. This "solution" is fraught with problems and confusion which are sure to evoke litigation long into the future and prevent workers from quickly receiving needed benefits if the *en banc* decision is allowed to stand.

The majority held that at the end of 104 weeks of temporary disability a worker is "**eligible to assert a claim** for permanent and total disability benefits," not that the worker is automatically entitled to continued disability benefits without a gap. 122 So.3d at 442 (emphasis added). "The worker may immediately **assert a claim** for permanent total disability benefits, and the judge **may award** those benefits **if the worker has proven** that he or she is in fact totally disabled." *Id* at

444. (emphasis added). The court made clear that they were not extending temporary benefits beyond the statutory limit, but merely enabling a disabled worker **to assert a claim** for permanent disability benefits without an artificial and unnecessary delay in the process (i.e., waiting for a medical determination of MMI). *Id.* (emphasis added). Thus, after 104 weeks of temporary disability benefits, an injured worker must assert a claim and meet a burden of proof as to permanent total disability benefits in order to receive continued wage replacement payments, despite the fact that the worker's condition is not "permanent" at that time. The claims process is long and expensive, and entails risks to a claimant. Employers and carriers have rights to independent medical examinations and vocational assessments to challenge a worker's disability claim. Depositions and other discovery must be undertaken by the parties before adjudication by a Judge of Compensation Claims. Doctors will be asked to perform the speculative and/or impossible tasks of assigning a permanent impairment rating and permanent restrictions to a condition that is not yet permanent. If a claimant does not prevail, costs will be assessed against him/her, with this risk discouraging the pursuit of short periods of benefits to which an employee may be entitled. If permanent total disability benefits are awarded, albeit for a "temporary" time, issues will arise as to whether supplemental benefits (annual cost-of-living increases) are owed, whether offsets for social security may be taken, how the benefits can be terminated if the worker improves or returns to work,

whether an employee must pay a co-pay for remedial medical care, and many other scenarios, all of which have the potential to cause time-consuming and expensive litigation. In short, the lower court's inappropriate "legislation" and judicial amendment of an unambiguous statute opens a Pandora's Box. Voices, Inc., suggests that it should remain closed, and that this court should instead reinstate the original panel decision (*Westphal* I) or alternatively, declare the current Workers' Compensation Act unconstitutional based on the arguments asserted in Petitioner's Initial Brief and in the briefs of *amici* supporting the Petitioner's position.

Judge Thomas warned in his dissent: "Under the majority opinion's new judicial legislation, however, Mr. Westphal is once again relegated to a legal twilight zone." *Id* at 455. His concern is that this new class of benefits comes with no guarantee of permanency and thus in the future, an injured worker such as Westhphal may be "required to prove what he has already proven…" While Voices is primarily concerned with the impact of this result on injured workers, the same legal twilight zone concern applies equally to employers and carriers navigating through the system. Every participant desires certainty in the system. But, as Voices will points out, the legal twilight zone is just the "tip of the iceberg" when it comes to the uncertainty and calamity which will result if this Court allows temporary permanent total disability benefits to exist.

The concept of temporary permanent disability opens holescreates significant problems in other portions of the statute. For example, Section 440.15(1)(f) creates a cost of living increase for permanently and totally disabled workers, commonly called permanent total supplemental benefits. However, this section provides no guidance as to whether the cost of living increase would apply to an injured worker receiving permanent total disability on a temporary basis. This lack of certainty has a ripple effect which impacts Section 440.15(9) as well. This section allows carriers to take a social security offset. But it can only be taken one time, prospectively, and the amount of offset is fixed at that time. *Monroe v. Publix #148*, 790 So.2d 1249, 1252-1253 (Fla.1st DCA 2001). The initial offset calculation includes permanent total supplemental benefits payable under Section 440.15(1)(f) at the time of the calculation but not future increases in the supplemental benefits. *See Jackson v. Hochadel Roofing Co.*, 794 So.2d 668, 671 (Fla. 1st DCA 2001). Accordingly, if the carrier is uncertain as to whether the 440.15(f) cost of living increase should be included in the injured worker's' bi-weekly PTD payment, then the carrier is also in limbo regarding whether or not it can exercise its right to an offset if the claimant receives SSDIsocial security disability payments. If the carrier is left in limbo as to what to pay and when,, then it is the injured worker who will suffer as a result. ..

An important goal of workers' compensation is to return the injured worker to gainful employment. See 440.015. Key to this goal is the carrier's ability to

encourage an injured worker to cooperate with vocational evaluations and testing by suspending PTD payments if the injured worker does not comply. See 440.15(1)(c). If an injured worker is placed into the legal twilight zone of temporary PTD, then no party can adequately know their rights and responsibilities under this section.

This legal twilight zone is also an arena in which no party has guidelines on what to do if the facts change. Is temporary PTD subject to modification administratively by the carrier? Is the prior order of PTD only subject to modification pursuant to 440.28? If the case goes to hearing again, which party will have the burden of proof?

Carriers have no administrative guidelines on how much to pay for temporary PTD. It seems the majority opinion below has assumed these benefits will be paid out as normal PTD benefits, but there are no guidelines for payment of such benefits in the statute and workers' compensation is purely a creature of statute. Therefore, injured workers cannot rely on the statute for guidance as to what amount of benefits will be paid or when the benefits are due.

Another question arising out of the problem of paying PTD prior to MMI is that an injured worker, upon obtaining MMI, is entitled to permanent impairment benefits. These benefits are paid out according to a schedule depending on the amount of his or her permanent impairment rating as assigned by the medical providers. See Section 440.15(3). PTD benefits and permanent impairment benefits

are mutually exclusive. *Brannon v. Tampa Tribune*, 711 So.3d 97 (Fla. 1st DCA 1998). If an injured worker has received temporary PTD between the expiration of 104 weeks of temporary benefits and actual MMI, then are these benefits still mutually exclusive? Should an offset be taken by the carrier for temporary PTD paid? There are many other potential problems associated with the creation of a new class of benefits with no modification to other affected parts of the statute. This is why it is the legislature's job to make substantive changes to a statute, not the court's. Accordingly, Voices strongly supports the Petitioner's argument for reversal of the *en banc* decision below.

CONCLUSION

Voices joins Petitioner's argument for reversal of the *en banc* decision below because the lower court created a new class of benefits, violating the separation of powers doctrine, and because the new class of benefits creates an unworkable system for injured workers. Voices suggests this Court should address the constitutional issues raised by Petitioner and Voices supports Petitioner in those arguments. Voices joins Petitioner in seeking a determination that the limitation to 104 weeks of temporary benefits is unconstitutional as applied and, alternatively, that the current Act is no longer an adequate remedy for injured workers and is a denial of Access to Courts as guaranteed in the 1968 Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished via electronic portal this 3rd day of February, 2014, to George T. Levesque, Esquire, Florida Senate, 404 South Monroe Street, Tallahassee, Florida 32399, at levesque.george@flsenate.gov; to Rachel Nordby, Deputy Solicitor General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, at Rachel.nordby@myfloridalegal.com; to William J. McCabe, 1250 South Highway 17/92, Suite 210, Longwood, Florida 32740, at billjmccabe@earthlink.net; to Richard W. Ervin, III, Esquire, Fox & Loquasto, PA, 1201 Hays Street, Suite 100, Tallahassee, Florida 32301, at richardervin@flappeal.com; to Richard A. Sicking, Esquire, 1313 Ponce de Leon Blvd., Suite 300, Coral Gables, Florida 33134, at sickingpa@aol.com; to Andre Mura, Esquire, Center for Constitutional Litigation, 777 6th Street, NW, Suite 520, Washington, D.C., 20001, at andre.mura@cclfirm.com; to Jason Fox, Esquire, Carlson & Meissner, 250 N. Belcher Road, Suite 102, Clearwater, Florida 33765, at jayfoxesq@aol.com; to Kimberly Proano, Esquire, Office of the City Attorney, Post Office Box 2842, St. Petersburg, Florida 33731, at kimberly.proano@stpete.org; to William H. Rogner, Esquire, Hurley, Rogner, Miller, Cox, Waranch & Westcott, 1560 Orange Avenue, Suite 500, Winter Haven, Florida 32789-5552, at wrogner@hrmcw.com; to Allen C. Winsor, Solicitor General, Office of the Attorney General, The Capital, PL-01,

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CERTIFICATE OF TYPE FACE COMPLIANCE

I HEREBY CERTIFY that this Amicus Curiae Brief was computer generated using Times New Roman fourteen font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P. 9.210 for computer-generated pleadings.

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