Filing # 9894975 Electronically Filed 02/04/2014 04:10:13 PM

RECEIVED, 2/4/2014 16:13:41, John A. Tomasino, Clerk, Supreme Court

SUPREME COURT OF FLORIDA
Case No. SC13-1930

BRADLEY WESTPHAL,

Petitioner,

v.

Lower Tribunal Nos.: 1D12-3563; 10-019508SLR
Consolidated: SC13-1976

CITY OF ST. PETERSBURG, ETC., ET AL.,

Respondents.

RESPONDENT CITY OF ST. PETERSBURG'S

ANSWER BRIEF ON THE MERITS

JOHN C. WOLFE
CITY ATTORNEY

BY: ***/S/ Kimberly D. Proano***
KIMBERLY D. PROANO
Assistant City Attorney
Attorney for Employer/Self-Insured
P. O. Box 2842
St. Petersburg, FL 33731
(727)893-7401-[FAX-(727)892-5262]
kimberly.proano@stpete.org
FBN: 0026819

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The Petitioner, City of St. Petersburg, shall be referred to herein as the "Employer/Self-Insured" (E/S) or by its separate name.

The Respondent, Bradley Westphal, shall be referred to herein as the "Claimant" or by his separate name.

" R." refers to the Record of Proceedings, Volume 1 (the only volume) and is followed by the number of the page or pages where the particular reference is contained. For example, "(R. at 8, 9)" is a reference to Record of Proceedings Volume 1, Pages 8 and 9 of the Record of Proceedings.

The Judge of Compensation Claims will be referred to herein as the "JCC".

The First District Court of Appeals will be referred to herein as the "First DCA".

The First DCA *en banc* opinion will be referred to herein as the "Majority Opinion".

The First DCA opinion decided on February 28, 2013 will be referred to herein as the "Panel Decision".

The initial 3 member panel who decided Westphal on February 28, 2013 will be referred to herein as the "Panel".

The First DCA *en banc* shall be referred to herein as the "Majority".

STATEMENT OF THE CASE AND FACTS

Claimant, Bradley Westphal, is a 53- year-old former firefighter for the City of St. Petersburg. (R. at 537). On December 11, 2009, Claimant injured his back and left leg stepping off a fire truck. (R. at 134, 469). The City, without hesitation, accepted the injuries as compensable and provided full medical and indemnity benefits.

The Claimant came under the care of multiple doctors, and on January 12, 2010, Dr. McKalip, a neurosurgeon, performed L3, L4, and L5 diskectomies and left L3-4 foraminotomy. (R. at 136). The Claimant was also seen by Dr. Uribe, another spine specialist, and Dr. Le, a pain management specialist. (R. at 447). Dr. Le opined that Claimant was at maximum medical improvement (MMI) on June 21, 2010 with a 9% permanent impairment (PI) rating. (R. at 447). The Claimant also was seen by Dr. Mixa, an orthopedic surgeon, for treatment of his left leg. (R. at 447). On January 3, 2011, Dr. Mixa placed the Claimant at MMI and gave him a 6% permanent impairment rating. (R. at 447). Dr. Mixa rescinded the Claimant's MMI status and performed left knee surgery on September 15, 2011 with an anticipated MMI date of March 25, 2011. (R. at 447). Claimant was placed at overall MMI as of March 25, 2011 by Dr. Mixa with a 12% impairment rating as a whole. (R. at 447). As of March 25, 2011 both Dr. Le and Dr. Mixa opined that

the Claimant had medical restrictions of at least sedentary duty. (R. at 447, 542, 544).

Almost two years after his last visit, on February 27, 2012, the Claimant sought treatment for his back with Dr. McKalip who took the Claimant off work status opining the Claimant had not reached MMI from a spine perspective. (R. at 154, 157). Dr. McKalip performed Claimant's second back surgery on April 11, 2012. (R. at 142). The goal of the surgery was to restore neurological function and possibly Claimant's leg strength. (R. at 145). Dr. McKalip testified that although the Claimant would not be able to do a high-intensity job, Dr. McKalip believed the Claimant would be able to do other sedentary-type of work and possibly mild activities. (R. at 149). Dr. McKalip anticipated further recovery and opined that permanent medical restrictions would best be determined at the time the Claimant reached MMI. (R. at 157, 158).

From a vocational perspective, the Claimant had worked in a light-duty position within the Fire Department from August 2010 until he voluntarily retired on January 21, 2011. (R. at 516, 537). The Claimant also worked part-time as a property manager until March 15, 2011 which was about the time he was approved for Social Security disability benefits. (R. at 538).

The Claimant filed a Petition for Benefits (PFB) on September 14, 2011 seeking permanent and total disability benefits (PTD) beginning March 3, 2011

and continuing as well as attorney fees, penalties, interests and costs. (R. at 5-7). A final hearing was set for March 28, 2012. (R. at 10). The final hearing was re-set due to Claimant filing a second Petition for Benefits on March 20, 2012, requesting temporary partial disability benefits (TPD) and temporary total disability (TTD) benefits in the alternative to PTD in addition to PTD beginning March 3, 2011 and continuing as well as attorney fees, penalties, interests and costs. (R. at 37, 38). A mediation was held on March 20, 2012 which resolved all issues except for PTD entitlement. (R. at 60-62).

The case proceeded to final hearing on June 21, 2012 before the Honorable Stephen L. Rosen, Judge of Compensation Claims (JCC). (R. at 458). At the final hearing, Claimant sought PTD benefits from the date of statutory maximum medical improvement (MMI) or the exhaustion of 104 weeks of temporary benefit entitlement (which was December 11, 2011) and penalties, interests, costs and attorney's fees. (R. at 466). City of St. Petersburg, a self-insured employer, defended the claim asserting the Claimant was not PTD from a medical or vocational standpoint, no penalties, interests, costs or attorney's fees were due and owing and the claim for PTD was not ripe, due or owing and premature because Claimant had not reached overall MMI. (R. at 460). The City further argued that Claimant did not meet the exception to the rule that a claimant must provide proof of total disability even if he reaches physical MMI. (R. at 45-46). The JCC

determined that the main issue was whether or not the Claimant was at physical MMI and had permanent physical restrictions. (R. at 567).

On June 22, 2012, the JCC entered a Final Order denying Claimant's petition for PTD benefit entitlement. (R. at 444-449). The JCC found that vocational evidence presented by both sides regarding the Claimant's ability to engage in gainful employment might be affected once Dr. McKalip, the Claimant's neurosurgeon, placed the Claimant at physical MMI and assigned permanent work restrictions. (R. at 448). The JCC rejected the opinion of Claimant's independent medical examiner and relied on the testimony of Dr. McKalip, who had performed Claimant's back surgery less than three months prior to the final hearing. (R. at 448). Relying on Dr. McKalip's testimony and the *Matrix v. Hadley* case, the JCC found that Claimant had not reached MMI from a physical standpoint, and it was too speculative to determine whether he would remain totally disabled after the date of physical MMI had been reached. (R. at 449).

The JCC denied the claims for PTD and the pending petitions were dismissed without prejudice. (R. at 449). The JCC also denied the claims for penalties, interests, attorney's fees and costs. (R. at 449).

The Claimant appealed the JCC's Final order. (R. at 442-443). Claimant raised several arguments in his brief. Among them was that the statute granting 104 weeks of temporary benefit entitlement as applied to Claimant denied him the right

of access to courts and that the Workers' Compensation Act as a whole is no longer a viable alternative to tort remedy. On January 3, 2013, the First DCA set oral argument for February 13, 2013. On January 30, 2013, the First DCA issued its order stating its focus was intended on the constitutionality of Florida Statute § 440.15 as applied to a claimant who has exhausted his temporary benefit entitlement, the right of access to courts, and the remedies available if the statute is unconstitutional. Claimant did not notify the Attorney General of his constitutional challenge, as required by law, until the same day the First DCA ordered its intent to focus on the constitutionality of Florida Statute § 440.15. On February 6, 2013, the Attorney General filed its motion to intervene, stating as the State's Legal Officer that she has the right and authority to defend the interests of the State, particularly state statutes. On February 7, 2013, the Attorney General's Office was brought in as an additional party to defend the constitutionality of the state statute and filed a supplemental brief, which was due on February 22.

Less than a week later, the First DCA issued its order reversing the JCC's Final Order. The First DCA held that although the JCC correctly applied the law, the statute is unconstitutional as applied to Claimant to the extent that it limits temporary benefit entitlement to 104 weeks. The First DCA reasoned that where an employee is not at physical MMI upon exhaustion of the temporary benefit

entitlement, there is a potential "gap" in receiving disability benefits until the employee reaches physical MMI.

The First DCA held such "gap" in benefits is unconstitutional. The First DCA then revived the prior statute's entitlement of 260 weeks of temporary benefit entitlement. The City of St. Petersburg filed Motions for Clarification and Rehearing *En Banc* on March 15, 2013. On September 23, 2013, the First DCA *en banc* reversed the initial 3- member panel decision. The First DCA *en banc* found the statute constitutional but receded from its original *en banc* decision in *Matrix v. Hadley*. The Majority Opinion held that a claimant can now file a PFB for PTD if he can prove he is totally disabled after he has been paid 104 weeks of TTD benefits regardless of whether he will remain totally disabled. The First DCA *en banc* also certified the following question to this Court as a matter of great public importance:

> 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?

The Majority Opinion and Panel Decision focused on the Claimant's gap in benefits. Specifically, between the period of December 11, 2011 to September 21,

2012, a period of approximately 9 months. (R. at 448-449; City's statement at oral argument on February 13, 2013). During this 9 month "gap," Claimant received approximately $4800 per month in pension and social security disability benefits, collectively and full medical benefits under workers' compensation. (R. at 335-336). Claimant also had his health insurance premiums paid for by the City for himself, his wife and dependents. (R. at 32, 321).

Claimant filed his Notice to Invoke Discretionary Jurisdiction with this Court on October 8, 2013. The City simultaneously with its Motion to Stay filed its Notice to Invoke Discretionary Jurisdiction on October 21, 2013. This Court granted the City's Motion to Stay on October 28, 2013 and accepted jurisdiction of this case on December 9, 2013.

A more specific reference to facts will be made in the Argument section of this Answer Brief.

SUMMARY OF ARGUMENT

The Employer/Self-Insured agrees with the Petitioner's argument and conclusions that the Majority Opinion violates separation of powers and due process. The Majority Opinion is also contrary to 15 years of precedent in violation of stare decisis. Such inconsistency in the law should not stand. The Majority Opinion rewrites the law by creating a new type of benefits, "temporary" permanent total disability, which encroaches upon the Legislature's ability to write

laws. The First DCA decided a similar case less than two years prior to *Westphal* and took into account the constitutional concerns of FLA. STAT. § 440.15(2)(a). *See, Matrix Employee Leasing, Inc. v. Hadley*, 78 So. 3d 621 (Fla. 1st DCA 2011). The *Hadley en banc* court was correct in holding that courts cannot rewrite the law, that remedy lies with the Legislature. *Id.*

The Majority Opinion and Panel Decision should not have considered the constitutionality of FLA. STAT. § 440.15(2)(a) since it can be resolved on other grounds. First, the case is about whether or not the Petitioner met his burden to show he was PTD at the time he reached MMI and if he was not at MMI, whether there was persuasive medical evidence to show that once he reaches physical MMI he would remain totally disabled. *See*, *City of Pensacola Firefighters v. Oswald*, 710 So. 2d 95 (Fla. 1st DCA 1998). Second, the PTD statute is a completely different statute than temporary total disability. *See*, FLA. STAT. § 440.15(2)(a) and (b) (2009). The Petitioner failed to meet his burden of proof and this Court should not review the constitutionality of the entire Workers' Compensation Act or the limitation of temporary disability benefits because the law as it stands provided the Petitioner with an opportunity to obtain PTD benefits.

Florida Statute § 440.15(2)(a) is constitutional both on its face and as applied. Statutes carry a strong presumption of constitutionality and this Court is obligated to construe a challenged legislation to effect a constitutional outcome

whenever possible. *See, Crist v. Ervin*, 56 So. 3d 745 (Fla. 2010) (citing *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)).

The Panel was incorrect in holding that 104 weeks limitation on temporary total disability is unconstitutional as applied to the facts of this case and prospectively. Moreover, the Workers' Compensation Law does not violate access to courts or due process. This Court and the First DCA have repeatedly struck down the access to courts argument holding that the Workers' Compensation Act still provides an injured worker with full medical care regardless of fault and with that the uncertainty of litigation. Petitioner's argument that there is no longer full medical care fails to acknowledge that the employer is still 100% responsible for work-related injuries.

The Petitioner and Panel's comparison of the State of Florida to other states' total disability benefits is misplaced and immaterial. The correct analysis should consider whether the Legislature abolished an existing right and if so, whether the Legislature satisfied the necessary justifications for doing so in compliance with *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

A reduction in the amount of temporary benefits an injured worker is entitled to is not an abolishment of a preexisting right. Therefore, the *Kluger* analysis does not apply. Assuming *arguendo* that it did, the 104 weeks statutory limitation of temporary benefits satisfy *Kluger* because it provides a reasonable

alternative to preexisting rights as they were in 1968. The amendments to the total disability benefits do not fundamentally change the intent of the Workers' Compensation Act. The intent of Chapter 440 is to provide prompt medical and indemnity benefits to an injured worker to facilitate the injured worker's return to gainful employment at a reasonable cost to the employer. See, FLA. STAT. § 440.15.

Furthermore, the 104-week temporary total disability limitation was in response to an overpowering public necessity. The factual findings from the WHEREAS clauses of LAWS OF FLORIDA 93-415 are presumed correct and entitled to great deference unless clearly erroneous. *Univ. of Miami v. Echarte*, 618 So. 2d 189, 196-97 (Fla. 1993). Comparison to other states and the fact the Florida Occupational and Safety Health Act has been repealed do not rebut the presumption beyond a reasonable doubt.

ARGUMENT

I. THE FIRST DCA *EN BANC* ERRED AS A MATTER OF LAW WHEN THEY RECEDED FROM MATRIX V. HADLEY.

a. Standard of Review.

The standard of review for pure questions of law is de novo. *See Armstrong v. Harris,* 773 So. 2d 7 (Fla. 2000). Therefore, no deference should be given to the judgment of the Majority Opinion or Panel Decision. *D'Angelo v. Fitzmaurice*,

863 So. 2d 311, 314 (Fla. 2003) (holding no deference is given to lower courts on a de novo standard of review.)

b. Argument.

i. The First DCA *En Banc* Decision Violates The Separation of Powers Doctrine Provided For in Article II, Section 3, of The Florida Constitution.

Florida requires a strict application of the separation of powers doctrine. *State v. Cotton*, 769 So. 2d 345 (Fla. 2000); c*f. Avatar Dev. Corp. v. State,* 723 So. 2d 199, 201(Fla. 1998) (recognizing, in the context of a nondelegation analysis, that "[a]rticle II, section 3 declares a *strict separation of the three branches of government* and that "No person belonging to one branch shall exercise any powers appertaining to either of the other two branches") (emphasis supplied). The judiciary encroaches on the power of the legislature if it construes an unambiguous statute in a way which would extend, modify or limit, its express terms or its reasonable and obvious implications. *Horowitz v. Plantation General Hosp. Ltd. Partnership*, 959 So. 2d 176, 182 (Fla. 2007) (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). The First DCA's *en banc* decision is an unconstitutional encroachment on the power of the legislative branch.

The statute in effect on a claimant's date of accident controls the substantive rights of the parties. *Russell v. P.I.E. Nationwide*, 668 So. 2d 696, 697 (Fla. 1st DCA 1996) (holding substantive statutes cannot be applied retroactively).

Pursuant to FLA. STAT. § 440.02(10), (2009), the "date of maximum medical improvement" is defined as "the date after which further recovery from, or lasting improvement to, an injury or disease can no longer be reasonably anticipated, based upon reasonable medical probability." The Majority's Opinion creates a new definition of MMI to allow a claim for PTD regardless of whether the employee will be totally disabled upon reaching MMI. This is an end run around the 104 week statutory temporary benefits limitation as it creates an additional "temporary" permanent total disability benefit. The Majority Opinion removes the medical testimony requirement for determining MMI and instead bases it on the expiration of the maximum temporary benefits allowed, 104 weeks.

The Majority Opinion also merges the concept of impairment and disability. The Majority uses the term "permanent impairment" in conjunction with other statutes *in pari materia* as the legal equivalent of a medical finding of MMI, regardless of whether a claimant actually improves. Majority Opinion, pg. 10. As stated by Justice Thomas' in his dissent, "it erroneously equates impairment with disability, and then proceeds to build a house of cards on this flawed concept." Majority Opinion, pg. 29.

Permanent impairment is not synonymous with disability. As stated in *Crum*, permanent impairment is anatomic or functional abnormality or loss determined as a percentage to the body as a whole, existing after the date of MMI

whereas disability is incapacity because of the injury to earn in the same or any other employment wages which the employee was receiving at the time of the injury. *See, Crum v. Richmond*, 46 So. 3d 633 (Fla. 1st DCA 2010). For example, an injured worker may have a high impairment rating at the time of statutory exhaustion of temporary benefits and subsequently a low impairment rating at the time the worker reaches physical maximum medical improvement. *Hadley*, 78 So. 3d at 625. Therefore, permanent impairment is not the equivalent of maximum medical improvement.

This Court has consistently held it must adhere to a statute's legislative intent. *See, Carter v. City of Stuart*, 468 So. 2d 955, 957 (Fla. 1985) (holding the judicial branch should not trespass into the legislature's decisional process); *Continental Heritage Ins. Co. v. State*, 981 So. 2d 583, 585 (Fla. 2008) (citing *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. 3d DCA 2001)) ("The power to legislate belong not to the judicial branch of government, but to the legislative branch."); *see also, Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (quoting *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, 694–95 (1918)), *Florida Dep't of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320, 323 (Fla. 2001)) (holding even where a court is convinced that the Legislature really meant and intended something not expressed in the

statute, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity).

If the statutory language is clear and has an expressed legislative intent, it must be regarded as conclusive. *U.S. v. Turkette*, 452 U.S. 576 (U.S. 1981) (quoting *Doe v. Department of Health*, 948 So. 2d 803 (Fla. 2d DCA 2006). *rev. den.* by *Doe v. Department of Health*, 961 So. 2d 932 (Fla. 2007)) ("[A] statutory interpretation is not a contact sport played between the judiciary and the legislature as members of opposing teams…[t]he judiciary must use a degree of common sense in deciding whether the legislature's intent is sufficiently clear that the court may imply a qualifying phrase within a statute. If there is any reasonable concern that a reading other than a strict interpretation might not comport with the legislature's intent, the legislature should generally be required to amend the statute, if that is necessary to fulfill its actual intent".))

Deciding which laws are proper and should be enacted is a legislative function. This Court's function is not to substitute its judgment for that of the Legislature. This Court is constitutionally obligated to respect the separate powers of the government. *State v. VanBebber*, 848 So. 2d 1046 (Fla. 2003) (Pariente, J., concurring).

The legislature defined MMI in unambiguous terms. The Legislature's intent when creating the 104 week limitation was not to force parties to make a

prompt decision as to award permanent total disability benefits but rather to ensure worker's compensation costs were reduced to employers while providing adequate coverage to employees. Ch. 93-415, Laws of Fla. The purpose for the enactment of the Workers' Compensation Act is to have an efficient and self-executing system that will not be liberally construed in favor of either the employer or injured worker. *See,* FLA. STAT. § 440.015 (2009).

The Majority Opinion cannot rewrite the law because it simply does not like it. A court takes the law as it finds it and does not have the power to make the law, change or amend the law consistent with a court's own view. *Webb v. Hill*, 75 So. 2d 596 (Fla. 1954). Although it might seem unfair to some individuals, that does not give the Majority or Panel the authority to disregard over a decade and a half of well-settled precedent. *See, Bush v. Schiavo,* 885 So. 2d 321, 336 (Fla. 2004) (holding that "...[w]e are a nation of laws and we must govern our decisions by the rule of law and not by our own emotions...our hearts are not the law. What is in the Constitution always must prevail over emotion. Our oaths as judges require that this principle is our polestar, and it alone."). This Court has made it clear the importance of a constitutional system with three independent and coequal branches that may not encroach upon the others.

The law as applied to the Claimant should not result in the judicial rewrite of legislation that has been enacted and followed since 1993 since the current law provided him a mechanism to obtain benefits without having to be at MMI.

ii. The First DCA's *En Banc* Decision Violates the Judicial Policy of Stare Decisis.

It is axiomatic that there must be consistency in the law in order for it to be effective. The doctrine of stare decisis mandates to let that which has been decided stand undisturbed. *State v. Johnson*, 107 Fla. 47, 50, 144 So. 299 (Fla. 1932). *Stare decisis,* or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo–American jurisprudence for centuries. *N. Florida Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003). Court decisions on controversial issues carry a strong presumption. *Id.* at 637 (holding that "the presumption in favor of *stare decisis* is strong, and where the decision at issue was a watershed judgment resolving a deeply divisive societal controversy, the presumption in favor of *stare decisis* is at its zenith.").

The Majority Opinion recedes from longstanding precedent, most notably the *Hadley* case. This case was decided not even two years prior to the *Westphal* decision, and as Justice Wetherall states in his dissent, the *Westphal* decision is "an unprecedented flip flop." Majority Opinion, pg. 58.

The facts of *Hadley* are similar to *Westphal*. The claimant's authorized treating doctor was unable to provide a definitive opinion of the claimant's disability status once he reached MMI. *Hadley*, 78 So. 3d at 623. The claimant exhausted 104 weeks of temporary disability benefits and filed a petition for benefits for PTD since he remained on total disability status per his authorized treating doctor. *Id*.

In *Hadley*, the JCC granted the claimant's petition for permanent total disability benefits not based on the law but based on his personal view that the "Legislature did not intend to leave a claimant …out in the cold with no basis for indemnity benefits when that worker is totally disabled for more than 104 weeks." *Id.* The *Hadley* court noted that in general, PTD benefits are premature if the injured employee is not at MMI. The case was controlled by a 13-year-long precedent starting with *City of Pensacola Firefighters v. Oswald*, 710 So. 2d 95 (Fla. 1st DCA 1998) which created an exception to this rule if the claimant can prove that he will remain totally disabled upon reaching MMI. The *Hadley* court reversed the JCC, holding the claimant was not at MMI as he failed to establish PTD once he reached MMI. *Id.* at 626.

The *Oswald* exception has been consistently upheld in cases such as *East v. CVS Pharmacy, Inc.*, 51 So. 3d 516 (Fla. 1st DCA 2010); *Crum v. Richmond*, 46 So. 3d 633 (Fla. 1st DCA 2010*); 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).

Consistent with *Oswald* and its progeny, a claimant can now file a claim for PTD benefits despite not having reached physical MMI if he can show total disability exists after the date of maximum medical improvement. Claimant had the opportunity to show this exception and he provided testimony to the JCC of his independent medical examiner. (R. at 67,117). The JCC is the fact finder and has the authority to weigh the evidence he finds most credible. *Mitchell v. XO Communications*, 966 So. 2d 489 (Fla. 1st DCA 2011). Relying on the authorized treating doctor's testimony and *Hadley*, the JCC properly denied the Claimant's petition for PTD benefits.

The arguments that were raised by the dissent in *Hadley* are the same arguments provided to support the Majority Opinion. The *Hadley* court expressly rejected those arguments in its Majority Opinion, "we are not persuaded …statutes are susceptible to the interpretation advocated by the dissent". *Hadley*, 78 So. 3d at. 626. The *Hadley* court correctly concluded that "we do 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." *Id.*

The Majority focuses on the absence of indemnity benefits during the gap as applied to Westphal and those similarly situated. The Majority believes a disabled worker who is told he may be well enough to return to work someday may have no compensation at all beyond the 104 weeks and therefore the 104 week limitation of TTD benefits is inadequate. Majority Opinion, pg. 13. It uses this belief as its support to reinterpret *Hadley* to eliminate the "gap." Unlike the Majority's flawed justification, it was proven in the record that Mr. Westphal actually did receive compensation, albeit not indemnity benefits. During the "gap," Mr. Westphal received full medical benefits and approximately $4800 per month in combined benefits of social security disability and pension disability benefits. See, Majority Opinion, pg. 70. In addition, the City also paid for Mr. Westphal's health insurance premiums. *See*, (R. at 321); FLA. STAT. § 112.191 (g).

The proper remedy for an inadequate law lies with the Legislature not the courts. *See*, *Thompson v. Florida Industrial Commission*, 224 So. 2d 286 (Fla. 1969). In *Thompson*, the claimant was appealing the 350 weeks of temporary benefit entitlement (now 104) since he remained totally disabled past the time limitation for benefits. *Id.* at 287. This Court held that the statute was clear on its face therefore the carrier was justified in ceasing payments. *Id.*

The Petitioner argues that the *Thompson* court felt 350 weeks was inadequate and therefore this Court will certainly think 104 weeks of temporary benefits is inadequate. Initial Brief, pg. 26. What the Petitioner fails to consider is that this Court specifically focused on its power as a judiciary and regardless if it perceived the law inadequate, this Court held the remedies lie specifically with the Legislature. *Id.*

The Petitioner's argument that the 350 weeks available in the 1967 worker's compensation law is an adequate remedy contradicts his own citation of *Thompson*. If 104 weeks is inadequate what makes 260 weeks or 350 weeks adequate? With whatever week limit, there will always be a challenge if there is an individual who passes the statutory limit but remains totally disabled. In fact, that is exactly what happened in the *Thompson* case. The First DCA had reconciled this by allowing an exception to the rule in *Oswald*. If a claimant can show he will remain totally disabled upon reaching MMI, then he is PTD eligible.

A statute that has been in place for years without change should not necessitate an abrupt change in the law where it would probably cause great inconvenience and confusion in the practice and where it can easily be changed by the legislature if need be. *See*, *Cottrell v. Amerkan*, 35 So. 2d 383, 385 (Fla. 1948) (quoting *State v. Dade Cnty. by Bd. of Cnty. Comm'rs, Dade Cnty. Port Auth.*, 210 So. 2d 200, 203 (Fla. 1968)) ("Be it remembered also that the Legislature has met

many times and not only seen fit to let the act stand, but in their wisdom they have re-enacted it with suitable changes. It would be presumptuous and most improper for us to invade the prerogative of the Legislature."). If the Legislature wanted to amend the definition of MMI, this Court must adhere to the presumption that the Legislature would have explicitly done so in the statute.

As stated, the *Hadley* case was decided only two years prior to the Majority Opinion. The First DCA on its own decided to revisit the *Hadley* case. See, Majority Opinion, pg. 15. Neither party asked the First DCA to recede from its prior decisions. In fact, *Westphal* argued there was no other statutory interpretation in the *Hadley* case and he is appealing based on the statute as it is written being unconstitutional. See, Petitioner's Initial Brief.

The Majority Opinion's excuse for completely reversing the *Hadley* decision is that this was the first time they had looked at the constitutionality of the statute, therefore, this case of first impression was "put in an entirely new light". Majority Opinion, Pg. 16. It contradicts its earlier holding, however, that the court need not look at the constitutional validity of the statute since this case could be decided on other grounds. Majority Opinion, pg. 7. Furthermore, the Majority Opinion is almost a verbatim of the *Hadley*'s dissent therefore the *Hadley* court had considered the constitutional implications of its decision. *Id.* at 626. If the *Hadley* case was reversed based on a new interpretation of the case law, then the First

DCA *en banc* is essentially holding that the *Hadley* case was unconstitutionally construed.

In his dissent, Justice Wetherall suggests that there was a difference in the membership of the First DCA which led to the unprecedented reversal of its prior decision.

> "It is unclear whether the majority elected to reinterpret section 440.15 in order to avoid declaring the statute unconstitutional or whether it did so simply because three additional votes could be mustered since the last failed effort to recede from *Oswald*. However, it appears the latter occurred because the majority opinion conspicuously avoids any suggestion that the statute would be unconstitutional if it were reinterpreted." Majority opinion, pg. 59 (Wetherall, J. dissenting).

This Court has held that a change in membership of a court should not override the judicial policy of stare decisis.

> "We cannot forsake the doctrine of *stare decisis* and recede from our own controlling precedent when the only change in this area has been in the membership of this Court. Justice Stewart of the United States Supreme Court addressed this issue over a quarter-century ago: A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception ***639** could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."*Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) (Stewart, J., dissenting). *N. Florida Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 638-39 (Fla. 2003)

A change in membership of the First DCA should not be grounds to override 15 years of legal precedent.

iii. The First DCA *En Banc* Decision Violates Due Process.

[F]lexibility is a concept fundamental to a determination of the adequacy of a statute's due process protections. *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 51 (Fla. 2000) (citing *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 610, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974)). Any rigid procedure is incompatible with the elastic nature of due process. *See id.*

The Majority Opinion violates due process because it takes something temporary and makes it permanent. Allowing a person at statutory MMI to be eligible to receive PTD benefits regardless if they will remain totally disabled removes the medical and vocational requirements to prove PTD. It is in conflict with established case law which requires permanent work restrictions and vocational evidence in order to determine whether one is PTD. *See, Diocese of St. Petersburg v. Cayer*, 79 So. 3d 82 (Fla. 1st DCA 2011); *Martinez v. Lake Park Auto Brokers, Inc.*, 60 So. 3d 533 (Fla. 1st DCA 2011); *Buttrick v. By Sea Resorts*, 84 So. 3d 476 (Fla. 1st DCA 2012); *Blake v. Merk and Company, Inc./Speciality Risk Services*, 43 So. 3d 882 (Fla. 1st DCA 2010).

In *Blake*, there are three ways to prove entitlement to permanent total disability benefits: (1) *permanent* medical incapacity to engage in at least sedentary employment, within a 50-mile radius of the employee's residence, due to physical

limitation; (2) *permanent* work-related physical restrictions coupled with an exhaustive but unsuccessful job search; or (3) *permanent* work-related physical restrictions that, while not alone totally disabling, preclude Claimant from engaging in at least sedentary employment when combined with vocational factors. Emphasis added.

All three ways require permanent work restrictions in order to prove entitlement. The employer has the right to try to find the claimant work prior to determining PTD. *See, Marvin v. Rewis Roofing,* 553 So. 2d 314 (Fla. 1st DCA 1989). If PTD determination would be required at the time of exhaustion of TTD benefits, employers would be unable to make proper vocational assessments in order to try to find an injured employee work within his restrictions.

II. THE MAJORITY OPINION AND PANEL DECISION MISPLACE ITS FOCUS ON TEMPORARY TOTAL DISABILITY BENEFITS.

The Panel Decision did not have to review the temporary benefits disability statute in deciding whether to affirm or deny the JCC's decision. This case is about permanent total disability benefits. The JCC had to consider whether the Claimant met his burden to prove he was permanently and totally disabled for the period of time December 11, 2011 to present and continuing and if not, whether the *Oswald* exception applied which allowed a claimant to file a petition for PTD if

he can prove that even when he did reach physical MMI he would still be totally disabled.

The City correctly argued that the case was premature and the exception did not apply. (R. at 46). The JCC in deciding this case looked at all the evidence presented and determined that the Claimant did not have permanent work restrictions and that it was too soon to tell if he would remain totally disabled once he reached physical MMI. (R. at 449). Therefore, JCC reviewed both whether Westphal was PTD and if the Claimant could satisfy the *Oswald* rule. (R. at 444).

The Panel Decision and Majority Opinion focus on the maximum amount of weeks allowed for temporary disability benefits is misplaced and unnecessarily raise constitutional questions. The TTD benefits eligibility is governed by a completely different statute than the PTD benefits entitlement and should not be used as a catalyst to dismantle the entire Workers' Compensation Act. See, FLA. STAT. § 440.15 (1) (a) and (b) (2009). The *Oswald* case has been in place for the last decade and a half, a precedent that the Legislature has left intact.

The findings of a trial court are presumptively correct and must stand unless clearly erroneous. *See Marshall v. Johnson*, 392 So. 2d 249, 250 (Fla. 1980); *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976); *Florida E. Coast Ry. v. Department of Revenue*, 620 So. 2d 1051, 1061 (Fla. 1st DCA 1993). The court's factual findings must be sustained if supported by legally sufficient evidence. Legally sufficient

evidence is tantamount to competent substantial evidence. *N. Florida Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626-27 (Fla. 2003). The standard of review for factual determinations in workers' compensation cases is whether competent substantial evidence supports the JCC's finding, not whether the record contains evidence which could be interpreted to support the arguments rejected by the JCC. *Frederick v. United Airlines*, 688 So. 2d 412, 414 (Fla. 1st DCA 1997).

The Claimant provided testimony from his independent medical examiner that he was not at MMI, and even if he were, he would be unable to work. (R. at 108,109). The doctor who performed his latest surgery testified that it was too speculative to tell whether or not he would be totally disabled upon reaching MMI. (R. at 156,157). Since the JCC is the ultimate fact finder, he chose to rely on the authorized treating doctor's testimony over the independent medical examiner. (R. at 448). There was competent substantial evidence to support this in the records.

III. THE WORKERS' COMPENSATION ACT INCLUDING FLORIDA STATUTE § 440.15(2)(a) REMAINS AN ADEQUATE REMEDY AS IT IS CONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED.

a. Standard of Review.

The determination of whether a statute is constitutional is a pure question of law which is reviewed de novo. *See Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010).

When the question involves both factual and legal issues, the Court must review a trial court's factual findings for competent, substantial evidence, while the legal question is reviewed de novo. *See N. Florida Women's Health and Counseling Serv., Inc. v. State*, 866 So. 2d 612, 626–27 (Fla. 2003); *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013).

b. Argument

i. Florida Statute §440.15(2)(a) Must be Upheld Because it Meets the Rational Basis Standard.

A law carries a strong presumption of constitutionality. Furthermore, courts shall not revisit the constitutionality of a statute if it can be resolved on other grounds. *See, Lewis v. Leon Cnty.*, 73 So. 3d 151, 153 (Fla. 2011) (holding that although our review is de novo, statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome); *see also City of Gainesville*, 918 So. 2d at 256 (quoting *Fla. Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005)) ("Should any doubt exist that an act is in violation . . . of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law.") *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004) (quoting *State ex rel. Flink v. Canova*, 94 So. 2d 181, 184 (Fla. 1957)).

In deciding the constitutionality of FLA. STAT. § 440.15(2)(a), this Court must apply the rational basis standard because there is no fundamental right to indemnity benefits under our Constitution and injured workers are not a suspect classification. *See*, *Acton v. Ft. Lauderdale Hosp.*, 440 So. 2d 1282 (Fla. 1983). Under a rational basis standard, courts uphold legislation so long as there appears a plausible reason for the Legislature's action. *Id.* The analysis is whether it was conceivable that the legislation bears a rational relationship to the goal of government. *Id.* It is the Petitioner's burden to show that the state action is without any rational basis. *Gallagher v. Motor Ins., Corp*., 605 So. 2d 62, 68-69 (Fla. 1992). The rational basis standard is highly deferential toward government action. *Strohm v. Hertz Corporation/Hertz Claim Management*, 685 So. 2d 37 (Fla. 1996).

In challenging § 440.15(2)(a), the Petitioner uses an incorrect constitutional analysis and erroneously focuses his attention on facial attacks of the Workers' Compensation Act as a whole. However, a person who is not denied any privilege by statute may not raise constitutional questions on behalf of some other person that may be affected by that statute's provision. *State v. Stepansky*, 761 So. 2d 1027 (Fla. 2000). Petitioner lacks standing to challenge other statutory provisions of the Workers' Compensation Act ("Act") to support his argument that FLA. STAT. § 440.15(2)(a) is unconstitutional as applied to him. Furthermore, attacking the Act and FLA. STAT. § 440.15(2)(a) on its face is contrary to the fundamental

principle of judicial restraint that this Court must follow. *See, Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184 (2008) (holding that courts should not anticipate a constitutional question unless necessary or formulate a rule of constitutional law broader than precise facts to which it is applied.)

The Petitioner's comparison of Florida's temporary benefits to other states is irrelevant.[1] Furthermore, the repeal of the Florida's Occupational Safety and Health Act does not prove beyond a reasonable doubt that FLA. STAT. § 440.15(2)(a) or the entire Act is unconstitutional. Under a facial challenge, if any set of circumstances will justify the law the challenged legislation will be upheld. *See, State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977).

ii. Florida Statute § 440.15(2)(a) Does Not Deny Access to Courts Because it Does Not Abolish an Existing Right.

In order to make a successful claim for denial of access to courts, Petitioner must prove that the Legislature abolished a common law right previously enjoyed by people of this state. A law that merely limits the amount of benefits but does not eliminate benefits does not rise to the level of completely abolishing a cause of

[1] Although the Petitioner argues that Florida is an outlier in number of weeks allotted for temporary benefits, the Petitioner ignores the dollar figures. Florida offers greater dollar per week maximum TTD benefits than more than half the other states mentioned. See Workers' Compensation Benefits, Coverage, & Costs, 2010, Nat'l Acad. of Social Ins., Table I, available at http://www.nasi.org/sites/default/files/research/NASI_Workers_Comp_2010.pdf (last visited January 20, 2013).

action. There is no abolishment of a pre-existing right when the Legislature merely adjusts a preexisting statutory limit on TTD benefits. Courts have upheld legislative amendments that limit classifications of benefits because these limits do not fundamentally change the original concept of Workers' Compensation. *See John v. GDG Services, Inc.*, 424 So. 2d 114, 116 (Fla. 1st DCA 1982), *approved*, 440 So. 2d 1286 (Fla. 1983).

In *Strohm*, the First DCA held that a statute that provided a limitation on the amount of chiropractic care under workers' compensation was constitutional. In doing so, the First DCA reasoned that there was no evidence to show a common law right to chiropractic care at the time the Declaration of Rights of the Florida Constitution. Even if there was a right, the appellant did not demonstrate that the Legislature abolished the right because the restriction placed by the Legislature "does not restrict the workers' compensation claimant's right to receive appropriate treatment; it merely diminishes, after a certain point in time, the range of providers who can offer such treatment under the Workers' Compensation Act." *Id.* at 39. The *Strohm* court cited to numerous cases from the First DCA and this Court to support its holding that limiting a benefit does not violate access to courts. *See, e.g., Newton v. McCotter Motors, Inc.*, 475 So. 2d 230 (Fla. 1985) (holding that a provision requiring death must result within one year of a compensable accident or following five years of continuous disability to be eligible for death

benefits, did not deny access to courts); *Sasso v. Ram Property Management*, 431 So. 2d 204 (Fla. 1st DCA 1983), *aff'd* 452 So. 2d 932 (Fla. 1984), *appeal dismissed*, 469 U.S. 1030, 105 S.Ct. 498, 83 L.Ed.2d 391 (1984) (holding that a provision cutting off wage-loss benefits at age 65 did not deny access to courts); *Acton v. Ft. Lauderdale Hosp.*, 440 So. 2d 1282 (Fla. 1983) (approving district court's determination that 1979 amendment that replaced permanent partial disability benefits in section 440.15(3) with permanent impairment and wage-loss benefits system did not violate access to courts); *Iglesia v. Floran*, 394 So. 2d 994 (Fla. 1981) (holding that an amendment repealing right to bring lawsuit for negligence of co workers except in cases of gross negligence did not deny access to courts); *Bradley v. The Hurricane Restaurant*, 670 So. 2d 162 (Fla. 1st DCA 1996) *review denied*, 678 So. 2d 337 (Fla. 1996) (holding section 440.15(3), Florida Statutes (Supp. 1994) which significantly reduces benefits to a permanently injured worker from benefits that the same injured worker would have received had the worker been injured earlier, does not violate right of access to courts); *John v. GDG Servs., Inc.*, 424 So. 2d 114, 116 (Fla. 1st DCA 1982), *aff'd* 440 So. 2d 1286 (Fla. 1983) (recognizing that "Workers' compensation provisions have long been justified as a necessary exchange-the employee trades his common-law remedy for a sure expeditious method of settling claims.")

In *Acton*, the employee argued that the wage loss statute violated equal protection and access to courts because it changed from lump sum payments for permanent partial disability to a system offering such payments only for permanent impairments and wage loss benefits for other types of disability. *Id.* This Court held that imprecision in the law that may disadvantage some workers does not make it unconstitutional. *Id.* The Court noted that the Workers' Compensation Law continues to afford substantial advantages to injured workers, including full medical care and wage-loss payments for total or partial disability without the delay and uncertainty of tort litigation. *Id.* Mr. Westphal certainly availed himself of such advantages.

Contrary to what was stated at oral argument to the First DCA, Petitioner now argues that the entire Workers' Compensation Act no longer works. See, Petitioner's Supplemental Brief to the First DCA. The Petitioner's complaints of the Act as a whole is a red herring. Even the Panel Decision held that the Workers' Compensation Act is still a viable tort remedy. Panel Opinion, pg. 22 (holding that "severing the 104 week limitation on temporary total disability benefits is both permissible and necessary, because this limitation can be separated from the remainder of the Act, leaving a complete system of recovery suited to fulfill the express legislative intent contained in section 440.15, Florida Statutes.").

The First DCA and this Court have recognized that limitations on the amount of benefits may seem unfair to some but that does not make the amendments unconstitutional. *Mahoney v. Sears, Roebuck & Co.*, 440 So. 2d 128 (Fla. 1983).

In *Mahoney*, the claimant received $1200 in impairment benefits after suffering an on-the-job injury resulting in 80% loss of vision with a 24% permanent impairment of the body as a whole. *Id.* Because the claimant would have received more compensation prior to the legislative amendments in 1979, he alleged that the Workers' compensation act denied him access to courts and was therefore unconstitutional. *Id*. This Court held that although the $1200 for loss of sight might seem inadequate or unfair, it did not render the statute unconstitutional as the claimant was fully paid medical care and indemnity benefits from his on-the-job accident without having to suffer the delay and uncertainty of seeking a recovery in tort from his employer or a third party. *Id.*

Further, as the statute was applied to Mr. Westphal, he received full medical care. Petitioner erroneously argues that past cases that have rejected constitutional attacks on the statute can no longer be used to counterbalance the 104 weeks of temporary benefits since from 2003 forward there is no longer full medical coverage. See, Initial Brief, pg. 32. The Petitioner's employer in this case never argued against compensability for his work-related injuries. Since day one of his

accident, the Employer has paid and continues to pay full medical care. See, JCC's Order dated June 22, 2012.

iii. Even if Florida Statute § 440.15(2)(a) Did Abolish an Existing Right, it Should Still be Upheld Because it Satisfies *Kluger*.

The *Kluger* analysis is only applicable if the Legislature abolishes a cause of action. *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Panel Decision improperly relied on *Kluger* to render Section 440.15(2)(a) unconstitutional. Prior to this case, the *Kluger* analysis was only implicated in Workers' compensation cases when it completely eliminated a third party plaintiff's cause of action. *See*, *Sunspan Engineering & Const. Co.. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975).

In order to satisfy the *Kluger* analysis, a statute must either: 1) provide a reasonable alternative or 2) address an overpowering public necessity that requires change.

Under prong 1, as applied to Petitioner, there was an opportunity for him to receive continuing benefits past his 104 weeks temporary benefit allotment if he could prove that he would remain totally disabled upon reaching physical MMI. He failed to provide persuasive evidence to the JCC. *See, Oswald*, 710 So. 2d 95.

Under prong 2, the Legislature had an overwhelming public necessity that needed to be addressed when it enacted the 104-week limitation on temporary

disability benefits. As stated in the preamble for the 1993 amendments, reforms were necessary because of Florida's economic situation. The amendments were in reaction to the decrease in jobs and employers being unable to afford the high rising insurance premiums. Ch. 93-415, Laws of Fla. Legislative findings must be given great deference. *See Univ. of Miami v. Echarte*, 618 So. 2d 189, 196-97 (Fla. 1993). Therefore, FLA. STAT. § 440.15(2)(a)'s 104 weeks of temporary benefits is justified and the legislation must be upheld.

As Florida Statute § 440.15(2)(a) applied to Mr. Westphal, he received and continues to receive full medical care and is currently receiving PTD benefits. To date, Mr. Westphal receives over $100,000 annually from combined workers' compensation, social security disability and pension disability benefits. He also receives health insurance premiums paid for by the City for Petitioner, Petitioner's spouse and his dependents up until the age of 25. (R. at 321). *See*, FLA. STAT. § 112.191(1)(g)(1).

iv. Florida Statute § 440.15(2)(a) Does Not Violate Due Process.

There are only two circumstances where this Court can overturn a statute on due process grounds, neither of which are applicable here:

> (1) When it is clear that the law is not in any way designed to promote the people's health, safety or welfare, or

> (2) When the statute has no reasonable relationship to the statute's avowed purpose. *Department of Insurance v. Dade County Consumer Advocates Office*, 492 So. 2d 1032 (Fla. 1st DCA 1986) (citing *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881 (Fla. 1974)).

Petitioner erroneously cites in his Initial Brief to *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917) to invoke principles of natural justice. *See*, Initial Brief, pg. 23. In that case, the Supreme Court upheld the New York workers' compensation system as constitutionally valid and not in violation of the 14th Amendment. The Petitioner argues that the 14th Amendment due process of law is implicated and therefore this Court has the ability to strike down statutes based on the principle of fundamental fairness.

The United States Supreme Court has expressly rejected such arguments that the due process clause allows courts to strike down laws based on a subjective view that they are unwise, improvident, or out of harmony with a particular school of thought. *Williamson v. Lee Optical of Okla. , Inc*., 348 U.S. 483, 488 (1955); *accord Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in Lochner... and like cases--that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely--has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws".) What the Petitioner is

essentially asking this Court to do is violate the separation of powers by judicial legislation under the guise of a "fundamental fairness" principle.

The Petitioner's premise that "we owe it to them" is not a valid justification to override 15 years of case law. Initial Brief, pg. 25. We owe it to the public to have laws that are consistent that cannot change based on an individual's personal belief of what is right and wrong. The Legislature has been entrusted by the people to enact laws. Therefore, the Legislature's amendments to the workers' compensation statute should be given great deference. *Univ. of Miami v. Echarte*, 618 So. 2d 189, 196-97 (Fla. 1993).

In amending FLA. STAT. § 440.15(2)(a), the Legislature intended to alleviate the burden on industry in order to promote economic growth that was beneficial to both employers and injured workers. *See*, Ch. 93-415, Laws of Fla. Because FLA. STAT. § 440.15(2)(a) was enacted to promote the people's health, safety and welfare, it does not violate due process.

The Workers' Compensation Act's purpose was to provide prompt medical and indemnity payments to the injured worker so that the injured worker could return to work. The repercussions if FLA. STAT. § 440.15(2)(a) were to be held unconstitutional would amount to a dismantling of the Workers' Compensation Act which would hurt both employers and injured workers. The Workers' Compensation law provides prompt medical and indemnity to workers hurt on the

job. In fact, as applied to Petitioner, if it weren't for workers' compensation he would likely be worse off since there was no evidence of any negligence of the employer to cause the Petitioner's injury. The Petitioner did not have to spend time or money on litigation costs with a lingering uncertainty as to whether he would be compensated at all for his injury. The City as a governmental entity is entitled to sovereign immunity. If the Workers' Compensation Act was repealed, the Petitioner's sole remedy would be in tort and, unless waived, would be limited to the statutory limits for recovery. *See* FLA. STAT. **§** 768.28.

CONCLUSION

The Majority Opinion violates separation of powers, stare decisis, and due process by creating a temporary permanent benefit. It is an impermissible judicial legislation and therefore should be reversed.

The constitutionality of FLA. STAT. § 440.15(2)(a) should not be considered because this case is about PTD and whether the *Oswald* exception applies. The JCC correctly held that the claimant was not at physical MMI and that it was too soon to tell if he would remain totally disabled once he reached physical MMI. Therefore, there was competent substantial evidence to support the JCC's ruling. The law as it stands works and should not be overturned because of some preconceived notion that it is unfair.

FLA. STAT. § 440.15(2) (a) is constitutional as applied to Westphal and those similarly situated. The Workers' Compensation Act remains an adequate remedy for injured workers and does not deny access to courts. If there are concerns with FLA. STAT. § 440.15(2)(a) or other portions of the Workers' Compensation Act, the remedy lies with the Legislature not this Court.

Based on the foregoing, this Court should affirm the JCC's order denying Claimant's PTD benefits and reverse both the First DCA *en banc* and Panel Decisions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-mail this _***4th***_ day of February, 2014, to: Jason L. Fox, Esq. (JayFoxEsq@aol.com), Co-Counsel for Appellant, Westphal, 250 Belcher Rd. North, Clearwater, FL 33765; Richard A. Sicking, Esq., (sickingpa@aol.com), Co-Counsel for Appellant, Westphal, 1313 Ponce DeLeon Blvd., #300., Coral Gables, FL 33134; Allen Winsor, Chief Deputy Solicitor General (allen.winsor@ myfloridalegal.com), Rachel E. Nordby, Esq. (rachel.nordby@myflorida legal.com), 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 Ave., Suite 500, Winter Park, FL 32789; Richard W. Ervin, III, Esq. (richardervin@flappeal.com), Fox & Loquasto, P.A., 1201 Hays Street, Ste. 100, Tallahassee, FL 32301; Andre M. Mura, Esq. (andre.mura@cclfirm.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; George T. Levesque, General Counsel

(Levesque.George@flsenate.gov), Florida Senate, 404 South Monroe Street, Tallahassee, FL 32399; and Daniel E. Nordby, General Counsel (Daniei.Nordby@myfloridahouse.gov), Florida House of Representatives, Suite 422, The Capitol, Tallahassee, FL 32399-1300; Matthew J. Mierzwa, Jr., Esquire (mmierzwa@mierzwalaw.com), Mierzwa & Associates, P.A., Suite #212, 3900 Woodlake Blvd., Lake Worth, FL 33463; Noah Scott Warman, Esquire (NWarman@sugarmansusskind.com), Sugarman & Susskind, P.A., 100 Miracle Mile #300, Coral Gables, FL 33134; and Mark L. Zientz, Esquire (mark.zientz@mzlaw.com), Law Offices of Mark L. Zientz, P.A., 9130 S. Dadeland Blvd., Suite 1619, Miami, FL 33156.

JOHN C. WOLFE
CITY ATTORNEY

BY: ***/S/ Kimberly D. Proano***
KIMBERLY D. PROANO
Assistant City Attorney
Attorney for Employer/Self-Insured
P. O. Box 2842
St. Petersburg, FL 33731
(727) 893-7401 - [FAX-(727)892-5262]
FBN: 0026819

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the requirements contained in Subsection 9.210(a)(2), Florida Rules of Appellate Procedure, including typeface of Times New Roman 14-point font.

JOHN C. WOLFE
CITY ATTORNEY

By: ***/S/ Kimberly D. Proano***
KIMBERLY D. PROANO
Assistant City Attorney
Attorney for Employer/Self-Insured
P. O. Box 2842
St. Petersburg, FL 33731
(727) 893-7401 - [FAX-(727)892-5262]
FBN: 0026819