Filing # 11029588 Electronically Filed 03/06/2014 12:19:12 PM

TGEGKXGF ."5/8/4236"34<45<66."Lqj p"C0'Vqo cukpq."Engtm"Uwr tgo g"Eqwtv

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-1930
CONSOLIDATED WITH: SC13-1976

BRADLEY WESTPHAL,
Petitioner,

v.

CITY OF ST. PETERSBURG, ETC., et al.,
Respondents.

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
Case No.: 1D12-3563

ANSWER BRIEF OF THE STATE OF FLORIDA

PAMELA JO BONDI
ATTORNEY GENERAL

Allen Winsor (FBN 016295)
Solicitor General
allen.winsor@myfloridalegal.com
Rachel Nordby (FBN 056606)
Deputy Solicitor General
rachel.nordby@myfloridalegal.com
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3681
(850) 410-2672 (fax)

TABLE OF CONTENTS

Table of Authorities iii

Statement of the Case and Facts 1

Summary of Argument 4

Argument...6

I. Westphal and the City Agree On the Proper Statutory Interpretation............6

II. Application of *Hadley* Does Not Violate the Right of Access to Courts........8

A. The Legislature Does Not Abolish Preexisting Rights When It Adjusts Preexisting Limits. 10

B. Westphal Received Greater Benefits Than His "Abolished" Right Provided...12

C. Because No Right Was Abolished, Westphal and His Amici's Complaints About Other Changes to Statutory Benefits Are Immaterial. 14

D. Even If The Legislature Had Abolished a Preexisting Right, It Satisfied *Kluger*. 16

III. The En Banc Decision Under Review Provides a Plausible Alternative Reading of Section 440.15 That Is Constitutional. 26

Conclusion 30

Certificate of Compliance 31

Certificate of Service 31

TABLE OF AUTHORITIES

<u>Cases</u>

Acton v. Ft. Lauderdale Hosp.,
418 So. 2d 1099 (Fla. 1st DCA 1982) 12, 16, 20

Acton v. Ft. Lauderdale Hosp.,
440 So. 2d 1282 (Fla. 1983) 21

Aguilera v. Inservices, Inc.,
905 So. 2d 84 (Fla. 2005) 10

Berman v. Dillard's,
91 So. 3d 875 (Fla. 1st DCA 2012) 19

Bradley v. Hurricane Rest.,
670 So. 2d 162 (Fla. 1st DCA 1996) 16

Chapman v. Dillon,
415 So. 2d 12 (Fla. 1982) 17

City of Pensacola Firefighters v. Oswald,
710 So. 2d 95 (Fla. 1st DCA 1998) 6

Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.,
978 So. 2d 134 (Fla. 2008) 25

De Ayala v. Fla. Farm Bureau Cas. Ins. Co.,
543 So. 2d 204 (Fla. 1989) 20

Eller v. Shova,
630 So. 2d 537 (Fla. 1993) 10, 16

Ferguson v. Skrupa,
372 U.S. 726 (1963) 15

Fla. Hosp. v. Buster,
984 So. 2d 478 (Fla. 2008) 7

Indus. Fire & Cas. Ins. Co. v. Kwechin,
447 So. 2d 1337 (Fla. 1983) 26

John v. GDG Servs., Inc.,
424 So. 2d 114 (Fla. 1st DCA 1982) 11, 18, 19

Kluger v. White,
281 So. 2d 1 (Fla. 1973) 9, 10

Lasky v. State Farm Ins. Co.,
296 So. 2d 9 (Fla. 1974). 17

Mahoney v. Sears, Roebuck & Co.,
419 So. 2d 754 (Fla. 1st DCA 1982) 11, 20

Mahoney v. Sears, *Roebuck & Co.*,
440 So. 2d 1285 (Fla. 1983) 16

Martinez v. Scanlan,
582 So. 2d 1167 (Fla. 1991) 16, 18

Matrix Emp. Leasing, Inc. v. Hadley,
78 So. 3d 621 (Fla. 1st DCA 2011) (en banc) 1, 6

McCotter Motors, Inc. v. Newton,
453 So. 2d 117 (Fla. 1st DCA 1982) 20

Miami Home Milk Prod. Ass'n v. Milk Control Bd.,
169 So. 541 (Fla. 1936) 24

Murray v. Mariner Health,
994 So. 2d 1051 (Fla. 2008) 26

N.Y. Cent. R.R. Co. v. White,
243 U.S. 188 (1917) 14

Sasso v. Ram Prop. Mgmt.,
431 So. 2d 204 (Fla. 1st DCA 1983) 20

Smithers v. N. St. Lucie Drainage Dist.,
73 So. 2d 235 (Fla. 1954) 24

State Farm Mut. Auto. Inc. Co. v. Nichols,
932 So. 2d 1073 (Fla. 2006) 18

State v. Bales,
343 So. 2d 9 (Fla. 1977) 24

State v. Presidential Women's Ctr.,
937 So. 2d 114 (Fla. 2006) 26

Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffolding Co.,
310 So. 2d 4 (Fla. 1975) 20

University of Miami v. Echarte,
618 So. 2d 189 (Fla. 1993) 24, 25

Westphal v. City of St. Petersburg,
122 So. 3d 440 (Fla. 1st DCA 2013) (en banc) .... passim

White v. Clayton,
323 So. 2d 573 (Fla. 1975) 11, 21

Williamson v. Lee Optical of Okla., Inc.,
348 U.S. 483 (1955) 15

Zingale v. Powell,
885 So. 2d 277 (Fla. 2004) 7

Statutes

§ 440.02, Fla. Stat. 27

§ 440.12, Fla. Stat. (1967)...13

§ 440.15, Fla. Stat. 6, 27, 29

Ch. 73-313, Laws of Fla. 12

Ch. 93-415, Laws of Fla. 21, 22, 24

Other Authorities

U.S. Dep't of Labor, CPI Inflation Calculator...13

STATEMENT OF THE CASE AND FACTS

Nature of the Case

On an issue of statutory interpretation, the en banc First District receded from its earlier decisions and reinterpreted part of the Workers' Compensation Act. It certified the statutory interpretation issue as one of great public importance, and this Court has accepted review.

In the usual certified-question case regarding statutory interpretation, the party seeking this Court's review challenges the lower court's interpretation, and the party prevailing below defends the lower court's interpretation. In this case, though, both the winner below (Bradley Westphal) and the loser below (the City of St. Petersburg) sought review, and both assert that the First District's interpretation is wrong. And perhaps more remarkably, they agree on the proper interpretation—they both assert that the First District's earlier interpretation in *Matrix Employee Leasing, Inc. v. Hadley*, 78 So. 3d 621 (Fla. 1st DCA 2011) (en banc), from which the decision on review receded, correctly interpreted the statute.

The real issue below—and apparently here—is whether the old interpretation, which the parties agree is the correct one, renders the statute unconstitutional. Not a single judge participating in the en banc decision on review believes that it does, and this Court should not hold otherwise. Because the parties

agree that the First District's statutory interpretation was error, and because the correct interpretation yields a constitutional result, this Court should accept the parties' agreed interpretation, reject Westphal's constitutional challenge, and uphold the Workers' Compensation Act in its entirety.

Facts

Firefighter Bradley Westphal was injured fighting a fire. *Westphal v. City of St. Petersburg*, 122 So. 3d 440, 443 (Fla. 1st DCA 2013) (en banc). His employer, the City of St. Petersburg, accepted the injury as compensable under workers' compensation and paid medical and indemnity benefits. *Id.* Westphal received temporary total disability benefits for 104 weeks but remained totally disabled after that. *Id.* He filed a petition seeking permanent total disability benefits, *id.,* which the Judge of Compensation Claims denied based on the then-prevailing statutory interpretation of *Hadley*.

Westphal raised four issues on appeal, one of which attacked the constitutionality of the 104-week limit on temporary total disability benefits in section 440.15(2)(a), Florida Statutes. R. Tab A.[1] The Attorney General intervened to defend the constitutional challenge. *See* Docket, Westphal v. City of St. Petersburg, 1D12-3563, Motion to Intervene (Feb. 5, 2013).

[1] The record on appeal will be referred to as (R. #:*) or (R. Tab *), where # stands for the volume number and * for the page number or tab letter.

A First District panel held the 104-week limit unconstitutional, concluding it restricted Westphal's right of access to courts. *Westphal*, 122 So. 3d at 465 n.11. En banc, the First District withdrew the panel decision, receded from *Hadley*, and reversed the order on review. *Id.* at 442. Both Westphal and the City now seek review of that en banc decision.

SUMMARY OF ARGUMENT

The Attorney General agrees with the parties and the Legislature that the *Hadley* interpretation was correct. And because that interpretation does not yield an unconstitutional result, this Court should reject Westphal's request to invalidate the statute.

Here, the Legislature's amendment of the statutory limit on temporary total disability weeks did not abolish a preexisting right, so it did not implicate the access-to-courts provision. But even if it could be construed that way, the 104-week limit satisfies *Kluger*'s two independent tests: 1) it is part of the comprehensive workers' compensation scheme, which remains a reasonable alternative for redress for work-related injuries, and 2) the Legislature enacted it as part of a comprehensive reform to address an overpowering public need, which could not otherwise be satisfied.

However, if this Court determines that the *Hadley* interpretation of section 440.15 implicates constitutional concerns, then under settled principles of constitutional avoidance, it is obligated to construe the statute to avoid the constitutional question. The decision under review provides just such a plausible alternative reading. Indeed, neither Westphal nor the City suggests that the First District's interpretation violates access to courts.

Because the parties agree that the *Hadley* interpretation is the correct one, and because that interpretation does not yield an unconstitutional result, this Court should reject Westphal's constitutional challenge and uphold the workers' compensation statute in its entirety.

ARGUMENT

Under Florida's workers' compensation system, temporary total disability benefits end when the temporary disability ends or after 104 weeks, whichever is earlier. § 440.15(2)(a), Fla. Stat. Workers can receive permanent total disability benefits when they can establish a permanent disability. *Id.* § 440.15(1). Under the First District's interpretation in *City of Pensacola Firefighters v. Oswald*, 710 So. 2d 95 (Fla. 1st DCA 1998), which the Court reaffirmed in *Matrix Employee Leasing, Inc. v. Hadley*, 78 So. 3d 621 (Fla. 1st DCA 2011) (en banc), this meant there could be a "statutory gap"—a time between the end of temporary total disability benefits and the beginning of permanent total disability benefits. Here, Westphal collected the full 104 weeks of temporary disability benefits, but he could not prove—at least not to the Judge of Compensation Claims' satisfaction—that at the end of 104 weeks he was permanently disabled. Therefore, he fell into the "statutory gap" for about nine months, after which the City concluded he *was* permanently disabled and began paying permanent disability benefits. This case is about the nine months Westphal spent in the "statutory gap."

I. WESTPHAL AND THE CITY AGREE ON THE PROPER STATUTORY INTERPRETATION.

On appeal, Westphal argued that the "statutory gap" that *Hadley* allowed constituted an access-to-courts violation. Although it stated that Westphal did not

ask the Court to recede from *Hadley*, the en banc First District held that *Hadley* was wrongly decided, and it announced a new statutory interpretation that avoided the "statutory gap" altogether. *Westphal*, 122 So. 3d at 447. The First District certified a question of great public importance, essentially asking whether *Hadley* was correct. *Id.* at 448. In other words, the question certified is whether the Workers' Compensation Act allows the "statutory gap." [2]

Unlike in most cases involving certified questions about statutory interpretation, the parties agree on an interpretation: Both Westphal and the City agree that the *Hadley* interpretation was the right one. Where they part ways, though, is with what should happen to the statute so interpreted. Westphal contends that this Court should strike it down as unconstitutional.[3] The City contends that this Court should uphold the Judge of Compensation Claims' decision.

The Attorney General agrees with the parties and the Legislature that the

---

[2] *Standard of Review*: This case turns on the interpretation and constitutionality of a statute, which are both matters of law reviewed de novo. *See Fla. Hosp. v. Buster*, 984 So. 2d 478, 484 (Fla. 2008) (citing *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004)).

[3] That was the result of an intervening panel decision, which the en banc court vacated. The panel decision applied the *Hadley* interpretation, found the resulting "statutory gap" unconstitutional, and invalidated the statute. The panel then revived an earlier version of the statute and held that 260 weeks, not 104, was the new limit. Although Westphal and his amici ask this Court to "revive" the panel decision, the decision under review here is the judgment of the en banc First District, not a vacated panel decision.

Hadley interpretation was correct.[4] And because that interpretation does not yield an unconstitutional result, this Court should reject Westphal's request to invalidate the statute. The Attorney General leaves to the other parties the underlying issue of whether Westphal has proven entitlement under the *Hadley* decision to nine additional months' benefits.[5]

II. APPLICATION OF *HADLEY* DOES NOT VIOLATE THE RIGHT OF ACCESS TO COURTS.

Westphal argued in the First District that application of the 104-week limit "per [*Hadley*]" resulted in a denial of his access to courts because it eliminated his right to wage loss payments and prevented him from seeking any other civil or tort remedy. R. Tab A, at 26-27. But not a single judge participating in the en banc

---

[4] In its amicus brief filed below, the Legislature urged the First District to adhere to the *Hadley* interpretation. R. Tab J., at 9; *see also Westphal*, 122 So. 3d at 453 (Thomas, J., concurring in result and dissenting in part) ("The majority opinion also disregards the Legislature's explicit approval of our two previous decisions in *Oswald* and *Hadley*, in its amicus curiae brief filed here. In addition, the majority opinion disregards the fact that the legislature has not acted to amend the relevant statutes we have interpreted for fifteen years.").

[5] Some members of the First District would have applied the *Hadley* decision but found that Westphal nonetheless had proven entitlement to the benefits. *See Westphal*, 122 So. 3d at 451 (Thomas, J., concurring in result only and dissenting in part); *id.* at 450 (Benton, J., concurring in result, joined by Ray, J.). Others would have applied the *Hadley* decision but found that Westphal had *not* proven entitlement to the benefits. *Id.* at 465 (Wetherell, J., dissenting, joined by Roberts and Rowe, JJ.).). That issue—which turns on whether the JCC's decision was based on competent substantial evidence—can be resolved on remand without the Attorney General's participation.

decision ultimately agreed. *See Westphal*, 122 So. 3d at 442 ("[W]e find it unnecessary to consider the claimant's argument that the statute, as we previously construed it in *Hadley*, is unconstitutional as a denial of the right of access to the courts."); *id*. at 449 ("I believe our prior interpretation met constitutional scrutiny.") (Wolf, J. concurring, joined by Lewis, C.J.); *id*. at 451 ("Not a single judge now maintains that either [interpretation] is unconstitutional.") (Benton, J., concurring in result, joined by Ray, J.); *id*. at 459 ("Significantly, *not one single judge* now espouses the view that section 440.15(2), which limits temporary total disability indemnity benefits, is unconstitutional.") (Thomas, J., concurring in result only and dissenting in part) (emphasis in original); *id*. at 466 ("[T]he majority opinion conspicuously avoids any suggestion that the statute would be unconstitutional if it were not reinterpreted. And at least two of the eight judges who voted to recede from *Hadley* are of the view that 'our prior interpretation [of the statute] met constitutional scrutiny.'") (Wetherell, J., dissenting, joined by Roberts and Rowe, JJ.) (second alteration in original). Indeed, the *Hadley* interpretation presents no constitutional problem.

Under the test set forth in *Kluger v. White*, the Legislature may not abolish a preexisting right of access to the courts without either providing a reasonable alternative or demonstrating an overpowering public necessity that cannot

otherwise be addressed. *See* 281 So. 2d 1, 4 (Fla. 1973). Here, the Legislature's amendment of the statutory limit on temporary total disability weeks did not abolish a preexisting right, so it did not implicate the access-to-courts provision. But even if it could be construed that way, the 104-week limit satisfies *Kluger*'s two independent tests: 1) it is part of the comprehensive workers' compensation scheme, which remains a reasonable alternative for redress for work-related injuries, and 2) the Legislature enacted it as part of a comprehensive reform to address an overpowering public need, which could not otherwise be satisfied.

A. The Legislature Does Not Abolish Preexisting Rights When It Adjusts Preexisting Limits.

Under *Kluger*, access-to-courts claims are evaluated based on the preexisting rights as of the time the present Declaration of Rights was adopted in 1968. *See Eller v. Shova*, 630 So. 2d 537, 542 n.4 (Fla. 1993); *Kluger,* 281 So. 2d at 4. Westphal and his amici therefore contend the Legislature "abolished" the statutory right to receive 350 weeks of temporary total disability compensation. *See* § 440.15(2), Fla. Stat. (1967). But the Legislature does not "abolish" a right by adjusting a preexisting statutory limit. The statutory disability benefits have always been limited. From its inception, in fact, Florida's Workers' Compensation Act has been essentially a collection of limits—limits on the categories of benefits, the duration of benefits, and the amount of benefits. *Cf. Aguilera v. Inservices, Inc*.,

905 So. 2d 84, 90 (Fla. 2005) ("Essentially, the system is designed for employers and insurance carriers to assume responsibility for *limited* amounts of medical and wage loss benefits . . . ." (emphasis added)).

This case, then, is like earlier cases where an injured worker challenged an amendment to an already limited disability benefit. *See Mahoney v. Sears, Roebuck & Co*., 419 So. 2d 754, 755-56 (Fla. 1st DCA 1982), *approved*, 440 So. 2d 1285 (Fla. 1983) (finding that, although the injured worker's recovery under the earlier statute "would have been significantly greater," no access to courts violation occurred because the challenged amendment did not *totally eliminate* the previously recognized cause of action); *see also White v. Clayton*, 323 So. 2d 573, 575 (Fla. 1975) ("The right of recovery in a wrongful death action has not been abolished; only the elements of damage have been changed."); *John v. GDG Servs., Inc*., 424 So. 2d 114, 116 (Fla. 1st DCA 1982) ("Although we note the benefits under the new wage-loss provisions may result in reduced benefits, the right to recover for industrial injuries has not been so reduced as to be effectively eliminated."), *approved*, 440 So. 2d 1286 (Fla. 1983).

Because the Legislature's substituting one reasonable limit for another did not "abolish" or "totally eliminate" a preexisting right, the right of access to courts is not implicated, and this Court need not proceed further.[6]

B. Westphal Received Greater Benefits Than His "Abolished" Right Provided.

Just as important, what Westphal argues as a "reduction" in benefits actually yielded far greater temporary total disability benefits than he could have received under the right purportedly abolished. This cannot violate access to courts.

Westphal characterizes the relevant measure of recovery in weeks alone, altogether ignoring the real measure of disability compensation—dollars. Although Westphal emphasizes the statutory change from 350 weeks to 104 weeks, no claimant seeks recovery of "weeks" in the abstract. Disability is compensated with money. So money—not time—is the relevant measure of recovery.

---

[6] Several amici suggest that the "opt out" provision in the 1968 statute, which allowed employees to waive participation in the workers' compensation system *before* an injury, further supports Westphal's access-to-courts claim. *See, e.g.*, Br. of Workers' Injury Law and Advocacy Group as Amicus Curiae in Support of Pet'r, at 12-15; Br. of Police Benevolent Association, et al., as Amici Curiae in Support of Pet'r at 11-12. This argument suffers two notable flaws. First, Westphal has not claimed any preexisting right to sue in tort, and amici cannot inject new issues. S*ee Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982). Second, Westphal could not have benefitted from any so-called opt-out in 1968 because (i) he points to no record evidence suggesting others were at fault—a prerequisite for any tort claim; and (ii) the City at that time would have been protected by sovereign immunity; the partial statutory waiver was not enacted until the 1970s. *See* Ch. 73-313, § 1, at 711, 714, Laws of Fla.

Because monetary compensation is the right measure, the Court cannot ignore the money Westphal actually received, which was far more than earlier statutes allowed. He received $765 for each of the 104 weeks he received temporary total disability, (R. Tab A, at 2), which totals $79,560. He was in the so-called statutory gap for approximately forty weeks, during which time he received no temporary total disability compensation. *Westphal*, 122 So. 3d at 449 (Benton, J., concurring in result). Overall, then, he received $79,560 for 144 weeks of temporary total disability (the 104 weeks he received plus approximately 40 weeks in the gap), averaging approximately $550 per week.

In 1968, on the other hand, Westphal could have received no more than forty-nine dollars per week. *See* § 440.12(2), Fla. Stat. (1967). Inflation alone cannot reconcile this eleven-fold disparity.[7] According to the United States Bureau of Labor and Statistics, forty-nine dollars in 1968 produces the buying power today

[7] Although Westphal received more than he could have in 1968 even adjusted for inflation, the Legislature had no constitutional obligation to respond to inflationary or other economic conditions. In fact, had the Legislature never amended the Workers' Compensation Act—leaving Westphal with a forty-nine-dollar weekly cap (albeit for more weeks)—there would have been no violation under *Kluger*. Westphal and his amici cite no case suggesting that legislative *inaction* can violate access to courts. *Cf. Jetton v. Jacksonville Elec. Auth.,* 399 So. 2d 396, 399 (Fla. 1st DCA 1981) ("Absent any finding of arbitrariness, it is the legislature that must determine periodically whether such limits on recovery should be adjusted for inflation . . . ."); *cf. also Atkins v. U. S.*, 556 F.2d 1028, 1047 (Ct. Cl. 1977) (rejecting claim that Congress violated the Compensation Clause by not adjusting judicial salaries to meet inflation).

of just $329—a fraction of what Westphal actually received weekly. *See* U.S. Dep't of Labor, CPI Inflation Calculator.[8]

As these data illustrate, today's workers' compensation system allowed Westphal substantially greater temporary total disability benefits than any 1968 statutory right provided. The amendment limiting temporary total disability benefits to 104 weeks, therefore, did not "abolish" any preexisting right.

C. Because No Right Was Abolished, Westphal and His Amici's Complaints About Other Changes to Statutory Benefits Are Immaterial.

Westphal and his amici offer other complaints about the current Workers' Compensation Act. For example, they contend it unfairly strips workers of the right to choose their own doctor, adds inequitable independent medical examiner requirements, wrongly limits certain psychiatric treatments, and injects unwarranted apportionment-of-injury principles. *See, e.g.*, Br. of Fla. Workers Advocates as Amicus Curiae in Support of Pet'r, at 8-17. All of this, they suggest, demonstrates that the current overall system is less favorable—or less fair—than the 1968 version.[9] But none of these other complaints has any bearing on whether

[8] http://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 6, 2014).

[9] Westphal and his amici suggest—as they did below—that principles of "natural justice" should factor into the access-to-courts issue. At the heart of this argument is *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917), which considered whether New York's workers' compensation system violated the

the Legislature abolished preexisting statutory rights to temporary total disability benefits. Westphal has not appealed any decision regarding his medical benefits, nor has he challenged any other provision of the Act. Therefore, unless the Legislature abolished his statutory temporary total disability rights, none of the other purported defects in the Act matters. Because the Legislature did not abolish any right to temporary total disability benefits, the Court should disregard the other complaints. But even if some right were abolished, the challenged amendments satisfy *Kluger*.

Fourteenth Amendment. Invoking principles of "natural justice," the Supreme Court ultimately upheld New York's system, finding it "not repugnant to the provisions of the 14th Amendment." *Id.* at 208. The Court also held that "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *Id.* at 198.

But the *White* decision does not support Westphal, who pursues no Fourteenth Amendment claim. Moreover, the Supreme Court has long abandoned the *Lochner*-era concept that the "Due Process Clause of the Fourteenth Amendment [allows courts] to strike down state laws, regulatory of business and industrial conditions, because they may be 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.").

D. Even If The Legislature Had Abolished a Preexisting Right, It Satisfied *Kluger*.

The Legislature is not categorically prohibited from abolishing statutory rights existing in 1968. It can do so if it meets either of *Kluger*'s alternative tests: it can either provide a reasonable alternative or it can address an overpowering public necessity that requires the change. In this case, even assuming the Legislature abolished some right to receive additional weeks of temporary total disability benefits, it independently satisfied each *Kluger* alternative.

1. The current Workers' Compensation Act constitutes a reasonable alternative to its 1968 predecessor.

Courts have held repeatedly that the Workers' Compensation Act constitutes a reasonable alternative to preexisting rights. Indeed, courts have referred to workers' compensation as a "classic example" of a statute providing a reasonable alternative. *Acton v. Ft. Lauderdale Hosp.,* 418 So. 2d at 1101; *see also Eller*, 630 So. 2d at 542 (workers' compensation is reasonable alternative to preexisting rights); *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991) (same); *Mahoney v. Sears*, *Roebuck & Co.*, 440 So. 2d 1285, 1286 (Fla. 1983) (same); *Bradley v. Hurricane Rest.,* 670 So. 2d 162, 164-65 (Fla. 1st DCA 1996) (same).[10] Therefore,

[10] Courts facing similar challenges in the past have alternatively held that the provision did not abolish a preexisting right or satisfied the reasonable-alternative exception. *See, e.g., Eller*, 630 So. 2d at 542 (finding no abolition of right but

the question is whether the challenged amendment to the Act has disrupted the balance, rendering the current system no longer a reasonable alternative. Westphal suggests that it has. But the cases considering this issue uniformly uphold the legislation.

Whatever their impact on individual claimants, the amendment limiting temporary total disability benefits to 104 weeks does not disturb the fundamental purpose of workers' compensation—the prompt provision of meaningful but limited benefits to injured workers irrespective of fault. And the Supreme Court has refused to invalidate legislative changes that alter benefit structures without fundamentally changing the statutory regime. Under Florida's Motor Vehicle No-Fault Law, for example, motorists give up the right to sue for certain damages in exchange for prompt payment of certain benefits irrespective of fault. *See Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 13-14 (Fla. 1974). The Florida Supreme Court upheld the no-fault Law against a *Kluger* challenge, finding it provided a reasonable alternative to the preexisting right it abolished. *Id.* at 15. After *Lasky*, the Florida Legislature amended the no-fault law, reducing the benefits it provided.

"even if the amendment had abolished a right of access, we find that workers' compensation provides a reasonable alternative"); *see also id*. at 543(Kogan, J., concurring in result) (finding "no need . . . to determine whether the statutory amendment in question abolished a cause of action" when "the amendment provides a reasonable alternative to any cause that *may have* existed" (emphasis added)).

Chapman v. Dillon, 415 So. 2d 12, 15-16 (Fla. 1982). Like Westphal here, the Plaintiffs in *Chapman* contended that the legislative changes rendered the law no longer a reasonable alternative under *Kluger*. *Id.* at 17.

The Court flatly rejected the challenge because, despite the reduced benefits, the amendments did not "fundamentally change[the] essential characteristic of the no-fault law." *Id.* As the Court later explained, although "the Legislature substantially reduced the percentage of medical expenses and lost wages the insured may recover," the statute remained a reasonable alternative because injured motorists could recover some damages even when they were at fault. *State Farm Mut. Auto. Inc. Co. v. Nichols*, 932 So. 2d 1073, 1076 (Fla. 2006) (citing *Lasky*).

Thus, the pertinent test is whether the challenged legislative amendments "fundamentally change the essential characteristic" of the workers' compensation system. In *Martinez v. Scanlan*, the Court considered challenges to workers' compensation amendments that "undoubtedly reduce[d] benefits to eligible workers." 582 So. 2d at 1171. The Court found no access-to-courts violation because the amendments did not fundamentally change the workers' compensation concept. *Id.* Despite the lessened benefits, the law "continue[d] to provide injured workers with full medical care and wage-loss payments for total or partial

disability regardless of fault and without the delay and uncertainty of tort litigation." *Id.* at 1172.

Likewise, in *John v. GDG Services, Inc*., the First District rejected an attack on another workers' compensation amendment, in which the claimant argued that "the new wage-loss statute diverges too greatly from the preexisting remedy, the right to recover for loss of wage-earning capacity." 424 So. 2d 114, 116 (Fla. 1st DCA 1982), *approved*, 440 So. 2d 1286 (Fla. 1983). In upholding the change, the First District noted that the workers' compensation concept had "long been justified" and refused to invalidate amendments that did not fundamentally change that concept: "Although we note the benefits under the new wage-loss provisions may result in reduced benefits, the right to recover for industrial injuries has not been so reduced as to be effectively eliminated." *Id.*

Notwithstanding Westphal and his amici's many complaints about the current law, it is not fundamentally different from the original concept. Workers still enjoy prompt payment of medical and disability payments irrespective of fault and without the uncertainty of litigation.

For this same reason, Westphal's complaints about other provisions, *see supra* Section II.C and Pet'r Initial Br., at 32-46, do not alter the analysis. The other changes—such as the introduction of independent medical examiner

requirements, limitations on the selection of physicians and certain treatments, and apportionment—do not fundamentally change the system. Moreover, although Westphal and his amici argue in the abstract that these additional provisions harm injured workers and reduce their overall recovery, there is no record to support that. Indeed, on appeal Westphal offered no objection to the medical treatment he received; his only complaint was the 104-week limitation on temporary disability benefits.

Furthermore, courts have uniformly upheld various limitations on claimant benefits, *see*, *e.g.*, *Berman v. Dillard's*, 91 So. 3d 875, 876-77 (Fla. 1st DCA 2012) (upholding age limit on permanent total disability benefits); *Bradley,* 670 So. 2d at 164 (upholding caps on impairment income benefits); *McCotter Motors, Inc. v. Newton*, 453 So. 2d 117, 119 (Fla. 1st DCA 1982) (upholding temporal limit on death benefits), *approved*, 475 So. 2d 230 (Fla. 1985); *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 209 (Fla. 1st DCA 1983) (upholding age limit for wage-loss benefits), *approved* 452 So. 2d 932 (Fla. 1984); *Mahoney,* 419 So. 2d at 755 (upholding limits on permanent impairment benefits); *Acton,* 418 So. at 1102 (upholding replacement of permanent partial disability benefits with permanent impairment and wage-loss benefits), never once finding that the cumulative effect of these changes violated access to courts. As a matter of fact, no party has

identified any case (save the vacated panel decision below) in which a court invalidated a limitation on claimant benefits under the access-to-courts provision.[11]

Last, even if this Court concluded that the reduction in weeks abolished a cause of action, the Legislature's substantial increase in the per-week compensation, discussed above in Section II.B, constitutes a reasonable alternative. Injured workers who receive fewer weeks' benefits receive more per week. Therefore, even if Florida's system of providing higher, front-loaded compensation actually did reduce some claimants' compensation, it enhances others'—like Westphal's. This satisfies *Kluger*'s reasonable-alternative prong. *See, e.g., Acton v. Ft. Lauderdale Hosp.*, 440 So. 2d 1282, 1284 (Fla. 1983) (rejecting access-to-courts challenge: "[The statutory change] may disadvantage some workers, such as Mr. Acton. On the other hand, the new system offers greater benefits to injured workers who still suffer a wage loss after reaching maximum medical recovery."); *White*, 323 So. 2d at 575 (rejecting access-to-courts challenge and finding that

[11] Twice, this Court has found access-to-court violations in the workers' compensation realm, but the provisions at issue did not involve limitations on individual workers' compensation benefits. Rather, they involved the claims of third-party plaintiffs, *see Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975) (invalidating the preclusion of third-party plaintiffs/alleged tortfeasors' common law tort actions against employers), and a discriminatory provision that provided reduced death benefits to dependents based on their nationality, *see De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204 (Fla. 1989) (invalidating on several constitutional grounds a provision that restricted death benefits for certain nonresident alien beneficiaries).

"[t]he new act, in comparison with the prior law, will increase damages in some circumstances and decrease them in others.").

2. The Legislature addressed an overpowering public necessity.

The challenged provision also satisfies *Kluger*'s second, independent test because it was part of a comprehensive reform designed to meet an overpowering public need. The legislation was no ordinary enactment: it followed extensive study and was passed during a special session called to address a crisis facing Florida's workers' compensation system. *See* Ch. 93-415, Laws of Fla. (totaling 153 pages, passed in November 1993 during a ten-day special session).

The Legislature enacted the reform to address the skyrocketing costs of both workers' compensation insurance and health care for injured workers. Ch. 93-415, Preamble, at 67-68, Laws of Fla. (setting forth legislative findings).[12] The

---

[12] The law states:

> WHEREAS, the Legislature finds that there is a financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state, and
>
> WHEREAS, over the past several years, businesses have experienced dramatic increases in the cost of workers' compensation insurance coverage despite recent legislative reforms, and
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many businesses will cease operating which, in

the current recessionary climate, could cripple the employment market in the state, and

WHEREAS, workers' compensation health care costs are escalating at a far greater rate than the present rate of inflation, and

WHEREAS, Florida employers are currently paying the second highest overall rates for workers' compensation coverage in the country, and

WHEREAS, despite initial system cost reductions occurring as a result of 1990 reforms to the compensation system, current system costs exceed cost levels prior to the 1990 legislation and workers' compensation insurance premium rates are 6 percent above the prereform level of 1990, and

WHEREAS, the Legislature finds that the current wage loss formula for permanent partial disability benefits causes a disincentive to return to work for those employees able to return to the same or similar employment, and

WHEREAS, the Legislature finds that the wage loss formula is partly to blame for an increase in eligibility for permanent partial disability benefits and for an increase in total payments for permanent partial disabilities, and

WHEREAS, permanent total disability benefits are awarded in Florida at levels more than five times the national average, and

WHEREAS, high costs for workers' compensation coverage inhibit economic growth and restrict funds available to provide employment and raise workers' wages, and

WHEREAS, an overriding public purpose is the necessity to lower compensation rates while retaining the ability of employers to purchase compensation coverage, and

WHEREAS, the Legislature finds that additional changes to the compensation system are necessary to lower rates while discouraging fraud and promoting workplace safety that will promote economic growth and stability for employers and employees, and

WHEREAS, the Legislature finds that there is an overpowering

Legislature concluded that, absent these reforms, Florida's economic situation would worsen, jobs would be lost, and employers would be unable to afford insurance. The 104-week limit on temporary total disability benefits, in conjunction with numerous other changes, was intended to meet the overwhelming public need for stabilization of the entire system. The Legislature set forth its specific findings detailing this overwhelming public need for "immediate, dramatic, and comprehensive legislative action." *Id.* And it expressly found that "the reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a workers' compensation system that provides adequate coverage to injured employees at a cost that is affordable to employers." *Id.*

> public necessity for reform of the current workers' compensation system in order to reduce the cost of workers' compensation insurance while protecting the rights of employees to benefits for on-the-job injuries, and
>
> WHEREAS, the Legislature finds that the reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a workers' compensation system that provides adequate coverage to injured employees at a cost that is affordable to employers, and
>
> WHEREAS, the magnitude of these compelling economic problems demands immediate, dramatic, and comprehensive legislative action,

Ch. 93-415, Preamble, at 67-68, Laws of Florida.

This Court must give great weight to these legislative determinations of fact. *See University of Miami v. Echarte*, 618 So. 2d 189, 196-197 (Fla. 1993). Legislative findings are presumptively correct, and all reasonable presumptions must be indulged in favor of the constitutionality of a legislative act. *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977); *Smithers v. N. St. Lucie Drainage Dist.*, 73 So. 2d 235, 237 (Fla. 1954); *Miami Home Milk Prod. Ass'n v. Milk Control Bd.*, 169 So. 541, 543 (Fla. 1936). In *University of Miami v. Echarte*, which addressed an access-to-courts challenge to a medical malpractice reform, this Court recognized that the challenged provision passed in response to a medical liability insurance crisis. 618 So. 2d at 191-92. The Legislature had set out its factual findings in the preamble of the chapter law and specifically concluded that the existing medical malpractice insurance crisis constituted an "overpowering public necessity." *Id.* at 196. In upholding the law, the Court deferred to the Legislature's findings:

> The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts. Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. Because the Legislature's factual and policy findings are presumed correct and there has been no showing that the findings in the instant case are clearly erroneous, we hold that the Legislature has shown that an "overpowering public necessity" exists.

Id. at 196-97 (citations omitted).

The findings of the Legislature in this case—like those in *Echarte*—are

entitled to great deference. The Legislature sought to address a pending workers' compensation crisis, and it detailed its specific findings regarding the public need for the particular comprehensive reform enacted. Westphal has made no showing that those findings are clearly erroneous, despite his burden to demonstrate constitutional invalidity "beyond reasonable doubt." *See Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008).

Because the 104-week limit, as interpreted in *Hadley,* satisfies both independent prongs of *Kluger*, it does not violate Westphal's right of access to the courts.

III. THE EN BANC DECISION UNDER REVIEW PROVIDES A PLAUSIBLE ALTERNATIVE READING OF SECTION 440.15 THAT IS CONSTITUTIONAL.

Under settled principles of constitutional avoidance, if this Court determines that the *Hadley* interpretation of section 440.15 creates a constitutional violation, then it is obligated to construe the statute to avoid that result. *See, e.g., State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006) ("'[W]hen two constructions of a statute are possible, one of which is of questionable constitutionality, the statute must be construed so as to avoid any violation of the constitution.'" (quoting *Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983))); *see also Murray v. Mariner Health*, 994 So. 2d 1051, 1057 (Fla. 2008). The decision under review provides just such a plausible alternative

reading. Indeed, neither Westphal nor the City suggests that the First District's interpretation violates access to courts.

The *Westphal* majority determined that the plain language of the Act allows an injured worker to avoid the "statutory gap" by bringing a claim for permanent total disability benefits based on a date of maximum medical improvement triggered by operation of law. 122 So. 3d at 448. This interpretation is at least plausible and, moreover, it is constitutional.

Relevant to its decision were the provisions governing permanent total disability benefits (§ 440.15(1)), temporary total disability benefits (§ 440.15(2)), and permanent impairment benefits (§ 440.15(3)), and the Act's defined terms in section 440.02. The First District noted that, by statute, six weeks before the terminus of the 104-week period of temporary total disability benefits, a doctor must evaluate the injured worker and assign an impairment rating. § 440.15(3)(d), Fla. Stat. ("After the employee has been certified by a doctor as having reached maximum medical improvement or 6 weeks before the expiration of temporary benefits, whichever occurs earlier, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating, using the impairment schedule referred to in paragraph (b)."). The First District determined that the term "impairment rating" could only refer to a permanent impairment rating.

Section 440.15(2)(a) itself requires that "an injured worker's permanent impairment" be determined upon reaching either the maximum number of weeks allowed or the date of maximum medical improvement, whichever occurs earlier. § 440.15(2)(a), Fla. Stat. The Act defines "permanent impairment" as "any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, *existing after the date of maximum medical improvement,* which results from the injury. § 440.02(22), Fla. Stat. Further, section 440.15(3)(d) requires that the doctor responsible for determining the permanent impairment rating "issue a written report to the employee and carrier certifying that maximum medical improvement has been reached," and "[i]f the employee has not been certified as having reached maximum medical improvement before the expiration of 98 weeks after the date temporary disability benefits begin to accrue, the carrier shall notify the treating doctor of the requirements of this section." § 440.15(3)(d)1.-2., Fla. Stat.

Reading these related provisions together, the First District concluded that the permanent impairment rating required to be assigned at the end of the 104-week period "is the legal equivalent of a medical finding that the disabled worker has reached maximum medical improvement." 122 So. 3d at 445. Accordingly, a totally disabled worker facing a gap in disability benefits may assert a claim for

permanent total disability benefits based upon the resulting certification of maximum medical improvement required under sections 440.15(2) and (3).

Westphal and the City challenge this interpretation as a violation of separation of powers and due process. *See* Pet'r Initial Br., at 10-19; Resp't City Answer Br., at 11-23. To the contrary, the decision respects the separation of powers by avoiding the constitutional issue—to the extent there is one. Indeed, as an amicus below, the Legislature itself raised the doctrine of constitutional avoidance and indicated its preference for the First District's present statutory interpretation over a holding that the statute (however interpreted) was unconstitutional. R. Tab J, at 18-20.

Moreover, due process concerns are not implicated merely because an injured worker—who remains totally disabled—can now bring a claim for permanent disability benefits to avoid a gap in disability benefits. As the First District pointed out, an injured worker's "status and eligibility for benefits can change with the circumstances." 122 So. 3d at 447. If a worker recovers from total disability to the point of regaining earning capacity, then the employer may adjust the benefits accordingly. *See* § 440.15(1)(d), Fla. Stat.; *see also id.* § 440.15(1)(a) ("No compensation shall be payable under this section if the employee is engaged in, or is physically capable of engaging in, at least sedentary employment.").

If the Court concludes the *Hadley* interpretation yields an unconstitutional result, this Court should nonetheless uphold the statute as valid because the First District's interpretation of section 440.15, Florida Statutes, is a plausible interpretation that avoids any constitutional issues.

CONCLUSION

Because the parties agree that the *Hadley* interpretation is the correct one, and because that interpretation does not yield an unconstitutional result, this Court should reject Westphal's constitutional challenge and uphold the workers' compensation statute in its entirety.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ *Rachel Nordby*
Allen Winsor (FBN 16295)
Solicitor General
Rachel Nordby (FBN 056606)
Deputy Solicitor General
Office of the Attorney General
The Capitol - PL-01
Tallahassee, Florida 32399-1050
allen.winsor@myfloridalegal.com
rachel.nordby@myfloridalega.com
(850) 414-3300
(850) 410-2672 (fax)

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Rachel Nordby*
Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on this 6th day of March, 2014, to the following:

Richard A. Sicking 1313 Ponce de Leon Blvd., #300 Coral Gables, FL 33134 (305) 446-3700 *sickingpa@aol.com*	Jason Fox Law Offices of Carlson and Meissner 250 North Belcher Rd., Ste. 102 Clearwater, FL 33765 (727) 443-1562 *jayfoxesq@aol.com*
Kimberly Proano Office of the City Attorney P. O. Box 2842 St. Petersburg, FL 33731 (727) 893-7401 *Kimberly.Proano@stpete.org*	Daniel E. Nordby General Counsel Florida House of Representatives Suite 422, The Capitol Tallahassee, FL 32399 *Daniel.Nordby@myfloridahouse.gov*
George T. Levesque General Counsel Florida Senate 404 South Monroe Street Tallahassee, FL 32399 *Levesque.George@flsenate.gov*	Richard W. Ervin, III Fox & Loquasto, P.A. 1201 Hays Street, Ste, 100 Tallahassee, FL 32301 *richardervin@flappeal.com*

<table>
<tr><td>Bill McCabe
1250 South Highway 17/92
Suite 210
Longwood, FL 32740
billjmccabe@earthlink.net</td><td>Geoffrey Bichler
Bichler, Kelley, Oliver & Longo
541 South Orlando Avenue, Suite 310
Maitland, FL 32751
geoff@bichlerlaw.com</td></tr>
<tr><td>Andre M. Mura
Center for Constitutional Litigation
777 6th Street, N.W. Suite 520
Washington, D.C. 20001
andre.mura@cclfirm.com</td><td>William H. Rogner
1560 Orange Ave., Suite 500
Winter Park, FL 32789
wrogner@hrmcw.com</td></tr>
<tr><td>Jeffrey E. Appel
Appel Harden Law Group
625 Commerce Drive, Suite 104
Lakeland, FL 333813
jappel@jealaw.net</td><td>Barbara Wagner
Wagenheim & Wagner, P.A.
1 Financial Plaza, Floor 7
Ft. Lauderdale, FL 33394-0015
barbw@sportsinjurylaw.com</td></tr>
<tr><td>Matthew J. Mierzwa, Jr.
Mierzwa & Associates, P.A.
Suite #212
3900 Woodlake Blvd.
Lake Worth, FL 33463
mmierzwa@mierzwalaw.com</td><td>Noah Scott Warman
Sugarman & Susskind, P.A.
100 Miracle Mile #300
Coral Gables, FL 33134
NWarman@sugarmansusskind.com</td></tr>
<tr><td>Mark L. Zientz
Law Offices of Mark L. Zientz, P.A.
9130 S. Dadeland Blvd., Ste. 1619
Miami, FL 33156
mark.zientz@mzlaw.com</td><td></td></tr>
</table>

/s/ *Rachel Nordby*
Attorney