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IN THE SUPREME COURT OF FLORIDA

Bradley Westphal,

Petitioner,

vs.

City of St. Petersburg / City of St. Petersburg Risk Management & the State of Florida,

Respondents.
_____/

Case Number: SC13-1930

Lower Tribunal Numbers:
1D12-3563
10-019508SLR

BRIEF IN SUPPORT OF RESPONDENTS ON BEHALF OF *AMICI CURIAE:* ASSOCIATED INDUSTRIES OF FLORIDA; ASSOCIATED BUILDERS AND CONTRACTORS OF FLORIDA; THE FLORIDA CHAMBER OF COMMERCE; THE FLORIDA INSURANCE COUNCIL; THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA; THE FLORIDA JUSTICE REFORM INSTITUTE; PUBLIX SUPER MARKETS; UNITED PARCEL SERVICE; THE FLORIDA ROOFING, SHEET METAL AND AIR CONDITIONING CONTRACTORS ASSOCIATION; THE FLORIDA RETAIL FEDERATION; THE AMERICAN INSURANCE ASSOCIATION; THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS; THE FLORIDA UNITED BUSINESSES ASSOCIATION, INC.; AND THE FLORIDA ASSOCIATION OF SELF INSUREDS

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PRELIMINARY STATEMENT

The Appellant, Bradley Westphal, is referred to as "Petitioner." The Appellees, City of St. Petersburg, City of St. Petersburg Risk Management, and the State of Florida are referred to as "Respondents." The Judge of Compensation Claims is abbreviated "JCC."

Temporary total disability is abbreviated "TTD." Temporary partial disability is abbreviated "TPD." Impairment benefits are abbreviated "IB's." Permanent total disability is abbreviated "PTD." Maximum medical improvement is abbreviated "MMI." Average weekly wage is abbreviated "AWW."

The First District's initial panel decision is referred to as *Westphal I*, while the court's *en banc* opinion is referred to as *Westphal II*. References to Petitioner's Initial Brief are referred to by the letters "IB" followed by the applicable page number.

CONCISE STATEMENT OF THE IDENTITY OF THE *AMICI CURIAE* AND THEIR INTEREST IN THE CASE

Associated Industries of Florida (AIF) is a statewide association of business, trade, commercial and professional organizations in the State of Florida. The members of AIF have a significant interest in the issues currently pending before this Court relating to the certified question.

Associated Builders and Contractors of Florida (ABC) is a non-profit corporation organized and existing under the laws of Florida. ABC is a statewide trade association for commercial industrial construction. It represents the interests of over 2,000 corporate members employing more than 100,000 individuals in commercial construction in Florida. ABC has a significant interest in the issues currently pending before this Court.

The Florida Insurance Council (FIC) is the largest not for profit insurance trade association in the State of Florida. It represents the interests of forty-two insurance groups consisting of 245 insurance companies, many of which write workers compensation coverage in Florida and who are therefore significantly affected by the First District's decision.

The Florida Chamber of Commerce (The Chamber) is a Florida non-profit corporation. The Chamber is a federation of employers, local chambers of commerce, and associations,

representing more than 139,000 businesses across Florida and consisting of more than three million employees. The Chamber therefore has significant concerns regarding the First District's decision.

The Property Casualty Insurers Association of America (PCI) promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is a national trade association composed of more than 1,000 member insurance companies. Member companies write 41 percent of the private workers' compensation market, including 55.1 percent of the private workers compensation market in Florida. Therefore, members are concerned with the impact of the First District's decision on the stability of the workers' compensation system.

The Florida Justice Reform Institute (The Institute) is a not-for-profit organization dedicated to reform of the state's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in civil justice. The Court's decision will have a direct impact on the mission of The Institute. The equitable administration of civil justice, as well as the availability and affordability of workers' compensation in Florida, are squarely implicated by this case.

United Parcel Service, Inc. (UPS) is a significant employer in the state of Florida that relies on a stable Workers' Compensation system to determine expected costs. UPS believes that this case has destabilized the workers' compensation system in Florida.

Publix Super Markets employs 116,000 people in Florida. The state's largest private employer believes that the First District's decision imperils the stability of workers' compensation in Florida and therefore it imperils the welfare of its associates.

Florida Roofing, Sheet Metal and Air Conditioning Contractors Association (FRSA) is a non-profit corporation organized and existing under the laws of Florida. FRSA is a statewide association of licensed roofing, sheet metal, and air conditioning contractors in the State of Florida. It represents the interests of over 650 corporations, partnerships, and proprietorships. The members of FRSA have a significant interest in the issues presented in this case.

The Florida Retail Federation (The Federation) serves as the chief advocate for Florida's retail industry, which is the second largest industry in Florida. The Federation represents over 7,000 business members in the state of Florida, ranging from national chains to small "mom-and-pop" stores. Almost all

of these businesses will be adversely impacted by any potential increase in workers' compensation premiums.

The American Insurance Association (AIA) is a leading national trade association representing some 350 major property and casualty insurance companies that collectively write more than $372 million in workers' compensation insurance premiums in Florida, representing 21% of the market. AIA members range in size from small companies to the largest insurers with global operations. AIA and its members have significant concerns with this case.

The National Federation of Independent Business (NFIB) is the nation's leading small business association whose mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide, including 10,500 in Florida. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. The NFIB is concerned about the adverse impact of the First District's decision on its members.

The Florida United Businesses Association, Inc. (FUBA) is a statewide trade association representing over 7,000 employers across the state of Florida. FUBA represents its members on

business-related issues before the Florida Legislature, the executive branch of state government, and the judicial branch. FUBA's members have a significant interest in the issue currently pending before this Court.

The Florida Association of Self Insured's (FASI) was formed in 1969 by individual and group self-insurers to promote and maintain a healthy environment for self insurance. FASI's purpose is be a voice for the Florida self insured market for all lines of coverage including Workers' Compensation. FASI and its members are acutely interested in court cases and rulings which could impact the self insurance environment in Florida and have participated in *amicus* briefs in order to weigh in on critical and pending cases before the Florida Supreme Court. FASI has grave concerns with the instant ruling.

SUMMARY OF ARGUMENT

The JCC properly denied PTD benefits, applying the plain language of the statute. The eligibility requirements for PTD benefits are determined by the Legislature alone. The Legislature permits an award of PTD benefits only where disability is permanent, which means after the MMI date. Any purported "gap" in benefit classes does not offend the Florida or the U.S. Constitutions. Moreover, the Legislature addressed the "gap" by requiring the payment of impairment benefits immediately upon the expiration of the 104 weeks of TTD benefits. Thus, impairment benefits fill the gap. A remedy for any remaining gap is the prerogative of the Legislature. This Court should answer the certified question in the negative, quash the opinion of the First District, and reinstate the JCC's correct order.

ARGUMENT

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND REINSTATE THE JUDGE OF COMPENSATION CLAIMS' CORRECT RULING WHICH APPLIED THE PLAIN LANGUAGE OF A CONSITUTIONALLY SOUND PROVISION OF THE FLORIDA WORKERS' COMPENSATION ACT

Introduction

The relief Petitioner sought below was a reversal of the JCC's denial of PTD benefits and a remand back to the JCC for an award of such benefits, which is the precise relief granted by the First District. See *Westphal II* at 448. Yet, Petitioner invoked this Court's jurisdiction and seeks reversal of the fully favorable decision. Petitioner's rather curious assertion is that the First District erred by ruling in his favor.

In reality, Petitioner (or more likely, his lawyers) senses an opportunity to invalidate the whole of Chapter 440. Most of Petitioner's Amicus supporters seek the same thing, although each seemingly targets a differing version of the Act for their statutory revival claim. Alternatively, they seek a judicial decree that injured workers may proceed either in tort or under a more generous prior iteration of the Act. This case is part of a calculated plan to invalidate the Legislature's policy decision to reform an unaffordable workers' compensation system.

Even if Petitioner's constitutional arguments fail, *Westphal II* as written represents an invalid and dangerous

usurpation of authority by the First District. In effect, the First District determined that it did not like the law as written by the Legislature. Therefore, it rewrote it in a manner more satisfying to a majority of the judges on the First District. The *Amici* submit that such judicial legislation is improper and that it imperils the entirety of the Act.

Argument on the merits

The JCC denied PTD benefits because Petitioner had not yet reached MMI. The JCC based his correct ruling on a validly enacted statute that denied the claimant no right protected by the U.S. or Florida constitutions. He properly applied the plain language of the statute.

A. Under the plain language of section 440.15(1), Fla.Stat., an injured worker becomes eligible for PTD benefits only where total disability is "permanent"

Workers' compensation is purely a creature of statute. *Jones v. ETS of New Orleans, Inc.*, 793 So.2d 912, 914 (Fla. 2001). A JCC has no jurisdiction or authority beyond that conferred by statute. *Bend v. Shamrock Services*, 59 So.3d 153, 156 (Fla. 1st DCA 2011). The rights and responsibilities of the injured worker and his employer are governed by the statute in effect on the date of the injury. See *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977).

"It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." *Knowles v. Beverly Enterprises-Fla., Inc.*, 898 So.2d 1, 5 (Fla. 2004). To divine Legislative intent courts look to a statute's plain language. See *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So.2d 1204, 1208 (Fla. 2006). When a statute is clear and unambiguous, there is no occasion for resorting to the rules of statutory construction and the statute must be given its plain and obvious meaning. See *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (1931).

By creating from whole cloth a "deemed" MMI date "by operation of law," and by further inventing oxymoronic "temporary permanent total disability" benefits, the First District violated the separation of powers under Article II, Section 3 of the Florida Constitution. The Legislature defines MMI as follows:

> "'Date of maximum medical improvement' means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability." Section 440.02 (10), Fla. Stat. (2009).

Until *Westphal II* the law was clear. The MMI date must be based on medical evidence. See *Buttrick v. By the Sea Resorts, Inc.*, 108 So.3d 658, 659 (Fla. 1st DCA 2013). The MMI date is

based on "a clear, explicit expression of that fact set forth in medical records or medical opinion testimony." *Kilbourne & Sons v. Kilbourne,* 677 So.2d 855, 859 (Fla. 1st DCA 1995). Physicians opine about MMI and JCC's rule based on those opinions.

An injured worker has potential entitlement to four discrete classifications of monetary benefits, each dependent on the claimant's MMI date:

1. *Temporary total* disability benefits: governed by section 440.15(2) (available before MMI);

2. *Temporary partial* disability benefits: governed by section 440.15(4) (available before MMI);

3. *Permanent impairment* benefits: governed by section 440.15(3) (available after MMI); and

4. *Permanent total* disability benefits: governed by section 440.15(1) (available after MMI).

Section 440.15(1) limits PTD benefits to those injured workers suffering "permanent" disability:

> "**Permanent** total disability -- (a) In case of **total disability adjudged to be permanent,** 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance of such total disability." (emphasis added)

In *Westphal II*, the First District held "that a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for TTD benefits is deemed to be at maximum medical improvement

by operation of law." 122 So.3d at 442. This holding is supported neither by the statute nor the First District's own precedent. All cases decided prior to *Westphal II* described MMI as both a medical determination and a prerequisite to an award of PTD benefits. 1

Contrary to arguments made by Petitioner, neither section 440.15(2) (TTD benefits) nor section 440.15(3) (impairment benefits) have applicability to a PTD determination. PTD benefits are governed exclusively by section 440.15(1), which permits an award of PTD benefits only after MMI. Moreover, Petitioner's argument reflects a false premise:

> "The Legislature's legal determination in section 440.15(2)(a), Fla. Stat., that all employees reach MMI at the 104 weeks anniversary of the accident (if not earlier, factually), is an impermissible conclusive presumption." (IB at 16, 17).

An injured worker who has been paid 104 weeks of temporary

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1 See *City of Pensacola Firefighters v. Oswald*, 710 So.2d 95 (Fla. 1st DCA 1998); *Advanced Employment Concepts v. Resmondo*, 718 So.2d 215 (Fla. 1st DCA 1998); *Interim Personnel v. Hollis*, 715 So.2d 355 (Fla. 1st DCA 1998); *Chan's Surfside Saloon/Cox Ventures 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); *Florida Transport 1982, Inc. v. Quintana*, 1 So.3d 388 (Fla. 1st DCA 2009); *Crum v. Richmond*, 46 So.3d 633 (Fla. 1st DCA 2010); *East v. CVS Pharmacy, Inc.*, 51 So.3d 516 (Fla. 1st DCA 2010); *Matrix Employee Leasing, Inc. v. Hadley*, 78 So.3d 621 (Fla. 1st DCA 2011)(*en banc*).

benefits does *not* reach MMI (since that is a medical question), but instead reaches the expiration of TTD benefits and becomes immediately eligible for impairment benefits. The Legislature did not decree that everyone reaches MMI at 104 weeks, but instead simply capped the number of weeks of TTD payable. Thus, an award of PTD benefits prior to MMI is functionally an award of "temporary permanent total disability," which is oxymoronic. "TPTD" benefits do not exist. Until *Westphal II*, the First District agreed. See *Florida Transport 1982, Inc. v. Quintana*, 1 So.3d 388 (Fla. 1st DCA 2009).

Temporary and partial disabilities are compensated in specific subsections that establish parameters for those benefit classes. To establish entitlement to PTD benefits, however, section 440.15(1) requires that a claimant prove total disability existing *after* the date of MMI. See *Crum v. Richmond*, 46 So.3d 633, 636 (Fla. 1st DCA 2010). A claim for PTD benefits before MMI is premature. See *Benniefield v. City of Lakeland*, 109 So.3d 1288, 1290 (Fla. 1st DCA 2013).

Petitioner and several *Amici* allege that applying the statute as written results (for a *very* few injured workers like Mr. Westphal) in a purportedly unconstitutional "gap" in benefits. The Florida Constitution, however, does not mandate the gapless provision of disability payments. Moreover, the

Legislature addressed this purported gap by requiring the payment of impairment benefits immediately upon the expiration of the 104 weeks of TTD. See section 440.15(3)(d), Fla.Stat. Until *Westphal II*, the First District agreed with that premise. See *Pospisil v. Osmond Lincoln Mercury*, 820 So.2d 1076 (Fla. 1st DCA 2002); *Integrated Administrators v. Sackett*, 799 So.2d 448 (Fla. 1st DCA 2001). Thus, the "gap" is filled by impairment benefits. Moreover, the pre-*Westphal II* First District correctly acknowledged that a remedy for any remaining gap is the prerogative of the Legislature. See *Matrix Employee Leasing, Inc. v. Hadley*, 78 So.3d 621, 626 (Fla. 1st DCA 2011)(*en banc*)("[W]e do not have the authority to rewrite the statutes to eliminate the potential 'gap' in disability benefits; that remedy lies with the Legislature.").

A court's responsibility in construing a statute is to effectuate the legislature's intent. *B.C. v. Fla. Dep't of Children & Families*, 887 So.2d 1046, 1051 (Fla. 2004). Failure to do so is contrary to the separation of powers because the Legislature alone is authorized to set policy and a Court's disagreement with such policy does not grant corresponding authority to invalidate it. See *Fast Tract Framing, Inc. v. Caraballo*, 944 So.2d 355, 357 (Fla. 1st DCA 2008). No court may "substitute its judgment for that of the Legislature as to the

wisdom or policy of a particular statute." *State v. Rife*, 789 So.2d 288 (Fla. 2001).

The Legislature limited TTD benefits to 104 weeks because it intended to do so. The statute permits an award of PTD benefits only for disability that is "permanent" because that was the Legislature's intent. The Legislature intended PTD benefits to be payable only after the injured worker achieves MMI and therefore drafted the statute to reflect that intent. The JCC properly denied PTD benefits because Petitioner had not yet reached MMI and was therefore not permanently disabled. He correctly applied the intent of the Legislature as expressed in a plain and unambiguous statute.

B. Chapter 93-415, enacted in response to an overpowering public necessity for reform of the workers' compensation system, is constitutionally sound.

Although the certified question does not address the constitutionality of Chapter 440, Petitioner devotes twenty-six of thirty-six pages of his argument to constitutional issues. Petitioner' goal is the wholesale invalidation of the Act and the judicial imposition of what cannot be obtained through the political process: a more liberal and costly workers' compensation system. The coordinated arguments presented by Petitioner and his *Amici* supporters are flawed and must be

rejected.

Petitioner asserts that *Westphal I* was correct and that Chapter 440 is unconstitutional. Of course, *Westphal I* invalidated a single provision as applied to Petitioner while Petitioner asks this Court to go much further, declaring the entirety of the Act invalid. Moreover, Petitioner seeks not to revive the 1992 Act, the 1989 Act, or even the 1979 Act, but the Act's *1976* iteration. Petitioner's argument, however, is based on a misapplication of precedent.

Westphal I clearly misapplied *Kluger v. White,* 281 So.2d 1 (Fla. 1973) in the context of a Legislative change to a single class of disability benefits payable under the Act. *Westphal I,* relying on *Kluger,* invalidated the 104-week cap on TTD benefits based on a comparison of TTD benefits available in 1968 with those available today. In doing so, the panel misapplied *Kluger,* which does not apply where the Legislature reduces, but does not eliminate entirely, the recovery available under the Act. Petitioner now seeks an even broader application of the same erroneous *Kluger* analysis.

Kluger applies only where the Legislature *abolishes* a cause of action. "The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action." *Jetton v.*

Jacksonville Elec. Authority, 399 So.2d 396 (Fla. 1st DCA 1981). The First District in *Westphal I* erred by invalidating section 440.15(2)(a) because the 1994 amendment reduced the maximum number of weeks of TTD benefits, but did not abolish a cause of action.

In 1935, the Legislature abolished the right to sue one's employer for accidental injury suffered in the course and scope of employment. Therefore, at the time of the 1968 adoption of the Declaration of Rights an injured worker had no common law cause of action. Instead, an injured worker's sole cause of action was prescribed by Chapter 440. An injured worker in 1968 had but one cause of action: a workers' compensation claim. That same cause of action remains for workers injured today.

Westphal I incorrectly analyzed "a decrease in the quantum of benefits" as "an elimination of a cause of action" implicating *Kluger*. Courts apply *Kluger* to invalidate workers' compensation statutes only where an amendment abrogates a common law cause of action. See, e.g., *Sunspan Engineering & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975) (Section 440.11, Fla. Stat. (1972) unconstitutional as it abrogated a third party plaintiff's common law right of action).

Reductions in benefits, even those that end altogether entitlement to certain benefits, are valid precisely because

such reductions reflect a reduction or abolishment of a *class of benefits*, but are not an abolishment of a *cause of action*. When benefits are periodically adjusted by the Legislature the same cause of action remains even where the amount due increases or decreases. Thus, *Kluger* plays no role here, which is precisely why the courts approved all previous reductions and eliminations of benefits. 2

Amici the American Association for Justice ("AAJ") asserts

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2 *Carr v. Central Florida Aluminum Products, Inc.*, 402 So.2d 565 (Fla. 1st DCA 1981) (Amendment reducing, to a maximum of $7,500.00, compensation for three types of permanent injuries was valid); *Acton v. Fort Lauderdale Hosp.*, 440 So.2d 1282 (Fla. 1983) (Amendment eliminating scheduled impairment benefits and replacing them with wage loss benefits was valid); *Sasso v. Ram Property Management*, 452 So.2d 932 (Fla. 1984) (Amendment abolishing wage loss benefits for those 65 and older was valid); *Eller v. Shova*, 630 So.2d 537 (Fla. 1993) (Amendment raising burden of proof in a tort claim to culpable negligence was valid); *Strohm v. Hertz Corp.*, 685 So.2d 37 (Fla. 1st DCA 1996) (Statute reducing unlimited chiropractic care to a maximum of eighteen visits was valid); *Berman v. Dillard's*, 91 So.3d 875 (Fla. 1st DCA 2012) (Amendment ending PTD benefits at age 75 was valid); *Bradley v. Hurricane Restaurant*, 670 So.2d 162 (Fla. 1st DCA 1996) (Amendment replacing wage loss benefits with lesser impairment benefits was valid); *Morrow v. Amcon Concrete, Inc.*, 433 So.2d 1230 (Fla. 1st DCA 1983) (Reduction by up to 50 percent wage loss benefits at age sixty-two when the employee is receiving social security benefits was valid); *Mahoney v. Sears, Roebuck & Company*, 419 So.2d 754 (Fla. 1st DCA 1982) (Statute that placed a dollar cap on benefits for eye injuries was valid); *Medina v. Gulf Coast Linen Services*, 825 So.2d 1018 (Fla. 1st DCA 2002) (Forfeiture of all benefits for making false or misleading statement was valid).

that *Westphal I*'s benefit-by-benefit *Kluger* analysis was proper. The AAJ's argument is flawed. *Kluger* may not be used to individually attack each subsection of Chapter 440 every time the Legislature adjusts the menu of benefits available, because such periodic adjustments do not eliminate the cause of action. Absent the complete elimination of a cause of action, *Kluger* plays no role. See *Alterman Transport Lines, Inc. v. State,* 405 So.2d 456 (Fla. 1st DCA 1981). *Kluger* permits a comparison of the *entirety* of the system adopted in 2003 to the *entirety* of the system in place in 1968, but *Kluger* does not permit a court to cherry pick individual benefit provisions and to selectively invalidate those that the court feels are inadequate.

Petitioner and several *Amici* supporters allege that the combined effect of the "takeaways" implemented since 1968 implicate *Kluger*. Even if the sum total of the purported legislative "takeaways" is properly considered as the elimination of a cause of action in existence in 1968, such legislation passes muster under *Kluger* for two independent reasons. First, *Kluger* permits abrogation of a right available at the time of the 1968 Declaration of Rights where the Legislature can show an overpowering public necessity. Second, the 2003 version of Chapter 440 is an adequate replacement for the Act available in 1968, satisfying *Kluger*.

(1) The Legislature enacted Chapter 93-415 in response to an overpowering public necessity

The Legislature enacted Chapter 93-415 in a special session because the Florida Workers' compensation system was in crisis and the Legislature expressly said so:

> "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
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>
> WHEREAS, the Legislature finds that there is an overpowering 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

Thus, the Legislature explained in detail why it was acting. It did so because the system was in "crisis" and warranted a special legislative session. The Legislature found that there was "an overpowering public necessity for reform of the current workers' compensation system." The Legislature acted

accordingly and did so consistent with *Kluger's* requirements.

(2) Chapter 93-415 provides an adequate, sufficient, and even preferable alternative to both Chapter 440 and to tort remedies in their 1968 iterations.

Petitioner would have had no recovery in tort since his injury was not due to employer negligence. Even in the presence of such negligence Petitioner would face time consuming and expensive litigation with no recovery at all until final judgment. He would bear the added burden of overcoming defenses available in 1968 such as assumption of the risk and contributory negligence. Moreover, his employer is a municipality entitled to sovereign immunity.

Instead of no recovery at all, Petitioner received nearly $100,000.00 in disability payments along with free medical care. He received such benefits at no cost to himself, regardless of fault, and through a self-executing system. He currently receives PTD benefits and supplemental benefits. He remains entitled to lifetime medical care. Yet, he seeks invalidation of the entirety of the Act primarily because he can selectively point to provisions in the 1968 Act that were more generous.

Under the 1968 Act, however, an injured worker's TTD benefits were only 60% of the AWW instead of 66 2/3%. Section 440.15(2), Fla.Stat. (1968). The 1968 cap on weekly benefits

was a mere $49.00 per week while Petitioner received $765.00 per week. Section 440.12(2), Fla. Stat. (1968). In 1968 death benefits were limited to $15,000.00 and funeral expenses were capped at $500.00 as compared to $150,000.00 and $7,500.00 respectively under current law. Section 440.16(1) and (2), Fla.Stat. (1968). An injured worker receiving PTD benefits in 1968 received only 60% of the AWW with no annual cost-of-living increase whereas Petitioner receives 66 2/3% of the AWW plus an annual 3% increase. Section 440.15(1)(a), Fla.Stat. (1968). Certain benefits are currently less generous, while others are more so.

Both the quantum of benefits payable and the method of delivery of such benefits are subject to the policy determinations of the Legislature. Chapter 93-415 reflects a comprehensive and successful plan designed to reduce excessive workers' compensation insurance rates and to improve Florida's economy. Such legislative policy decisions are constitutionally valid. A reduction of benefits that does not eliminate the system in its entirety, and which leaves in place a system that compensates injured workers in a no-fault and self-executing manner, satisfies the Florida Constitution.

Petitioner and several *Amici* argue that the Legislature's repeal of the Florida Occupational Safety & Health Act ("FOSHA")

renders Chapter 440 unconstitutional. The argument is flawed. The Federal Occupational Safety & Health Act ("OSHA") was created in 1971. With its adoption, FOSHA became both redundant and pre-empted by federal law. See *Gade v. National Solid Wastes Management Assoc.*, 505 U.S 88, 112 S.Ct. 2374 (1992). To avoid redundant regulation of workplace safety Congress established a regime by which each state may choose, with federal approval, to assume responsibility for occupational safety and health issues. Where a state chooses not to assume that responsibility, the federal government retains authority over the creation, interpretation, and enforcement of such standards. See 29 U.S.C.A. § 667; *Chadwick v. Board of Registration in Dentistry*, 958 N.E.2d 500, 510 (Mass. 2011). By repealing FOSHA, the Legislature permissibly opted to allow the federal government to regulate workplace safety. 3

Several of Petitioner's *Amici* suggest that the 1970 elimination of the right to "opt out" of the Act renders the current Act unconstitutional. This too is incorrect. The right to opt out was mutual. That is, both the employee and the

3 Petitioner asserts that Florida is "unique among the states" because it lacks its own workplace safety regime. The truth, however, is that exactly half of the states currently choose to defer the regulation of workplace safety issues to OSHA. See https://www.osha.gov/dcsp/osp/faq.html#oshaprogram

employer had the right to opt out of the system (but only *prior* to the occurrence of an injury). See section 440.05(3), Fla.Stat. (1968). The Legislature's abrogation of the right to opt out was also mutual, meaning that both the employee and the employer lost the right to opt out. Therefore, it represented a *mutual renunciation of rights*, something approved by this Court when the Act was originally adopted. Moreover, while it is true that employees lost their right to opt out of the system, they also gained something worth much more: a guarantee that their employers could not opt out and deprive them of rapid and guaranteed redress for injury without fault.

The instant claimant is admittedly a sympathetic figure. He is a firefighter injured while responding to an emergency call. He has the respect and admiration of his employer, his community, and the *Amici*. He is not, however, entitled to a recovery beyond that granted by the Legislature. The Legislature alone has the authority to design a workers' compensation system that meets the competing interests of labor and industry.

The inevitable tension between labor's desire to have more generous benefits on the one hand, and industry's desire to maintain an affordable and stable insurance market on the other, is best resolved through the political process. Workers' compensation can only work as a comprehensive and predictable

system and not as a tailor-made remedy to be applied based on individual needs and unforeseeable judicial perceptions of right and wrong. In rejecting an early fairness-based challenge to the unemployment compensation system, this Court articulated the necessity of preserving the system even where individual hardship results:

> "It may be that (our ruling) will work a hardship in this case but individual cases should not be permitted to overthrow a long settled rule that the public has relied on and in a multitude of instances would be adversely affected by it if overthrown. Rules of law must be grounded on reason and justice rather than on what emotional impulse would dictate." *Gentile Bros. Co. v. Florida Industrial Commission*, 10 So.2d 568, 571 (Fla. 1942).

Only a *very* few injured workers remain in a TTD status 104 weeks after their accident. At its core, Petitioner's fundamental assertion is that the application of Chapter 440 resulted in a hardship to him since he was unable to obtain PTD benefits until after reaching MMI. Anecdotal adverse implications for an individual, however, do not establish the invalidity of the comprehensive system. That system compensates thousands of injured workers in a self-executing manner and without regard to fault. The Legislature alone establishes both the menu of benefits available and their method of delivery. Petitioner's arguments are for the Legislature and not this Court.

CONCLUSION

The JCC denied the claim for PTD benefits because the claimant had not yet reached MMI. The JCC's correct ruling was based on a validly enacted statute, which denied the claimant no right protected by the U.S. or Florida constitutions. Petitioner seeks reversal of a fully favorable decision. This Court, however, should answer the certified question in the negative, quash the First District's opinion, and reinstate the JCC's proper ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Richard A. Sicking, Esquire (sickingpa@aol.com), 1313 Ponce de Leon Blvd., #300, Coral Gables, FL 33134; Jason Fox, Esquire, (JayFoxEsq@AOL.com), 250 N. Belcher Road, Suite 102, Clearwater, FL 33765; Kimberly D. Proano, Esquire, P. O. Box 2842,St. Petersburg, FL 33731; (Kimberly.Proano@StPete.org); Allen Winsor, Chief Deputy Solicitor General, The Capitol, PL-O 1, Tallahassee, Fl. 32399 (Allen.Winsor@myfloridalegal.com); Rachel E. Nordby, Office of the Attorney General, co-counsel for the respondent State of Florida, The Capitol, PL-01, Tallahassee, FL 32399-1050, (Rachel.nordby@myfloridalegal.com); Richard W. Ervin, III, Esquire (richardervin@flappeal.com), 1201 Hays Street, Suite 100, Tallahassee, FL 32301; Andre M. Mura, Esquire (andre.mura@cclfirm.com); Center for Constitutional Litigation, P.C., 777 6th Street, N.W., Suite 520, Washington, DC 20001; Bill McCabe, Esquire (billjmccabe@earthlink.net); 1250 South Highway 17-92, Suite 201, Longwood, FL 32750; Geoffrey Bichler, Esquire (Geoff@bichlerlaw.com), 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; Daniel Nordby, General Counsel

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CERTIFICATION

I HEREBY CERTIFY that the foregoing Brief complies with the font type and size requirements designated in Rule of Appellate Procedure 9.210 on this 14th day of March, 2013.

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