Filing # 11789064 Electronically Filed 03/26/2014 03:43:27 PM

RECEIVED, 3/26/2014 15:48:38, John A. Tomasino, Clerk, Supreme Court

SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

BRADLEY WESTPHAL,

Petitioner,

vs.

CASE NOS: SC13-1930
SC13-1976

CITY OF ST. PETERSBURG/
CITY OF ST. PETERSBURG
RISK MANAGEMENT and
STATE OF FLORIDA,

Respondents. /

Lwr. Tribunal: 1D12-3563
OJCC Case No. 10-019508SLR

REPLY BRIEF OF PETITIONER, BRADLEY WESTPHAL, ON THE MERITS

JASON L. FOX of
CARLSON & MEISSNER
Co-Counsel for Petitioner, Westphal
250 North Belcher Rd., #102
Clearwater, FL 33765
Telephone: (727) 443-1562
E-Mail: JayfoxEsq@aol.com
Florida Bar No. 0413021

RICHARD A. SICKING of
TOUBY, CHAIT & SICKING, P.L.
Co-Counsel for Petitioner, Westphal
1313 Ponce De Leon Blvd., #300
Coral Gables, FL 33134
Telephone: (305) 446-3700
E-Mail: sickingpa@aol.com
Florida Bar No. 073747

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONS

STATUTES

RULE

MISCELLANEOUS

INTRODUCTION

Westphal I refers to *Westphal v. City of St. Petersburg,* 2013 WL 718653 (Fla. 1st DCA Feb. 28, 2013); 38 Fla. L. Weekly D 504 (February 28, 2013).

Westphal II refers to *Westphal v. City of St. Petersburg,* 122 So. 3d 440 (Fla. 1st DCA 2013).

"Appendix" refers to the Appendix to the Supplemental Brief of Appellant filed in *Westphal v. City of St. Petersburg*, Fla. 1st DCA Case No. 1D12-3563, and contained in the Brief Record.

ARGUMENT

ANY RATE CRISIS NO LONGER EXISTS

The State of Florida and the amicus curiae in support of the respondents contend that the reduction of temporary disability from 350 weeks to 260 weeks in 1991 and 104 weeks in 1993 was in response to a crisis in workers' compensation rates. (State's Brief, 13-15). (Respondent Amicus' Brief, 9, 13-15). They say this satisfies the "overwhelming public necessity" test of *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). (State's Brief, 22-24). (Respondent Amicus' Brief, 13-15). However, the petitioner only requests that the issue of invalidity be decided prospectively.[1] This is in

[1] This was the panel decision in *Westphal I.*

accord with precedent. *Martinez v. Scanlan,* 582 So. 2d 1167 (Fla. 1991); *Amendments to the Florida Rules of Workers' Compensation Procedure*, 891 So. 2d 474 (Fla. 2004); See also *City of Miami v. Bell*, 634 So. 2d 163 (Fla. 1994). This is so because it is just too difficult to unravel the past. Therefore, the issue is not whether this denominated insurance crisis was an overwhelming public necessity to justify the reduction of benefits in 1991 and 1993. The issue is whether such denominated crisis has continued to the present day. Plainly, it has not.

Both *Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co.*, 175 So. 2d 39 (Fla. 1965) and *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980), hold that a statute that may have had a constitutional basis when it was enacted, should be declared invalid when the circumstances no longer exist.

In 2009, the Legislature passed an amendment to §440.34, Fla. Stat., the attorney's fee statute, by deleting the word "reasonable" in response to the Florida Supreme Court's decision in *Murray v. Mariner Health Care, Inc.*, 994 So. 2d 1050 (Fla. 2008). This was House Bill 903, which became Ch. 2009-94, Laws of Fla. The House Staff Analysis of H.B. 903 stated that in the early part of the decade Florida consistently had the most expensive or second most expensive workers' compensation rates in the country.

However, the House of Representatives' Staff Analysis went on to describe the reduction in workers' compensation rates from 2002 to 2008 from $4.47 per $100 of payroll to $2.20 per $100 of payroll (Appendix 3) and that

> ...the Office of Insurance Regulation had approved six consecutive decreases in workers' compensation insurance rates, resulting in a cumulative decrease of the overall statewide average rate of more than 60 percent (Emphasis added).

(Appendix, 1, 3).

Footnote 8 in *Westphal I* states:

> Florida Insurance Commissioner Kevin McCarty approved a 6.1% workers' compensation insurance rate increase, effective January 1, 2013, but noted that '[e]ven with this increase, Florida's rates are still 56 percent below the rates prior to the 2003 reforms, and are competitive with other states nationally.' See Florida Office of Insurance Regulation, 2012 Workers' Compensation Annual Report, 3 (Dec. 2012), http://www.floir.com/sitedocuments/wc2012annualreport.pdf. According to the 2012 Annual Report mandated by section 627.211(6), Florida Statutes, 'Based on a comparative analysis across a variety of economic measures, the workers' compensation market in Florida **is competitive.**' Id. (emphasis added). Looking historically, according to the Annual Report issued in 2001, '[c]omparison of cumulative rate changes since 1978 between Florida and the nation as a whole highlights the volatility of state rates. . . . Across all years, however Florida's rates have remained lower relative to 1978 than national rates.' See Division of Workers' Compensation, 2001 Annual Report, 70 (2001), http://www.myfloridacfo.com/wc (then click on 'Annual Reports' and scroll down to '2001 Annual Reports').

Westphal I, at 507.

In the same year, 2009, the Office of Consumer Advocate State of Florida prepared "Actuarial Analysis of Office of Insurance Regulation Filing Number 09-16045" (September 30, 2009). This report states:

> In 2008 the state of Florida's workers' compensation system only returned 43.7 cents of every premium dollar in claim payments to injured workers while the nationwide average return was 61.8 cents. For each of the last ten years the State of Florida's workers compensation system has returned a smaller percentage of the premium dollar to insured workers than the countrywide average. The odds against this happening by chance are more than 1,000 to 1.

(Appendix, 9).

In summary, the petitioner submits that "excessive workers' compensation premiums" can no longer satisfy the second part of the *Kluger v. White* test of "overwhelming public necessity". The workers' compensation insurance rates are down by more than 56 to 60 percent.

The Court will immediately recognize that the second part of the *Kluger v. White* test is similar to the strict scrutiny test for equal protection of the laws: the Legislature must demonstrate a compelling state interest and the Legislature must demonstrate no other reasonable alternative. See *De Ayala v. Florida Farm Bureau Casualty Co.,* 543 So. 2d 204 (Fla. 1989); *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993). The

second condition of the second part of the *Kluger v. White* test is: "...no alternative method of meeting such public necessity can be shown". Id., at 4.

There are no tax dollars used in the expense of the State of Florida in administering the Florida Workers' Compensation Law. All of the revenue used to fund the administration of the workers' compensation law comes from the Workers' Compensation Administrative Trust Fund. §440.50(1)(a), Fla. Stat. This is based on assessments upon insurance companies writing workers' compensation insurance in Florida and assessments on self-insureds. §440.44(3), Fla. Stat; §440.49(9), Fla. Stat.; and §440.50, Fla. Stat.; §440.501, Fla. Stat. and §440.51, Fla. Stat.

Thus, there is an alternative method of meeting an overpowering public necessity of the expense of insurance premiums by infusing tax dollars into the program. The Legislature chose not to do so, which is a legislative choice, but it is an alternative method to reducing employee benefits in order to reduce premiums.

Another alternative method is a refund of excess insurance profits. Effective 1994 when the Legislature created "statutory maximum medical improvement", Section 627.215(1)(a), Fla. Stat. (1993), already provided for excess profits from workers' compensation insurance to be refunded to the policy holder (employer) in cash or as a credit toward renewal.

This did not affect employees' benefits. It benefited employers.

Strangely, the current statute §627.215, Fla. Stat., no longer contains this excess profits provision for workers' compensation insurance as it does for other insurance. It was repealed in 2012. Ch. 2012-213, §7, at 2913, Laws of Fla.

THE *SMITH* AND *DE AYALA* CASES

The City, the State and Respondent Amicus have overlooked *Smith v. Dept. of Insurance*, 507 So. 2d 1080 (Fla. 1987).

In *Smith*, the Florida Supreme Court considered the constitutional validity of the Tort Reform and Insurance Act of 1986. The Court held that some provisions of the Act were valid, but others were not, and were severable.

In particular there was an invalid absolute cap of $450,000 for non-economic losses which violated Access to Courts. The Legislature had not provided an "alternative remedy and a commensurate benefit". Id., at 1088. (It was severable). Accord *Estate of McCall v. U.S.A.*, Fla. Sup. Ct. Case No. SC11-1148, opinion filed March 13, 2014.

Smith illustrates that the alternative remedy, that is the statutory remedy, must be "commensurate" in terms of *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

The "commensurate" test of *Smith* would compare 104 weeks today with 350 weeks in 1968, which is not commensurate. It is 71% less.

In *Smith*, this Court reasoned:

> Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1. None of these caps, under the reasoning of appellees, would "totally" abolish the right of access to the courts. At least one of the appellees candidly argues that there is no constitutional bar to completely abolishing noneconomic damages by requiring potential injured victims to buy insurance protecting themselves against economic loss due to injury as an alternative remedy. That particular issue is not before us but we note that if it were permissible to restrict the constitutional right by legislative action, without meeting the conditions set forth in *Kluger*, the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace or, as Mr. Smith puts it, "majoritarian whim." There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system.

Smith v. Department of Ins., supra, at 1089.

The State argues that all the other take-aways are irrelevant. (State's Brief, 14-15). To the contrary, the cases like *Acton, Sasso, Mahoney, Scanlan* and *Bradley* relied on by the State, held that reductions or changes in indemnity were valid because Florida still provided full medical care. (State's Brief, 12, 16, 18, 20). Well, it does not anymore. (Petitioner's Brief,

30-33, 37-39). So, the reasoning of these cases no longer exists.

Art. I, §2, Fla. Const., provides that everyone has the right to be rewarded for industry. In *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 537 (Fla. 2008), this Court recognized that the Art. I, §2, Fla. Const. right to be rewarded for industry was a constitutional basis for the Florida Workers' Compensation Law.

In *De Ayala*, the Court held:

> The classifier contained in section 440.16(7) involves alienage, one of the traditional suspect classes. *Ramani.* Moreover, it involves the right to be rewarded for industry. Art. I, §2, Fla. Const. It therefore is subject to strict judicial scrutiny under either the fourteenth amendment's equal protection clause; *Bernal v. Fainter*, 467 U.S. 216, 219, 104 S. Ct. 2312, 2315, 81 L.Ed. 2d 175 (1984); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Ramani*, or under article I, section 2 of the Florida Constitution. (Emphasis added).

De Ayala v. Florida Farm Bureau Cas. Ins., at 207.

The State acknowledged that the right to be rewarded for industry was one of the grounds for the decision in *De Ayala*. (State's Brief, 21, footnote 11).

The reduction of temporary disability from 350 to 104 weeks is contrary to the right to be rewarded for industry.

WESTPHAL IS NOT BETTER OFF

The State of Florida argues that Westphal is better off under the current law than he would have been under the 1967 Florida Workers' Compensation Law, which was in force in 1968 when the people voted for the Access to Courts provision. (State's Brief, 12-13). While acknowledging that there is a reduction in the weeks involved from 350 to 104 (State's Brief, 12), the State argues that the dollars are more. Therefore, say they, there is no Access to Courts problem. (State's Brief, 12-14).

This argument is incorrect. This case is about weeks, not about dollars. Workers' compensation laws have always provided for periodic installment payments regardless of the amount of dollars involved. There are two reasons for this: installments are easier for the employer/carrier to pay. More importantly, periodic payments are required so that the disabled employee will have ongoing income to pay ongoing expenses for himself and his family, particularly for shelter and food.

In the early 1970s the U.S. Congress considered establishing minimum standards for state workers' compensation laws. This was called the "Javits Bill". For this purpose, Congress created the National Commission on State Workmen's Compensation Laws to make recommendations. The report was submitted to the President and the

Congress on July 31, 1972. In regard to weekly compensation rates, the Commission recommended:

> *Maximum weekly benefits.* Both the Department of Labor and the Model Act recommend that the maximum weekly benefit should be at least two-thirds of the average weekly wage in the State. The majority of States do not meet this standard: most did in 1940, but since then have not kept pace with the rise in wages. In 32 States as of January 1, 1972, the maximum for a family of four was less than 60 percent of the State's average wage. Such levels of payment are clearly inadequate.
>
> * * * * *
>
> **Maximum Weekly Benefit**
>
> The recommendation published by the Department of Labor provides that the maximum weekly benefit in a State should be at least 66 2/3 percent of the average weekly wage in the State. Table 3.6 indicates the extent of full compliance with this standard since 1940. The majority of States do not now meet the standard. Maximum benefits were nearer to the average wage in 1940 than they have been since then, although there has been some improvement in recent years.

The Report of The National Commission on State Workmen's Compensation Laws, at 19, 60 (U.S. Government Printing Office, 1972).

In the 1967 Florida Workers' Compensation Law, the temporary total disability weekly compensation rate was 60% of the average weekly wage. §440.15(2), Fla. Stat. (1967). The maximum compensation rate was $49.00 per week. This was set ad hoc by the Legislature every two years. §440.12, Fla. Stat. (1967).

Following the National Commission report, the states enacted many of the recommendations, as did Florida. It was popularly known as the "Papy Bill". Ch. 74-197, Laws of Fla. Section 7 of Ch. 74-197, at p. 547, Laws of Fla., changed the method of determining the maximum compensation rate to an annual survey based on unemployment records. Later, in the 1979 reform, Ch. 79-40, §10, at 229, Laws of Fla., increased the temporary total disability rate to 2/3rds of the average weekly wage.

The Papy Bill consisted of numerous improvements in the Florida Workers' Compensation Law in light of the recommendations of the National Commission.

A comparison of the current law to the 1967 law would include some of the improvements of the Papy Bill of long ago. Others have since been modified or removed as well. Compare §440.15(1)(e), Fla. Stat. (1974), with §440.15(1)(f), Fla. Stat. (2013). [5% COLA for permanent total disability for life now reduced to 3% COLA to age 62].

The dollars involved have nothing to do with the reduction in the available weeks for temporary total disability from 350 in 1967 to 104 in the current law. More importantly, *Kluger v. White,* 281 So. 2d 1 (Fla. 1973), is about take-aways, not about add-ons. E.g., *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973).

The issue is whether the take-aways constitute an adequate remedy compared to the 1967 law. In the present case, they do not.

All compensation is calculated from the average weekly wage. §440.14(1), Fla. Stat. Temporary total disability is paid at 66 2/3% of the average weekly wage. §440.15(2), Fla. Stat. However, such payments are capped by the maximum compensation rate for the year of the accident based on unemployment records. §440.12(2), Fla. Stat. In the illustration on pages 12-13 of it's brief, the State does not tell us what Westphal's "imaginery" average weekly wage would have been in 1968. Therefore, the State's figures are imaginery. What is real, however, is that Westphal's average weekly wage was $1,463.30. (R. 445). Under §440.15(2), Fla. Stat., his temporary total disability rate would be 2/3rds, which is $975.32. Westphal does not receive his temporary total disability rate because it is flattened to the maximum rate of $765 per week. This means that he loses $210.32 for every week that he is disabled indefinitely ($1, 463.30 - $765 = $210.32). This is an uncompensated loss which he alone must bear. So much for being better off! This argument of the State does not hold up.

104 WEEKS IS NOT ADEQUATE

The City, the State and the Amicus for the Respondents contend that the current Florida Workers' Compensation Law does not violate Access to

Courts because the benefits are adequate. (City's Brief, 26-38); (State's Brief, 4, 10, 16-17, 21); (Respondent Amicus' Brief, 13, 15, 19). They really offer no proof for this contention. Instead, there is the petitioner's proof that:

1. Full medical care has been eliminated (Petitioner's Brief, 30-33, 37-39);

2. Temporary disability of all kinds has been reduced from 350 to 104 weeks (Petitioner's Brief, 40);

3. Permanent total disability has been reduced from lifetime to age 75 (Petitioner's Brief, 39);

4. The Florida Occupational Safety and Health Act has been repealed (Petitioner's Brief, 45-46); and,

5. There are many other take-aways (Petitioner's Brief, 35-46).

The current Florida Workers' Compensation Law is not an adequate remedy compared to the 1967 law in force when Access to Courts was adopted. It really is not even an adequate remedy considered by itself.

THE SAFETY INSPECTORS WERE SENT HOME

The Respondent Amicus gives short shrift to the repeal of the Florida Occupational Safety and Health Act (Respondent Amicus Brief, 17). Half truth! While many states have deferred to OSHA to adopt safety rules,

enforcement with respect to state and local government and small employers remains with the states, as OSHA does not exercise jurisdictions in those areas. (Petitioner's Brief, 33).

CONCLUSION

Allowing employees to claim temporary permanent total disability is not a solution. It violates separation of powers and is based on statutory maximum medical improvement which violates due process of law.

The real problem is: What is the remedy? Since the case is before the court de novo, there are many possibilities:

1. re-adopt the panel decision with no further comment;

2. re-adopt the panel decision with the comment that the lack of full medical care, cutting off PT at age 75, major contributing cause, no workplace safety act and such other take-aways as this Court cares to mention can no longer be used to counterbalance reductions in indemnity - such as 104 weeks of temporary disability;

3. re-adopt the panel decision and notify the Legislature that the lack of full medical care, the cutoff of PT at age 75, major contributing cause, no workplace safety act, etc., so imperil the constitutional validity of the Florida Workers' Compensation Law that immediate action by the Legislature is required

to remedy infirmities. E.g., *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684, at 688 (Fla. 1972) [*Ryan II*];

4. decide which amendments of take-aways have individually violated Access to Courts, so that it is necessary to reach back to those provisions which pass constitutional muster;

5. decide that §440.11, Fla. Stat., (exclusiveness of liability) is no longer valid as the Florida Workers' Compensation Law is no longer "commensurate" (*Smith*) with the remedy the people knew to be the remedy for employees injured at work (the 1967 Law) when they voted for Access to Courts in 1968.

Respectfully submitted,

JASON L. FOX of
CARLSON & MEISSNER
Co-Counsel for Petitioner, Westphal
250 North Belcher Rd., #102
Clearwater, FL 33765
Telephone: (727) 443-1562
E-Mail: JayfoxEsq@aol.com
Florida Bar No. 0413021

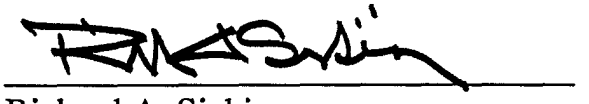
RICHARD A. SICKING of
TOUBY, CHAIT & SICKING, P.L.
Co-Counsel for Petitioner, Westphal
1313 Ponce De Leon Blvd., #300
Coral Gables, FL 33134
Telephone: (305) 446-3700
E-Mail: sickingpa@aol.com
Florida Bar No. 073747

By: 
Richard A. Sicking, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-mail this 26th day of March, 2014, to: Jason Fox, Esq. (JayfoxEsq@aol.com), Law Offices of Carlson and Meissner, co-counsel for petitioner, 250 N. Belcher Rd., Suite 102, Clearwater, FL 33765; Kimberly D. Proano, Esq. (kimberly.proano@stpete.org), Office of the City Attorney, counsel for respondent, City of St. Petersburg, P.O. Box 2842, St. Petersburg, FL 33731; Allen C. Winsor, Chief Deputy Solicitor General (allen.winsor@myfloridalegal.com), and Rachel E. Nordby, Esq. (rachel.nordby@myflorida legal.com), co-counsel for the respondent State of Florida, 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,

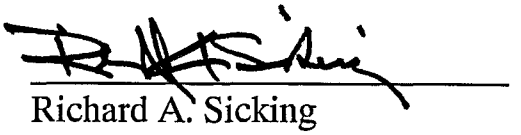
PLLC, 541 South Orlando Avenue, Suite 310, Maitland, FL 32751; Matthew J. Mierzwa, Jr., Esq. (mmierzwa@mierzwalaw.com), Mierzwa & Associates, P.A., Suite #212, 3900 Woodlake Blvd., Lake Worth, FL 33463; Noah Scott Warman, Esq, (NWarman@sugarmansusskind.com), Sugarman & Susskind, P.A., 100 Miracle Mile #300, Coral Gables, Florida 33134; Mark L. Zientz, Esq. (mark.zientz@mzlaw.com), Law Offices of Mark L. Zientz, P.A., 9130 S. Dadeland Blvd., Suite 1619, Miami, FL 33156; Jeffrey E. Appel, Esq. (jappel@jealaw.net), Appel Harden Law Group, P.O. Box 6097, Lakeland, FL 33807; George T. Levesque, General Counsel (Levesque.George@flsenate.gov), Florida Senate, 404 South Monroe Street, Tallahassee, FL 32399; and Daniel E. Nordby, General Counsel (Daniel.Nordby@myfloridahouse.gov), Florida House of Representatives, Suite 422, The Capitol, Tallahassee, FL 32399-1300.



Richard A. Sicking

CERTIFICATE OF FONT SIZE AND STYLE

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



Richard A. Sicking