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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MARVIN CASTELLANOS,

Petitioner,

CASE NO.: SC13-2082

vs.

Lwr. Tribunal: 1D12-3639;
OJCC No. 09-027890GCC

NEXT DOOR COMPANY and
AMERISURE INSURANCE CO.,

Respondents. /

INITIAL BRIEF OF PETITIONER, MARVIN CASTELLANOS, ON THE MERITS

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TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS 1-6

SUMMARY OF ARGUMENT 7-11

POINTS INVOLVED

POINT ONE

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES SEPARATION OF POWERS AND DUE PROCESS OF LAW WHEN:

A. THIS CONFLICTS WITH RULE 4-1.5 OF THE RULES REGULATING THE FLORIDA BAR;

B. THE FEE SCHEDULE IS CONCLUSIVE CONTRARY TO THE *LEE ENGINEERING* CASE;

C. THE USE OF THE FEE SCHEDULE PRODUCES AN UNCONSTITUTIONAL RESULT.

POINT TWO

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW AND THE RIGHT TO BE REWARDED FOR INDUSTRY

WHEN:

A. THE MANDATORY AND CONCLUSIVE ATTORNEY'S FEE SCHEDULE IS CONFISCATORY OF THE CLAIMANT'S ATTORNEY'S RIGHT TO BE PAID AN ADEQUATE FEE FOR SERVICES;

B. THE MANDATORY AND CONCLUSIVE ATTORNEY'S FEE SCHEDULE APPLIES TO BOTH EMPLOYEE PAID FEES AND EMPLOYER/ CARRIER PAID FEES.

POINT THREE

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES EQUAL PROTECTION OF THE LAWS WHEN:

A. IT CREATES AN UNEQUAL CONTEST;

B. IT DISCOURAGES LEGAL REPRESENTATION IN SMALL CASES.

POINT FOUR

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES THE RIGHT TO CONTRACT AND EXPRESS FREELY WHEN:

A. IT DOES NOT ALLOW THE EMPLOYEE TO CONTRACT WITH HIS LAWYER TO PAY A

REASONABLE ATTORNEY'S FEE;

B. IT DOES NOT ALLOW THE EMPLOYEE TO HAVE HIS OBLIGATION TO PAY A REASONABLE ATTORNEY'S FEE TRANSFERRED TO THE EMPLOYER/CARRIER BY STATUTE.

POINT FIVE

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES ACCESS TO COURTS WHEN:

A. THE 1967 FLORIDA WORKERS' COMPENSATION LAW PROVIDED FOR REASONABLE ATTORNEY'S FEES;

B. THE 1967 FLORIDA WORKERS' COMPENSATION LAW DID NOT CONTAIN A COMPULSORY AND CONCLUSIVE FEE SCHEDULE.

ARGUMENT

POINT ONE 12-26

POINT TWO 26-31

POINT THREE 31-33

POINT FOUR 33-37

POINT FIVE 37-40

CONCLUSION 40

CERTIFICATE OF SERVICE

CERTIFICATE OF FONT SIZE AND STYLE

TABLE OF CITATIONS

CASES

Amendments to the Florida Rules of Workers' Compensation Procedure,
891 So. 2d 474
(Fla. 2004) 26

Barco Vending Co. v. Villalonga,
608 So. 2d 128
(Fla. 1st DCA 1992) 26

Board of County Commissioners of Hillsborough County v. Scruggs,
545 So. 2d 910
(Fla. 2nd DCA 1989) 31

Brotherhood of Railroad Trainmen v. Virginia,
377 U.S. 1,
12 L. Ed. 2d 89,
84 S. Ct. 1113 (1964) 36-37

Campbell v. Aramark,
933 So. 2d 1255
(Fla. 1st DCA 2006) 16-20

Castellanos v. Next Door Company,
24 So. 3d 392
(Fla. 1st DCA 2013) 8, 20

City of Miami v. Bell,
34 So. 2d 163
(Fla. 1994) 26

Corn v. New Mexico Educators Federal Credit Union,
889 P. 2d 234 (N.M. App. 1994); cert. denied, 889 P. 2d 203 (N.M. 1995) 32

Davis v. Keeto, Inc.,
463 So. 2d 368, at 371 (Fla. 1st DCA 1985) 36

Davis v. Bon Secours-Maria Manor,
892 So. 2d 516 (Fla. 1st DCA 2004) 14

De Ayala v. Florida Farm Bureau Cas. Ins. Co.,
543 So. 2d 204, (Fla. 1989) 27-28

First Baptist Church of Cape Coral, Inc. v. Compass Construction Co.,
115 So. 3d 978 (Fla. 2013) 35

Florida Forest & Park Service v. Strickland,
18 So. 2d 251 (Fla. 1944) 25

Florida Patient's Compensation Fund v. Rowe,
472 So. 2d 1145 (Fla. 1985) 35

Florida Silica Sand Co. v. Parker,
118 So. 2d 2 (Fla. 1960) 21

Foliage Design Systems, Inc., v. Fernandez,
589 So. 2d 389 (Fla. 1st DCA 1991) 13

Fumigation Department v. Pearson,
559 So. 2d 587
(Fla. 1st DCA 1989) 25-26

Goldberg v. Kelly,
397 U.S. 254,
25 L. Ed. 2d 287,
90 S. Ct. 1011,
(1970) 23

Irwin v. Surdyk's Liquor,
599 N.W. 132
(Minn. 1999) 23

Jacobson v. Southeast Personnel Leasing,
113 So. 2d 1042
(Fla. 1st DCA 2013) 35-36

Jones v. Chiles,
638 So. 2d 48
(Fla. 1994) 8, 19

Kaufman v. Community Inclusions,
57 So. 3d 919
(Fla. 1st DCA 2011) 17-19

Kluger v. White,
281 So. 2d 1
(Fla. 1973) 37-38

Lee Engineering & Construction Co. v. Fellows,
209 So. 2d 454
(Fla. 1968) ....passim

Luckey v. State,
979 So. 2d 353
(Fla. 5th DCA 2008) 25

Lundy v. Four Seasons Ocean Grand Palm Beach,
932 So. 2d 506
(Fla. 1st DCA 2006) 16-20

Maas v. Olive,
992 So. 2d 196
(Fla. 2008)
[*Olive II*] 30-31

Makemson v. Martin County,
491 So. 2d 1109
(Fla. 1986) 30

Martinez v. Scanlan,
582 So. 2d 1167
(Fla. 1991) 26

Murray v. Mariners Health/ACE USA,
946 So. 2d 38
(Fla. 1st DCA 2006) 14-15, 17

Murray v. Mariner Health Care, Inc.,
994 So. 2d 1051
Fla. 2008) ....passim

North Florida Women's Health v. State,
866 So. 2d 616
(Fla. 2003) 30

Olive v. Maas,
811 So. 2d 644
(Fla. 2002)
[*Olive I*] 30

Scott v. Williams,
107 So. 3d 379
(Fla. 2013) 12, 19, 27, 32, 34, 37

Shevin v. International Inventors, Inc.,
353 So. 2d 89
(Fla. 1977) 28

Sir Electric, Inc., v. Borlovan,
582 So. 2d 22
Fla. 1st DCA 1991) 13

Standard Guaranty Ins. Co. v. Quanstrom,
555 So. 2d 828
(Fla. 1990) 35

State vs. Jefferson,
58 So. 2d 661, 664
Fla. 2000) 15

State v. J.P.,
907 So. 2d 1101
(Fla. 2004) 28

State Farm v. Palma,
629 So.2d 830
(Fla. 1993) 5

State Plant Bd. v. Smith,
110 So. 2d 401
(Fla. 1959) 25

Straughn v. K&K Land Management, Inc.,
326 So. 2d 421
(Fla. 1976) 25

Trujillo v. City of Albuquerque,
965 P. 2d 305
(N.M. 1998) 33

United Mine Workers of America v.
Illinois State Bar Assn.,
389 U.S. 217,
19 L. Ed. 2d 426,
88 S. Ct. 353 (1967) 36-37

United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 28 L. Ed. 2d 339, 91A S. Ct. 1076 (1971) 36

Wideman v. Daryl Products Corporation, 27 So. 2d 448 (Fla. 1961) 21

Wood v. Florida Rock Industries, 929 So. 2d 542 (Fla. 1st DCA 2006) 16-20

CONSTITUTIONS

Florida Constitution ....passim

Florida Constitution (1968) ....passim

Art. I, § 2, Fla. Const. 27, 32, 34

Art. I, § 2, Fla. Const. (1968) 28

Art. I, § 4, Fla. Const. 34

Art. I, § 9, Fla. Const. 25

Art. I, § 21, Fla. Const. ....passim

Art. V, Fla. Const. 26

Art. III, §1, Minn. Const. 24

Amend. I, U.S. Const. 24

Amend. XIV, U.S. Const. 32, 34

STATUTES

§2.01, Fla. Stat. 38

§27.7002, Fla. Stat. 31

§27.7002(5), Fla. Stat. 31

§27.711, Fla. Stat. 31

§27.711(7), Fla. Stat. 31

Ch. 440, Fla. Stat. 29

§440.09(3), Fla. Stat. 3-4

§440.09(4), Fla. Stat. 2-4

§440.105, Fla. Stat. 3

§440.105(3)(c), Fla. Stat. 7, 12, 35

§440.105(4)(b)9, Fla. Stat. 2, 4

§440.192, Fla. Stat. 2

§440.34, Fla. Stat. ....passim

§440.34, Fla. Stat. (2009) ....passim

§440.34(1), Fla. Stat. 16

§440.34(1), Fla. Stat. (2009) 6, 20

§440.34(3), Fla. Stat. 6, 16

§440.34(7), Fla. Stat. 13-14

§501.136, Fla. Stat. 28

Ch. 77-290, §9, Laws of Fla. 22

Ch. 2003-412, §26, Laws of Fla. 13

Ch. 2009-94, §1, Laws of Fla. 6, 8, 16

Minnesota Workers' Compensation Act 23

RULES

Canon 12, Canons of Professional Ethics 22

Fla. Admin. Code R. 60Q-6.124(3) 4

Rule 4-1.5, Rules Regulating The Florida Bar 7

Rule 4-1.5(b), Rules Regulating The Florida Bar ....passim

Rule 4-1.5(b)(1), Rules Regulating The Florida Bar 16

MISCELLANEOUS

2007-2008 Annual Report of the Office of the Judges of Compensation Claims 12

Staff Analysis to CSHB 903 22

STATEMENT OF THE CASE AND FACTS

Marvin Castellanos was injured in a work-related accident on October 12, 2009. (R. 1308). He arrived at work and noticed a tool missing (a caliper) from his work station. (R. 1308). Without the tool, he could not carry out his job responsibilities, which would cause production at the plant to slow or come to a halt. (R. 1308). He asked his supervisor, Justin Schecter, for assistance in locating the tool, and Mr. Schecter directed him to ask Julmar Fabregas. (R. 1309). Mr. Castellanos did not want to approach Julmar about the caliper because he had known him to be confrontational. (R. 1309). Instead of intervening to diffuse what he knew could become a volatile situation, Schecter told the claimant to ask Julmar himself. (R. 1309). He followed Schecter's instructions. Predictably, an argument ensued. This escalated into an altercation, and Julmar punched the claimant several times causing injuries. (R. 1310).

The employer/carrier (E/C) authorized Mr. Castellanos to see Dr. Santelices at Physician's Health Center ("PHC") on October 12, 2009. (R. 1731-32). Mr. Castellanos returned to PHC for authorized care, and Dr. Santelices requested authorization for treatment deemed medically necessary, to include physical/occupational therapy three times per week for two weeks, Naproxen 500mg, and Biofreeze. (R. 1735). Because Appellees

failed to authorize the recommendations, the claimant filed a Petition for Benefits on October 29, 2012, seeking:

> 1. Temporary Total/Partial Disability benefits from 10/12/2009 to present and continuing at the correct compensation rate;
> 2. Correction of AWW and resulting Compensation Rate due to include all hours worked for the 13 week prior to work accident plus overtime and fringe benefits; and
> 3. Medical care under the supervision of Dr(s): PCP/MCC.

(R. 1698-1700).

The adjuster, Patricia Shiver from Amerisure, filed a Response to Petition for Benefits on November 5, 2009, stating:

> Claim has been denied based on FS 440.09(4) and 440.105(4)(b)9[.] We reserve the right to amend based on valid reason that may arise. We reserve the right to all future defenses, which may arise. PICA not applicable.

(R. 1701).

Unlike §440.192, Fla. Stat., there is no statutory provision requiring the E/C to plead defenses with specificity; thus, counsel for the claimant was compelled to conduct discovery to determine the basis for the affirmative defenses. To wit, the E/C's Response did not specify the basis for denial, so claimant's counsel deposed the adjuster on 3/1/10. (R. 1784-1820). She testified that, "[t]he claim has been denied based on Fla. Stat. 440.09(4); 440.105(4)(b)9 ... on the fraud statute and the aggressor." (R. 1801).

A Pretrial Stipulation was filed on April 9, 2010. The E/C raised a

myriad of defenses, including, *inter alia*, the following:

1. No competent, substantial evidence to support claim for TT/TP.
2. Voluntary limitation of income/employment.
3. No causal connection between the Claimant loss of employment/income and any alleged injuries.
4. Major contributing cause.
5. Condition self-inflicted.
6. Offset subsequent earnings.
7. Medical Care not authorized.
8. Claimant reached MMI.
9. No competent, substantial evidence to support medical claims.
10. Claimant violated section 440.105 and section 440.09(4) by providing false, fraudulent, or misleading statement. The Employee/Claimant provided deposition testimony of February 25, 2010 regarding the events.
11. Florida Statute Section 440.09(3).
12. The claimant was the aggressor/aggressor doctrine.

(R. 1718-19).

A final hearing was held before the Judge of Compensation Claims (JCC) on August 10, 2010, and concluded on August 12, 2010. (R. 1305). The JCC's Final Compensation Order dated September 8, 2010, awarded:

1. Compensability of the claimant's October 12, 2009 work accident;
2. Authorization of a follow-up appointment for the claimant at Physician's Health Center;
3. Payment to the claimant of any future indemnity benefits based on average weekly wage of $1,231.50 of the corresponding compensation rate of $765.00; and
4. Awarded the claimant's attorney fees and costs retaining jurisdiction over the quantum.

(R. 1314).

The JCC also found that claimant's counsel was successful in the

following respects:

1. Securing compensability of the claim;
2. Defeating the E/SA's affirmative defenses of violation of §440.09(4) and §440.105(4)(b)9;
3. Defeating the E/SA's affirmative defense under §440.09(3);
4. Defeating the E/SA's defense and no accident occurred in the course and scope of Mr. Castellanos' employment;
5. Defeating the E/SA's affirmative defense of §440.02(18) and §440.15(4)(e);
6. Defeating the E/SA's defense that no competent substantial evidence exists to support medical claims and the defense of major contributing cause.

(R. 1304-15).

With regard to the near complete lack of evidence to support certain defenses, the JCC found: "No evidence was presented substantiating Mr. Castellanos voluntarily limited his income after he was terminated by the Employer, so I reject this defense," and the "E/C's Florida Statute 440.09(3) defense is unsupported by any compelling evidence." (R. 1312-14). On Motion for Rehearing, the JCC issued an Order which denied further treatment. (R. 1316-19).

On May 11, 2011, the claimant filed a Verified Motion for Attorney's Fees and Costs payable by the E/C pursuant to Fla. Admin. Code R. 60Q-6.124(3) and §440.34, Fla. Stat. (R. 79-142). The claimant sought a reasonable fee, alleging that a guideline fee was unfair, confiscatory of his

time, unreasonable, and manifestly unjust. (R. 12).

The JCC held a hearing on the attorney's fee issue on March 31, 2012 and found that the claimant's attorney secured benefits of $822.70, on which the statutory fee is $164.54. (R. 13). The JCC entered an Order granting Verified Motion for Attorney's Fees and Costs directing that the "employer/carrier shall pay the claimant a statutory attorney's fee of $164.54" ... and "shall pay claimant $4,630.65 in costs". (R. 19). In so doing, the JCC was not unmindful of the inherent unfairness and chilling effect of the guideline fee, specifically finding that:

> "At final hearing, the claimant ultimately prevailed in obtaining a finding of compensability, a necessary precursor to obtaining benefits. To obtain this result, the claimant had to overcome between 13 and 16 different defenses raised by the E/C throughout the course of litigation." (R. 12).
>
> "It is highly unlikely that the claimant could have succeeded and obtained the favorable result he did without the assistance of capable counsel...." (R. 13).
>
> "Mr. Touby is an exceptionally skilled, highly respected practitioner who has been awarded as much as $350 to $400 an hour for his success in workers' compensation cases." (R. 17).
>
> "There is no question in the undersigned's view that the 107.2 hours expended by his firm in the prosecution of this matter were reasonable and necessary and that same constitutes and "exceedingly efficient use of time." (R. 18).
>
> "The hours are wholly consistent with the 115.20 defense hours documented. (Exhibit 3. See generally, *State Farm v. Palma*, 629 So.2d 830 (Fla. 1993) The E/C's challenges to claimant's

time are wholly rejected. (Exhibit 13, p. 28, 29)." (R. 19).

The JCC fully accepted the notion that "Lawyers can't work for $1.30 an hour." (R. 19).

The First District Court of Appeals affirmed the JCC's order and stated:

> Constrained by the statutory formula set forth in section 440.34(1), Florida Statutes (2009), the judge of compensation claims awarded claimant's counsel an attorney's fee of only $164.54 for 107.2 hours of legal work reasonably necessary to secure the claimant's workers' compensation benefits. We do not disagree with the learned judge of compensation claims that the statute required this result, and are ourselves bound by precedent to uphold the award, however inadequate it may be as a practical matter.

The statutory formula referred to by the District Court is Ch. 2009-94, §1, Laws of Fla., that removed the word "reasonable" from Section 440.34(1), Fla. Stat., and revised Section 440.34(3), Fla. Stat., to read:

> A claimant is ~~shall be~~ responsible for the payment of her or his own attorney's fees, except that a claimant is ~~shall be~~ entitled to recover an ~~a reasonable~~ attorney's fee in an amount equal to the amount provided for in subsection (1) or subsection (7) from a carrier or employer:

It is this constraint that led the District Court to decide to certify to the Florida Supreme Court the following as a question of great public importance:

> **WHETHER THE AWARD OF ATTORNEY'S FEES IN THIS CASE IS ADEQUATE, AND CONSISTENT WITH THE ACCESS TO COURTS, DUE PROCESS, EQUAL PROTECTION, AND OTHER REQUIREMENTS OF THE FLORIDA AND FEDERAL CONSTITUTIONS.**

SUMMARY OF ARGUMENT

Section 440.105(3)(c), Fla. Stat., makes it a crime for anyone to be paid anything for representing anyone in a workers' compensation claim without approval of the Judge of Compensation Claims. (JCC).

Section 440.34, Fla. Stat., sets forth the circumstances for the JCC to give approval. Historically, it only applied to claimants' attorneys, regardless of who paid the fee.

The 2003 Legislature amended the attorney's fee statute to delete the *Lee Engineering* factors which had been used to modify upwards or downwards the schedule of attorney's fees in the statute: 20% of the first $5,000 of benefits obtained; 15% of the next $5,000 and 10% of the remainder for the first 10 years and then 5% thereafter. The statute was further amended that the JCC shall not approve of any attorney's fee in excess of the schedule. However, the statute still provided for a reasonable attorney's fee. In *Murray v. Mariner Health Care, Inc.*, infra, the Florida Supreme Court held that there was ambiguity between the words requiring a "reasonable attorney's fee" and the mandatory schedule. The Court resolved the ambiguity in favor of a reasonable attorney's fee and not the schedule. The Court specifically held that the *Lee Engineering* factors, also contained in Rule 4-1.5 of the Rules Regulating The Florida Bar, controlled. *Murray*,

at 1062. In so doing, the Court pointed out that "statutes should be construed so as to avoid an unconstitutional result". *Murray*, at 1057. The next session of the Legislature amended the statute to delete the word "reasonable" from subsections (1) and (3) of §440.34, Fla. Stat., so that the ambiguity was removed. Ch. 2009-94, §1, at 1351-1353, Laws of Fla., was further amended to provide that the JCC can only approve an attorney's fee that meets the schedule.

In the present case, the JCC found for the claimant in the merits order, found his entitlement to attorney's fees from the employer/carrier (E/C), and reserved jurisdiction to determine the amount. The E/C requested the JCC to determine the amount. In the attorney's fee order, the JCC found that the E/C had raised 13-16 defenses and that it was necessary for the claimant's attorney to expend 107.2 hours of legal time in the successful prosecution of the claim (this corresponded to 115.2 hours of the E/C's counsel.) However, the JCC found that the benefits secured amounted to $822.70 and that based on the schedule contained in the 2009 amendment he could only award $164.54 for attorney's fee (which comes out to $1.53 per hour.)

On appeal, the Florida First District Court of Appeal affirmed, but certified the question as one of great public importance whether the 2009 amendment is constitutionally valid.

The Supreme Court has accepted jurisdiction.

The problem begins as an issue of separation of powers, which can be solved in terms of the Constitution itself.

The JCC is an executive branch official. *Jones v. Chiles*, infra. He cannot decide the constitutionality of a statute. *Castellanos*, infra. However, he is confronted with having to choose from conflicting laws: (1) the mandatory schedule of fees in the 2009 amendment by the Legislature; (2) Rule 4-1.5(b) of the Rules Regulating The Florida Bar which requires that a reasonable attorney's fee be determined by certain factors; and (3) the *Lee Engineering* case, infra, which holds that an attorney's fee schedule cannot be conclusive and the *Murray* case, infra, which holds that the JCC must determine a reasonable attorney's fee, rather than use a schedule in order to avoid an unconstitutional result.

The JCC's job is to provide the parties with a due process hearing. Due process of law is the government that listens and then decides. Under the 2009 amendment, everyone is prohibited from telling the JCC what really happened. The JCC may not consider facts for the determination of attorney's fees found everywhere else in the law: the hours expended - forbidden; a reasonable hourly rate - forbidden; the skill of counsel - forbidden; the complexity of the case - forbidden; the usual fee in the

community - forbidden.

Thus, even the person who by chance had a "correct" fee awarded by the JCC was equally prohibited from presenting relevant evidence as someone who by chance received an "incorrect" fee. The rigid fee schedule cannot tell the difference between an excessive fee and an inadequate fee. Thereby, the 2009 amendment is facially invalid: no one can receive a fair and meaningful hearing. A fee schedule cannot be conclusive. *Lee Engineering*, infra. Yet here the Legislature wishes it to be.

The 2009 amendment was not accompanied by any Legislative findings of a crisis or overpowering public necessity to delete the word "reasonable" from the statute. To the contrary, the staff analysis to the bill describes rates as being down over 60% since the 2003 reform. (Appendix, 3).

Certainly $164.54 for a completely litigated case at $1.53 per hour is totally unfair and unreasonable. It is the result of a process that offends the Constitutions in a number of other ways besides separation of powers and due process of law.

The 2009 amendment violates the right to be rewarded for industry and the prohibition against the taking of property without due process of law. It is confiscatory of the claimant's attorney's right to engage in his

practice and be paid an appropriate fee.

The 2009 amendment violates equal protection of the laws in that it is state action that creates an unequal contest between the unregulated employer/carrier and the severely regulated claimant as to legal expenses.

The 2009 amendment violates the right to contract and to speak freely. It prohibits the employee from agreeing to pay his attorney a reasonable attorney's fee and it prohibits the employee from agreeing that the employer/carrier shall pay a reasonable attorney's fee when he prevails.

The 2009 amendment violates Access to Courts. When the people voted for the Access to Courts provision in the 1968 Constitution, they knew what the remedy was for employees injured at work. The 1967 Florida Workers' Compensation Law provided for the payment of reasonable attorney's fees for the claimant's attorney, regardless of who paid. That statute did not contain a fee schedule. The current compulsory and conclusive fee schedule is not an adequate remedy by comparison. The former is reasonable; the latter is unreasonable.

ARGUMENT

POINT ONE

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES SEPARATION OF POWERS AND DUE PROCESS OF LAW WHEN:

A. THIS CONFLICTS WITH RULE 4-1.5 OF THE RULES REGULATING THE FLORIDA BAR;

B. THE FEE SCHEDULE IS CONCLUSIVE CONTRARY TO THE *LEE ENGINEERING* CASE;

C. THE USE OF THE FEE SCHEDULE PRODUCES AN UNCONSTITUTIONAL RESULT.

The standard of review is de novo. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

To begin with, Section 440.105(3)(c), Fla. Stat., makes it a first degree misdemeanor for anyone to be paid anything for representing anyone in regard to a workers' compensation claim without approval of a Judge of Compensation Claims (JCC).

Section 440.34, Fla. Stat., sets forth the circumstances for the JCC to give approval. Historically, the criminal statute only applied to claimant's attorneys, regardless of who paid the fee. (2007-2008 Annual Report of the Office of the Judges of Compensation Claims, at 27; Appendix, 32). Section

440.34, Fla. Stat., has been changed a number of times since it was first enacted in 1941. It is clear that the statute in force on the date of the employee's accident controls. *Sir Electric, Inc., v. Borlovan*, 582 So. 2d 22 (Fla. 1st DCA 1991); *Foliage Design Systems, Inc., v. Fernandez*, 589 So. 2d 389 (Fla. 1st DCA 1991).

The 2003 Special Session A of the Florida Legislature made a number of changes in Section 440.34, Fla. Stat. Ch. 2003-412, §26, at 3943-3944, Laws of Fla.

Sub-sections (1) and (3) were changed so that the basis for the claimant's attorney's fee was no longer for "service rendered", or "time reasonably spent" but was to be for "benefits secured".

Subsection (1) was amended to provide that the JCC "...shall not approve... an attorney's fee in excess of the amount permitted by this section". This was the schedule of 20% of the first $5,000 of benefits obtained; 15% of the next $5,000 and 10% remaining for first 10 years and 5% thereafter.

Subsection (1) and (3) were further amended to delete the *Lee Engineering* factors which had been used previously to modify upwards or downwards the attorney's fee based on the schedule.

Subsection (7) was created to provide for an alternative to the fee

schedule in "medical only" claims, which could not exceed $1,500 one time per accident at a maximum of $150 per hour.

There were also amendments to provide for an offer of judgment and the taxing of costs against the non-prevailing party (employee or employer/carrier).

After the 2003 changes went into effect, a JCC decided a case based on the prior statute in *Davis v. Bon Secours-Maria Manor*, 892 So. 2d 516 (Fla. 1st DCA 2004). She awarded only a guideline fee of $576.79, which was $4.48 per hour for 128.6 hours to secure $2,883.97 in benefits. The First DCA reversed and described the hourly rate of $4.48 as "manifestly unfair". Id., at 518.

In *Murray v. Mariner Health Care, Inc.*, 994 So. 2d 1051 (Fla. 2008)[1] the Florida Supreme Court considered a case in which the claimant prevailed at trial in a complex case but the benefits were only $3,244.21. Based on the 2003 amendment, the JCC awarded the amount required by the fee schedule, which was $684.84. This was $8.11 per hour for the legal time required, approximately 80 hours.

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[1] The Supreme Court entered an order on October 23, 2008, correcting the style of the case, but it was still incorrectly reported as *Murray v. Mariner Health and ACE USA*,

However, the JCC did find that $16,000 would have been a reasonable fee based on the factors contained in *Lee Engineering & Construction Co. v. Fellows*, 209 So. 2d 454 (Fla. 1968).

On appeal, the Florida First District Court of Appeal affirmed, holding that the statute was constitutional, but certified a question based on earlier cases to the Supreme Court. *Murray v. Mariners Health/ACE USA*, 946 So. 2d 38 (Fla. 1st DCA 2006).

The Supreme Court decided: "We need not address the constitutional issues raised in this case." *Murray*, at 1053. The Court held that there was an ambiguity between the mandatory use of the fee schedule in subsection (1) and the authorization of a "reasonable attorney's fee" in subsection (3) for employer/carrier paid fees.

The Court stated that the standard of review is de novo:

> ...Below, we analyze the issue presented under this standard, keeping in mind that '[w]herever possible, statutes should be construed in such a manner so as to avoid an unconstitutional result.' *State vs. Jefferson*, 758 So. 2d 661, 664 (Fla. 2000).

Murray, at 1057.

The Supreme Court resolved the ambiguity by interpretation in favor of a reasonable attorney's fee and against the fee schedule.

The Supreme Court held that Rule 4-1.5(b) of the Rules Regulating

The Florida Bar applied to an award of attorney's fees for legal services in the processing of claims. *Murray*, at 1061-1062.

As the Rule 4-1.5(b)(1) factors are the same as the *Lee Engineering* factors, the Supreme Court concluded:

> In sum, our decision in *Lee Engineering* controls our decision here.

Murray, at 1062.

In so deciding, the Florida Supreme Court quashed the decision of the First District Court of Appeal in *Murray* and remanded for an award of $16,000.

Further, the Supreme Court disapproved of the First DCA's decisions in *Lundy*[2], *Wood*[3] and *Campbell*[4]. *Murray*, at 1062.

In the next session, in 2009, the Legislature amended Section 440.34, Fla. Stat., to delete the word "reasonable" [attorney's fees] from subsection (1) and (3). Ch. 2009-94, §1, at 1351-1353, Laws of Fla.

The amendment to subsection (1) deleted "as reasonable".

The amendment to subsection (3) deleted "a reasonable".

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[2] 932 So. 2d 506 (Fla. 1st DCA 2006)

[3] 929 So. 2d 542 (Fla. 1st DCA 2006)

[4] 933 So. 2d 1255 (Fla. 1st DCA 2006)

The amendment to subsection (3) requires the amount of the claimant's attorney's fee paid by the employer/carrier to be equal to the fee schedule in subsection (1). The *Murray* ambiguity was thereby removed.

Thereafter, in *Kaufman v. Community Inclusions*, 57 So. 3d 919 (Fla. 1st DCA 2011), the Florida First District Court of Appeal was presented with a case involving the 2009 amendment to Section 440.34, Fla. Stat. The JCC awarded a fee of $684.41 based on the mandatory schedule, because the benefits were $3,417.03.

The First DCA affirmed:

> We reject Claimant's equal protection, due process, separation of powers, and access to courts challenges to the amended statute for the same reasons we rejected similar challenges to section 440.34, as previously amended in 2003, in *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506 (Fla. 1st DCA 2006). We are, of course, aware that in quashing this court's decision in *Murray v. Mariners Health/ACE USA*, 946 So. 2d 38 (Fla. 1st DCA 2006), the Florida Supreme Court also disapproved of this court's decisions in *Lundy*, *Campbell v. Aramark*, 933 So. 2d 1255 (Fla. 1st DCA 2006), and *Wood v. Florida Rock Industries*, 929 So. 2d 542 (Fla. 1st DCA 2006). *Murray*, 994 So. 2d at 1062. The supreme court did not address any constitutional issues in *Murray, see id.* at 1053, however, and did not cast any doubt on the reasoning used in *Lundy, Campbell,* and *Wood*, in rejecting constitutional claims like those made here.

Kaufman, at 920-921.

First of all, the First DCA in *Kaufman* did not hold that the 2009

amendment to Section 440.34, Fla. Stat., was constitutionally valid. What they held was that they rejected the appellant's claims that 2009 amendment was invalid. That is not the same thing at all.

Neither did the Court state what specific claims the appellant made as to due process, equal protection, separation of powers and access to courts.

It was, however, inappropriate for the First District Court of Appeal to resurrect *Lundy, Wood* and *Campbell* in *Kaufman*, at 921.

First of all, *Wood* was not a constitutional law case. It was an interpretation case only (which explains the certified question). It specifically states that the question was one of statutory construction. *Wood*, at 543. There is not one word about constitutional validity.

The First DCA was mistaken in *Kaufman* about *Wood*'s constitutional reasoning. There was not any. There is however, a line of reasoning in *Wood* that should be rejected by this Court, as it was in *Murray*, which is, that the Rules Regulating The Florida Bar, specifically Rule 4-1.5(b), do not apply to workers' compensation cases. *Wood*, at 544. *Wood* says that the 2003 statute was unambiguous. Id., at 545. This Court held in *Murray* that it was ambiguous, so *Wood*'s interpretation of the statute was completely overruled by *Murray*. It was error for the First DCA to resurrect *Wood* in *Kaufman*.

Campbell simply follows *Wood* and *Lundy*. So, what was the First DCA's holding in *Lundy*? The holding in *Lundy* was that the interpretation in *Wood* was constitutionally valid. However, since *Wood* was overruled by this Court in *Murray*, *Lundy*, becomes meaningless. It is a holding that an interpretation of a statute that is wrong (*Wood* overruled by *Murray*) is constitutionally valid. This has no value as precedent.

In *Castellanos v. Next Door Company*, 124 So. 3d 392 (Fla. 1st DCA 2013) below, the First DCA said it was bound by the precedent of *Wood/Lundy/Campbell/Kaufman*. *Castellanos* at 394. This is simply wrong as precedent. No matter, the case is before this Court de novo. *Scott v. Williams*, supra. It is for this Court to decide the constitutional questions involved.

It begins as a separation of powers problem, which is solved by due process of law.

The judge of compensation claims is an executive branch official. *Jones v. Chiles*, 638 So. 2d 48 (Fla. 1994).

The First District Court of Appeal was correct in *Castellanos* below that the JCC is without authority to declare Section 440.34, Fla. Stat., unconstitutional.

When conducting an attorney's fee hearing, the JCC is now confronted

with having to choose from among conflicting laws. If he follows the fee schedule in the statute, he violates Rule 4-1.5(b) of the Rules Regulating The Florida Bar. If he follows the fee schedule in the statute, he is not following this Court's decisions in *Lee Engineering* and *Murray v. Mariner Health Care*. If he follows the fee schedule in the statute, he is not following the U.S. Constitution and the Florida Constitution.

Yet, the First DCA holds in *Castellanos*, supra, that the JCC must follow the statute. Of course, the First DCA held that the statute was valid based on their own precedent (*Wood/Lundy/Campbell/Kaufman*) without explaining why. *Castellanos*, at 394. The First DCA did state that they felt themselves bound by their precedent, even though the fee was inadequate as a practical matter. *Castellanos*, at 393.

This brings us to the certified question for which the Court has accepted jurisdiction. Is the 2009 amendment to Section 440.34, Fla. Stat., constitutionally valid?

The Legislature removed the word "reasonable" from the statute. What is the opposite? The answer is "unreasonable". Are not all laws supposed to be reasonable? The problem is the mandatory and conclusive fee schedule.

In *Lee Engineering & Construction Co. v. Fellows*, 209 So. 2d 454

(Fla. 1968), the Florida Supreme Court stated:

> Allowance of fees is a judicial function.

Id., at 457.

In deciding the appropriate method for determining attorney's fees, this Court pointed out that the Florida Industrial Commission (executive branch) had promulgated a minimum schedule of fees to be used by the deputy commissioners (now JCC's).

Concerning the use of a fee schedule, this Court decided:

> Such a schedule is helpful but it is not conclusive.

Id., at 458.

> "...IT IS NOT CONCLUSIVE"

Ibid.

The Supreme Court reached the same conclusion that a fee schedule cannot be conclusive in *Florida Silica Sand Co. v. Parker*, 118 So. 2d 2, at 5 (Fla. 1960):

> Such a schedule is helpful but is not conclusive. Enumerable economic factors enter into the fixing of reasonable fees in one section of the State and in one community which might not be present in others.

Id., at 5.

Wideman v. Daryl Products Corporation, 127 So. 2d 448, at 451 (Fla. 1961), also holds:

Such a schedule is helpful but is not conclusive.

Id., at 451.

In *Lee Engineering*, this Court adopted Canon 12 of the Canons of Professional Ethics as the factors to be used to determine appropriate attorney's fees in workers' compensation cases.

Later in 1977, the Legislature incorporated the *Lee Engineering* factors to be used by the workers' compensation judge to modify upwards or downwards the fee schedule in the statute. Ch. 77-290, §9, at 1293-1294.

As this Court stated in *Murray*, the *Lee Engineering* factors were removed from the statute in 2003 without explanation. *Murray*, at 1061. However, *Murray* clearly held that *Lee Engineering* was to be followed as the factors were now in Rule 4-1.5(b) of the Rules Regulating The Florida Bar. *Murray*, at 1061-1062.

There were no legislative findings in 2009 to explain the repeal of the word "reasonable" in the statute. To the contrary, the staff analysis to accompany the bill (CSHB 903) stated that workers' compensation rates were down over 60% since the 2003 reform. (Appendix, 3).

This Court already pointed out in *Murray* why a mandatory fee schedule as the exclusive method for determining the amount of claimant's attorney's fees does not work in a constitutional way.

> ...the application of the formula in **<u>all</u>** cases would result in inadequate fees in some cases and excessive fees in other cases. (Emphasis added).

Murray, at 1061.

The Court described this as an absurd result. *Murray*, at 1061.

The only way to tell whether a fee awarded under the schedule is inadequate or excessive is to judge it by the Rule 4-1.5(b) factors (*Lee Engineering* factors). That determination, however, should be made in the first instance in all cases.

In *Irwin v. Surdyk's Liquor*, 599 N.W. 132 (Minn. 1999), the Supreme Court of Minnesota considered the validity of an amendment to the Minnesota Workers' Compensation Act which limited claimant's attorney's fees to $13,000. Id., at 139. The Court held that the statute violated separation of powers because the Court oversaw the conduct of attorneys and awards of attorney's fees by the workers' compensation agency located in the executive branch were subject to judicial review.

> This limitation goes beyond merely indicating what the legislature deems desirable. Even as here, where there was a finding that the fees awarded were inadequate to reasonably compensate relators' attorney, the legislature has prohibited any deviation from the statutory maximum. Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees.

> This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers of Minn. Const. art. III, § 1. Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional.

Id., at 141-142.

This conflict can be resolved by due process of law.

What the compulsory fee schedule does is prohibit the JCC from considering facts that elsewhere in the law, especially Rule 4-1.5(b), are to be considered in awarding attorney's fees. In the same way, the parties are gagged so that they may not tell the JCC these facts; they cannot say what really happened. They have to lie by omission.

The time necessary to perform the legal services, a reasonable hourly rate, whether the case is simple or complex, and the community standard -- the *Lee Engineering* factors are relevant.

Due process of law is the government that listens and then decides.

This compulsory and conclusive fee schedule is state action. Even when a state sets up a social economic program that is a mere entitlement, the state must run that program with due process of law. *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). A workers' compensation claim is far more than an entitlement, it is a property right of

the employee. *Florida Forest & Park Service v. Strickland*, 18 So. 2d 251, (Fla. 1944).

Both the U.S. Constitution, Amendment XIV, and the Florida Constitution, Art. I., Sec. 9, require that the hearing before the JCC be "full and fair, not merely colorable or illusive". See *State Plant Bd. v. Smith*, 110 So. 2d 401, at 407 (Fla. 1959); *Luckey v. State*, 979 So. 2d 353 (Fla. 5th DCA 2008).

The compulsory fee schedule is mindless. It fails both ways. The schedule cannot tell whether a fee is inadequate or excessive. Everyone (employee - employer - carrier) is prohibited from telling the judge what facts would bear on whether the fee per the schedule is inadequate or excessive. It is only by chance that the schedule would produce an appropriate fee. The fee schedule is not only mandatory, it is conclusive. Yet, it is not based on all relevant facts and it cannot be rebutted. That is not due process of law. See *Straughn v. K&K Land Management, Inc.*, 326 So. 2d 421 (Fla. 1976).

This is not to say that the fee schedule should not be considered at all. It still could be a starting point that could be modified upwards or downwards in extraordinary and unusual circumstances by the Rule 4-1.5(b) factors. See *Fumigation Department v. Pearson*, 559 So. 2d 587 (Fla. 1st

DCA 1989); *Barco Vending Co. v. Villalonga*, 608 So. 2d 128 (Fla. 1st DCA 1992); *Murray v. Mariner Health Care, Inc.*, supra, at 1059.

The result in the present case of a fee of $164.54 for a completely litigated case, which comes to $1.53 per hour, is truly absurd; which the First DCA dubbed inadequate as a practical matter. *Castellanos*, at 393.

However, since the JCC does not have the power to do unconstitutional as applied, it is impractical to have the attorney's fee cases reviewed en masse by the First DCA, just to get an award by an Art. V tribunal. The number of cases would be overwhelming.

In keeping with precedent[5], a decision by this Court that the 2009 amendment deleting the word "reasonable" in regard to claimant's attorney's fees is facially invalid should be prospective.

POINT TWO

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW AND THE

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[5] *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 *City of Miami v. Bell*, 34 So. 2d 163 (Fla. 1994)

RIGHT TO BE REWARDED FOR INDUSTRY WHEN:

A. THE MANDATORY AND CONCLUSIVE ATTORNEY'S FEE SCHEDULE IS CONFISCATORY OF THE CLAIMANT'S ATTORNEY'S RIGHT TO BE PAID AN ADEQUATE FEE FOR SERVICES;

B. THE MANDATORY AND CONCLUSIVE ATTORNEY'S FEE SCHEDULE APPLIES TO BOTH EMPLOYEE PAID FEES AND EMPLOYER/ CARRIER PAID FEES.

The standard of review is de novo. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

Article I, Section 2, of the Florida Constitution provides:

> SECTION 2. Basic rights–All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry,...

Section 440.34 impermissibly infringes on the fundamental right to be rewarded for industry. Here, petitioner's counsel spent time and resources, but Section 440.34, Fla. Stat., provides a reward for that industry that was so scant, inadequate and unreasonable as to render it illusory. As such, this right was denied when the JCC awarded a fee that was unreasonable and confiscatory, amounting to less than $2 per hour.

This fundamental right is subject to a strict scrutiny standard. See *De*

Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So. 2d 204, at 206 (Fla. 1989); see also *State v. J.P.*, 907 So. 2d 1101, at 1109 (Fla. 2004) ("When a statute or ordinance operates to the disadvantage of a suspect class or impairs the exercise of a fundamental right, then the law must pass strict scrutiny.) This section of the Florida Constitution guarantees to everyone in this state the fundamental right to be rewarded for industry and to acquire, possess and protect property. In *Shevin v. International Inventors, Inc.*, 353 So. 2d 89, at 93 (Fla. 1977), one of the few decisions dealing directly with the "right to be rewarded for industry," the Florida Supreme Court stated that inherent in that protection (i.e., the "inalienable right to be rewarded for industry") is the right to do business and to contract free from unreasonable government regulation. Id., at 93. The Court held that Section 501.136, Fla. Stat., which was intended "to safeguard the public against fraud, deceit and financial hardship and to foster and encourage competition and fair dealing in the field of invention development services" was constitutionally onerous, unreasonable and violated the right to be rewarded for industry (under Art. I, Sec. 2, of the Florida Constitution (1968)). Id. at 93. The Court decided:

> ...the cumulative effect of the statute would be to substantially diminish the Plaintiff's ability to engage in business in the State of Florida and might constitute a substantial prohibition of the business altogether because of substantial impossibility of compliance. Such a result constitutes an unconstitutional infringement on Plaintiff's

inherent right of liberty to engage in business.

Id., at 93.

The same circumstances apply in the instant case. Here, Section 440.34, Fl. Stat., shares a purported benevolent purpose of protecting injured workers, in addition to reducing employers' costs. In reality, Section 440.34, Fla. Stat., harms the workers it seeks to protect by substantially diminishing, and handicapping, their ability to retain counsel. The fee guidelines restrict the ability of petitioner's attorney to engage in business in the State of Florida for representing injured workers to the point that "there are no attorneys in the state that would handle" a case for less than $2.00 per hour. (R. 634). Compounding the situation is the fact that Section 440.105(3)(c), Fla. Stat., makes it a crime to receive a fee which is not in compliance with the provisions of Chapter 440, thereby precluding the claimant from paying anything to his attorney to augment the inadequate fee of less than $2.00 per hour. The effect is obvious - a restriction on the business of representing injured workers in small value, disputed workers' compensation claims. This results in the substantial impossibility of compliance, as there is no ability for the attorney to be rewarded for his skilled services and industry. Such a result constitutes an unconstitutional infringement of the inherent right of liberty to engage in business and should be found unconstitutional.

Under strict scrutiny the legislation is presumptively unconstitutional and the state must prove that the legislation furthers a compelling state interest through the least intrusive means. *North Florida Women's Health v. State*, 866 So. 2d 616 (Fla. 2003). In the instant case, the state has failed to prove that the legislation furthers a compelling state interest through the least intrusive means, rendering it unconstitutional. There was no crisis, no overwhelming public necessity to require a rigid and conclusive fee schedule.

The confiscatory nature of statutory caps or limitations on attorney's fees is illustrated by a group of cases which hold that statutory caps on the attorney's fees paid to attorneys under the Registry Act are unconstitutional as applied. *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986); *Olive v. Maas,* 811 So. 2d 644 (Fla. 2002) [*Olive I*]; *Maas v. Olive*, 992 So. 2d 196 (Fla. 2008) [*Olive II*].

While these three cases involve Sixth Amendment right to counsel (but also post-conviction proceedings, which are different), nonetheless, the principal is the same that the statutory capped fees were hopelessly inadequate. There the remedy was easily constructed: the trial judge could conduct a hearing and consider all evidence relevant to a reasonable attorney's fee and if that exceeded the cap, he could do unconstitutional as

applied and award a reasonable fee for the services rendered. The JCC cannot do unconstitutional as applied. Interestingly, none of the statutes involved had any words relating to an award of a reasonable attorney's fee. There was no ambiguity a la *Murray*. There were just inadequate caps.

The statute involved is Section 27.711, Fla. Stat. Section 27.711(7), Fla. Stat., provided that a trial court may not approve payment of costs and fees above the amounts specified in the section (the caps) and Section 27.7002(5), Fla. Stat., plainly stated that attorney's fees above the caps are not authorized. Of this, the Florida Supreme Court held:

> Maas argues that the rationale of *Olive I* is no longer valid because the Legislature enacted section 27.7002 to clarify its intent that the fee caps cannot be exceeded in any circumstances. While this may too have been the Legislature's intent, such an interpretation of the statute would render it unconstitutional. (Emphasis added.)

Olive II, at 203.

The same result was reached in a parental rights case which did not involve the Sixth Amendment. *Board of County Commissioners of Hillsborough County v. Scruggs*, 545 So. 2d 910 (Fla. 2nd DCA 1989).

POINT THREE

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES EQUAL PROTECTION OF THE

LAWS WHEN:

A. IT CREATES AN UNEQUAL CONTEST;

B. IT DISCOURAGES LEGAL REPRESENTATION IN SMALL CASES.

The standard of review is de novo. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

Both the U.S. Constitution and the Florida Constitution guarantee equal protection of the laws. U.S. Const. Amend. XIV; Fla. Const. Art. I, §2.

The 2009 amendment is state action that is mandatory, conclusive and rigid in the determination of claimant's attorney's fees, regardless of whether the employee or the E/C pays. By contrast, there is no limit of any kind on the attorney's fees which the employer or carrier may pay for their own legal services.

The Constitution must be dollar blind.

In *Corn v. New Mexico Educators Federal Credit Union*, 889 P. 2d 234 (N.M. App. 1994); cert. denied, 889 P. 2d 203 (N.M. 1995), the court considered the constitutional validity of a statutory cap of $12,500 on the claimant's attorney's fees, 3/4's to be paid by the E/C and 1/4 by the claimant. (A reasonable fee could be assessed against the E/C only for "bad faith" handling of the claim).

The Court held that the cap of $12,500 violated equal protection of the

laws because it created an unequal contest between the worker and the employer/carrier because there was no limit on attorney's fees paid by the employer/carrier to its own attorney.

> Assuming that the goal is reduction of litigation costs, and without considering the fairness of imposing the burden of reducing costs on only one side, we cannot understand how capping attorney's fees only for workers achieves the desired goal, except in an arbitrary manner.

Id., at 242.

The Court also pointed out that the statutory cap discouraged legal representation of workers. Id., at 243. But see *Trujillo v. City of Albuquerque*, 965 P. 2d 305 (N.M. 1998), approving of the result in *Corn*, but rejecting "heightened rational basis" analysis. Id., at 314.

This Court expressed the same concern in *Lee Engineering*:

> ...but it is obvious that fees should not be so low that capable attorneys will not be attracted, nor so high as to impair the compensation program [citing Larson]

Lee Engineering, at 457.

POINT FOUR

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES THE RIGHT TO CONTRACT AND EXPRESS FREELY WHEN:

A. IT DOES NOT ALLOW THE EMPLOYEE TO

CONTRACT WITH HIS LAWYER TO PAY A REASONABLE ATTORNEY'S FEE;

B. IT DOES NOT ALLOW THE EMPLOYEE TO HAVE HIS OBLIGATION TO PAY A REASONABLE ATTORNEY'S FEE TRANSFERRED TO THE EMPLOYER/CARRIER BY STATUTE.

The standard of review is de novo. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

The Florida Constitution, Art. I, §2, protects the right to contract and Art. I, §4, protects freedom of speech. U.S. Const. Amend. I and Amend. XIV.

One would think that an employee could contract with his own lawyer to pay a reasonable attorney's fee to be determined by the *Lee Engineering* factors and Rule 4-1.5(b) of the Rules Regulating The Florida Bar, and subject to approval by the JCC when payment is made. Or, one would think that an employee could contract to pay a reasonable hourly rate (again subject to JCC approval when payment is made). Under the 2009 amendment, an employee can do neither. The schedule is compulsory and conclusive regardless of whether the employee pays or the employer/carrier pays under the fee shifting provision of the statute. The fee schedule is it!

Technically, an agreement between the employee and the attorney for the payment of a reasonable fee or an hourly rate, would be an attempt to

commit a misdemeanor under Section 440.105(3)(c), Fla. Stat. So much for the constitutional right to contract!

In *First Baptist Church of Cape Coral, Inc. v. Compass Construction Co.*, 115 So. 3d 978 (Fla. 2013), the Supreme Court of Florida held that an alternative fee recovery clause with an hourly rate was valid. Further, this was true whether the fee shifting to the non-prevailing party was by statute or contract or whether it was a contingent fee to an hourly rate or vice versa. Note: The lodestar method of determining a reasonable attorney's fee described in *First Baptist* would not apply to workers' compensation cases when there is a schedule. *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

Plainly, the mandatory fee schedule in the 2009 amendment would prohibit the right to contract for an alternative fee recovery recognized in *First Baptist*.

Free speech is a fundamental right. *Jacobson v. Southeast Personnel Leasing, Inc.*, 113 So. 3d 1042, at 1048-1049 (Fla. 1st DCA 2013).[6]

The First DCA addressed the claimant's right to counsel:

> The speech at issue here is Claimant's own words - given voice through his attorney...

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[6] A workers' compensation case.

Jacobson, at 1049.

We could compare the 135-page pamphlet published by the Florida Industrial Commission that was the 1967 Florida Workers' Compensation Law with the 2009 Florida Workers' Compensation Law applicable to this case, published by the Florida Workers' Compensation Institute amounting to 697 pages. We have too many laws!

Workers' compensation started out being simple, but it no longer is. The employee has a right to be heard through counsel, otherwise he would be "helpless as a turtle on its back". *Davis v. Keeto, Inc.*, 463 So. 2d 368, at 371 (Fla. 1st DCA 1985); 475 So. 2d 695 (Fla. 1985). Some years ago, the U.S. Supreme Court recognized the free speech right of employees to seek legal counsel for the assertion of claims for industrial injury, including workers' compensation. *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 12 L. Ed. 2d 89, 84 S. Ct. 1113 (1964); *United Mine Workers of America v. Illinois State Bar Assn.*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 28 L. Ed. 2d 339, 91A S. Ct. 1076 (1971).

> A State could not... infringe in any way the right of individuals and the public to be fairly represented in

lawsuits...[7]

Brotherhood of Railroad Trainmen, supra, at 7.

The purpose, and certainly the result, of the 2009 amendment is to make small claims by employees impractical.

POINT FIVE

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES ACCESS TO COURTS WHEN:

A. THE 1967 FLORIDA WORKERS' COMPENSATION LAW PROVIDED FOR REASONABLE ATTORNEY'S FEES;

B. THE 1967 FLORIDA WORKERS' COMPENSATION LAW DID NOT CONTAIN A COMPULSORY AND CONCLUSIVE FEE SCHEDULE.

The standard of review is de novo. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

Art. I, §21, Fla. Const., provides:

> Access to courts.–The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Supreme Court of

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[7] Explained: applies to state workers' compensation cases also. footnote 5, *United Mine Workers of America*, supra, at 357.

Florida decided the validity of a no-fault automobile accident liability act under the Access to Courts provision. The Supreme Court of Florida adopted this rule:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided **by statutory law predating the adoption of the Declaration of Rights** of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. §2.-01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. (Emphasis added).

Kluger v. White, supra, at 4.

It is important to note that the Supreme Court of Florida included the statutory remedies that existed in 1968. Indeed, after stating the rule, the Court gave an illustration of such a statute, which in 1973, satisfied the rule:

> Workmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury. (Emphasis added).

Kluger v. White, supra, at 4.

In 1968 when the people voted for the Access to Courts provision,

they knew that the 1967 Florida Workers' Compensation Law was the remedy for employees who were injured at work. The 1967 Florida Workers' Compensation Law authorized an employee to contract with his own lawyer to pay a reasonable attorney's fee and it authorized payment of a reasonable attorney's fee from the employer/carrier according to the fee shifting provisions of the statute under various circumstances.

The 2009 amendment to Section 440.34, Fla. Stat., does not permit the employee to contract with his lawyer for a reasonable hourly fee or to pay him a reasonable attorney's fee. Neither does the 2009 amendment permit the recovery of a reasonable attorney's fee from the employer/carrier under the fee shifting provisions of the statute.

Instead, it provides for an attorney's fee schedule that is compulsory and conclusive. It is arbitrary and capricious. A fee set by the rigid schedule would still be subject to judicial review to determine whether it was inadequate or excessive. There are two possibilities: (1) it cannot be reviewed which would violate Access to Courts; or (2) it can be reviewed. Then, it would be judged using the Rule 4-1.5(b) factors (*Lee Engineering* factors). Therefore, this should be done in the first place by the JCC. It would be impractical to have to go to the First DCA for this determination. There are just too many cases; it would drown the court.

CONCLUSION

Could there be a statutory construction that avoids the constitutional question certified by the First DCA a la *Murray*? Section 440.33, Fla. Stat., gives the JCC general powers to do the right thing, but is that enough?

This Court should declare the 2009 amendment to Section 440.34, Fla. Stat., to be facially invalid prospectively.

Respectfully submitted,

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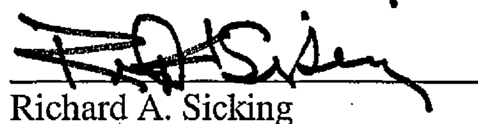
CERTIFICATE OF SERVICE

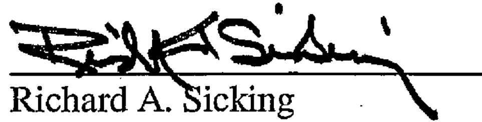
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 8th day of April, 2014, to: Roberto Mendez, Esq. (rmendez@mendezlawgroup. com), The Law Group of Mendez & Mendez, P.A., 7061 Taft Street, Hollywood, FL 33024; Michael J. Winer, Esq. (mike@mikewinerlaw.com), Law Office of Michael J. Winer, P.A., 110 North 11th Street, 2nd Floor, Tampa, FL 33602; Mark A. Touby, Esq. (mark.touby@tgclegal.com), Touby, Chait & Sicking, PL, 2030 South Douglas Road, Suite 217, Coral Gables, FL 33134; Christopher Smith, Esq. (chris@ cjsmithlaw.com), 2805 W. Busch Blvd., Suite 219, Tampa, FL 33618, Kenneth B. Schwartz, Esq. (kbs@flalaw.com), Kenneth Schwartz, P.A., 1803 S. Australian Avenue, Suite F, West Palm Beach, FL 33409; Richard W. Ervin, Esq. (richardervin@flappeal. com), Fox & Loquasto, P.A., 1201 Hays Street, Suite 100, Tallahassee, FL 32301; Geoffrey Bichler, Esq. (geoff@bichlerlaw.com), Bichler, Kelley, Oliver & Longo, 541 South Orlando Avenue, Suite 310, Maitland, FL 32751; and 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.



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.



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