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IN THE SUPREME COURT OF FLORIDA

SC Case No.: SC14-1916
Case No. 1D14-1676
L.T. No.: 11-002425GCC

HENRY DIAZ,

Appellant,

v.

PALMETTO GENERAL HOSPITAL
and SEDGWICK CMS, INC.,

Appellees.

ANSWER BRIEF

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INTRODUCTION

In this Answer Brief, the Respondent adopts the labeling used in the Petitioner's Initial Brief for the sake of consistency of reading. The Petitioner, Henry Diaz, will be referred to as the Petitioner, Claimant or as Mr. Diaz. The Respondents, Palmetto General Hospital and Sedgwick CMS, will be referred to as the Respondents, as the E/C or by their corporate names. The record will be cited as: [R.]. In addition, the following abbreviations will be utilized throughout the brief:

• Average Weekly Wage will be abbreviated as AWW

• Expert Medical Advisor will be abbreviated as EMA

• Independent Medical Examiner will be abbreviated as IME

• Judge of Compensation Claims will be abbreviated as JCC

• Major Contributing Cause will be abbreviated as MCC

• Petition for Benefits will be abbreviated as PFB

• Office of the Judges of the Compensation Claims will be abbreviated as OJCC

• Temporary Total Disability benefits will be abbreviated as TTD

• Temporary Partial Disability benefits will be abbreviated as TPD

• TOPAZ Micro Debrider Surgical Procedure will be abbreviated as TOPAZ

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE

At issue in this appeal is the constitutionality of the July 1, 2009 amendment to section 440.34 of the Florida Workers' Compensation Statute, which awards fees to any claimant's attorney who obtains benefits on behalf of his client by a prescribed fee schedule.

Petitioner, Henry Diaz, appeals the order of the First DCA entered on September 19, 2014, *Diaz v. Palmetto General Hospital/Sedgewick CMS,* No. 1D14-1676 (Fla. 1st DCA September 19, 2014). That Opinion affirmed the JCC's order awarding attorney fees to claimant based on the precedent set in *Castellanos v. Next Door Co.,* 124 So.3d 392 (Fla. 1st DCA 2013) which certified the same question to this Court.

In the underlying case the JCC awarded Diaz prevailing-party attorneys' fees to be paid by Respondents, Palmetto General Hospital/Sedgwick CMS. The JCC applied the fee schedule in section 440.34(1), Florida Statutes, to the total benefits and awarded fees of $1,593.47. [R. 6 - 10].

Petitioner argues that the 2009 Amendment, which removed the word "reasonable" from §440.34(3) and limits prevailing-party attorneys' fees to those

determined by a schedule, renders section 440.34 unconstitutional both facially and as applied.

As shown below, this Court should affirm the 1st DCA decision.

STATEMENT OF THE FACTS

Petitioner alleged that he was injured due to repetitive trauma in the workplace while performing his duties as a pharmacy technician and pharmacy intern. He was seen by a primary care doctor. He later came under the care of Dr. Kenneth Easterling (orthopedist) who diagnosed right elbow tendonitis and mild carpal tunnel syndrome. When he first saw Dr. Easterling on May 10, 2010, the claimant did not request medical care from the employer. Dr. Easterling was the only doctor to treat Mr. Diaz prior to the final hearing. Subsequently, the E/C obtained an IME with Dr. Lewis Eastlick and Petitioner obtained an IME with Dr. Jesse Bassadre. The E/C denied the claim based on major contributing cause. The two IME opinions conflicted as to the major contributing cause of Mr. Diaz symptoms so the JCC appointed Dr. Elizabeth Anne Ouelette to serve as an EMA in the case. [R. 121 and 123-126].

The case went to final hearing on June 13, 2012. At the final hearing claimant was represented by two attorneys, Martha Fornaris, Esq. and Grethel San Miguel, Esq. The E/C was represented by Douglas W. Barnes, of Douglas W.

Barnes, P.A. [R. 118]. On July 12, 2012, the JCC entered a Final Compensation Order. After rehearing, the JCC entered a second Final Compensation order on 8/7/12 in which the JCC gave deference to the EMA opinion and found that the claimant prevailed on the issue of compensability. [R. 7, 118 and 125]. Claimant was awarded temporary partial disability benefits plus penalties and interest, and an evaluation and ongoing treatment with an orthopedic hand specialist. The JCC further ruled that the E/C would pay attorney fees and costs to Claimant's attorney for securing such benefits. Lastly, the JCC found that the employer/carrier prevailed on the AWW, and ordered the E/C to continue to use $ 854 as the AWW. [R. 7 and 132].

A fee hearing was held on 2/14/14. Again, Claimant was represented by the same two attorneys at hearing. However, the E/C was then represented by Vanessa Lipsky, Esquire of the Eraclides Law Firm. The JCC found that the parties stipulated to the value of the benefits obtained and had already resolved the issue of costs. [P. 6-8]. Based on this stipulation the JCC awarded Claimant's attorney a fee of $1,593.47 as prescribed by Florida Statute §440.34(1). [P. 10].

Claimant appealed this decision to the Florida First District Court of Appeals which affirmed the JCC's order on September 19, 2014. This appeal followed.

SUMMARY OF THE ARGUMENT

Petitioner lacks standing to bring these constitutional challenges to §440.34 because he cannot demonstrate how he was adversely impacted by it. He has not shown how §440.34 as applied to him hinders his ability to retain counsel or in some way changed the way the carrier treated the claim. He merely points to potential abstract, conjectural or hypothetical situations applied to others, who not before this court, could potentially be affected by the statute. Since not adversely affected himself, he lacks standing to bring these constitutional challenges to the statute.

In addition to being constitutional as applied to Petitioner, §440.34(1) is constitutional on its face. There are many situations where §440.34(1) can produce a fee that is "reasonable". Therefore, even if the court were to accept Petitioners argument that reasonable as defined by *Lee Engineering* is the standard for constitutionality, the statute is still facially constitutional.

The 2009 Amendments to §440.34(1) and (3) did not violate the Access to Courts provisions of the Florida or Federal Constitutions in this case because no rights were totally abolished; it did not deprive the injured worker of the assistance of counsel, claimant lacks standing to bring this challenge; and if a right was totally abolished, there was an overpowering public necessity to do so. These amendments also did not violate Petitioner's Due Process rights. Due process

requirements are satisfied if an opportunity for a meaningful hearing is provided. In this case Petitioner had his right to a meaningful hearing. In fact, he was represented by two competent attorneys, prevailed at the hearing before the JCC and was awarded benefits. Therefore, the claimant had all the Due Process he was entitled to.

Florida Statute §440.34(1) does not violate Petitioner's right to equal protection. Limiting fees to a percentage of the benefits secured as prescribed by §440.34(1) bears a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant.

Florida Statute §440.34(1) does not violate the separation of powers provisions of the Federal or Florida constitutions. The legislature is charged with enacting substantive law and the judiciary has exclusive authority to adopt rules of judicial procedure. Since §440.34(1) is substantive law, it is not the role of the judiciary to decide whether the limitation of attorney fees appropriate, as such decisions are within the authority of the Legislature.

Petitioners rights to free speech and to contract have not been violated by §440.34. Petitioner did contract with counsel and was heard by the JCC, the Florida First District Court of Appeals and now by the Florida Supreme Court. In addition, a statute restricting the right to contract cannot be invalidated if the restriction was enacted to protect the public's health, safety, or welfare. The

restrictions set forth in §440.34(1) were enacted to protect the public's welfare by ensuring that a worker is able to retain a substantial portion of awarded benefits so as to prevent the burden of support for that worker from being cast upon society.

Florida Statute §440.34(1) does not create a taking without Due Process and did not violate his right to be rewarded for industry. Petitioner, not his attorney, is the real party in interest. It was not Petitioner's effort in the practice of law that is sought to be rewarded, it was the efforts of Petitioner's attorneys. He did not participate in any industry for which he was denied a reward, and it is not his property right in question. Therefore he lacks standing to make this challenge. In addition, strict scrutiny does not apply as the practice of law is not a fundamental right. Since limiting fees to a percentage of the benefits secured bears a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant the statute is constitutional.

ARGUMENT

Before addressing Petitioner's specific complaints, we must look at the law in general as it relates to a constitutional challenge:

> "A statute is presumed to be valid, and every presumption is to be indulged in favor of the validity of that statute. *Golden v. McCarthy*, 337 So. 2d 388, 389 (Fla.1976); *McElrath v. Burley*, 707 So. 836, 839 (Fla. 1st DCA 1998). The party challenging a statute has the burden to demonstrate the unconstitutionality of the statute by negating every conceivable basis for upholding the law. *Burley,* 707 So. 2d at 839." *Lundy v. Williams*, 932 So.2d 506 (Fla. 1st DCA 2006), *disapproved on other grounds*.

Florida Statute §440.34(1) is presumed to be valid. To prevail in this constitutional challenge, Petitioner must "demonstrate the unconstitutionality of the statute by negating every conceivable basis for upholding the law." *McElrath v. Burley,* 707 So. 2d 836, 839 (Fla. 1st DCA 1998) and *Lundy* at 509. As claimant has failed to negate every conceivable basis for upholding the statute, his constitutional challenges must fail.

In *Kaufman*, the Appellant challenged the 2009 amendments to §440.34 and made four of the same challenges made by Petitioner in this case: Access to Courts, Equal Protection, Separation of Powers and Due Process. The First DCA rejected the Claimant's challenges to the 2009 amendments to §440.34(1) and (3). That court concluded the Legislature passed these amendments in response to this Court's *Murray* decision. It explained that the *Murray* decision effectively disapproved of the First DCA's holdings in the similar cases of *Lundy, Wood* and *Campbell.* However, the *Murray* decision was based on statutory construction and did not address constitutional issues related to §440.34(1). Since *Lundy, Wood* and *Campbell* were disapproved on other grounds, the reasoning used in those cases to address the same constitutional challenges brought in this case remains sound. *Kaufman v. Community Illusions, Inc.* 57 So.3d 919, 921(Fla. 1st DCA 2011). As

in the *Kauffman* case, the JCC in this case has correctly applied §440.34(1) and for reasons stated below, the statute is still constitutional.

The only other issue this Petitioner raises is the Right to Contract. As will be shown below, such argument is also without merit.

<u>ARGUMENT ONE</u>: PETITIONER LACKS STANDING TO BRING THIS APPEAL AS HE WAS NOT ADVERSELY AFFECTED BY THE 7/1/2009 AMENDMENT TO FLORIDA STATUTE §440.34.

STANDARD OF REVIEW: DE NOVO

The Employer agrees that the standard of review is de novo because the constitutional challenge is a pure question of law. *Scott v. Williams,* 107 So.3d 379 (Fla. 2013).

This court has said: "The courts will not declare an act of the legislature unconstitutional unless its constitutionality is challenged directly by one who demonstrates that he is, or assuredly will be, affected adversely by it." *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952). *See* also *M.Z. v. State*, 747 So.2d 978, 980 (Fla. 1st DCA 1999) (stating: "It is a fundamental principle of constitutional law that a party cannot challenge the constitutionality of a statute unless it can be demonstrated that he has been, or definitely will be, adversely affected by its terms."). "To establish standing it must be shown that the party suffered injury in fact (economic or otherwise) for which relief is likely to be redressed...the injury

must be distinct and palpable...it may not be abstract, conjectural or hypothetical." *Peregood v. Cosmides,* 663 So.2d 665, 668 (Fla. 5th DCA 1995). (citing multiple U.S. Supreme Court Cases, citations omitted).

Standing will also be addressed where appropriate below, however, in general Petitioner argues that the amendments to §440.34(1) which became effective 7/1/2009, are unconstitutional because the statute "impacts all injured workers throughout our state in an unconstitutional way and is inconsistent with access to courts, due process, equal protection and other requirements of the Florida and Federal constitution. (Petitioner's Brief P. 9 – 10). Throughout Petitioner's brief two recurrent themes appear. First, he argues that attorneys would not be inclined to represent injured workers without the potential of a "reasonable" fee. (Appellant Brief P.14 – 24, 36, 39, 40-42, 48 and 50). Secondly, he argues that the elimination of a "reasonable" carrier paid fee also eliminates Workers' Compensation insurance carriers' incentive to provide benefits without unnecessarily resisting. [Petitioner's Brief P. 13-17, 23].

A. Difficulties obtaining legal representation.

There may be some hypothetical situation where an injured worker has difficulty finding an attorney to represent him or her. As there are an infinite number of situations, same could not be totally ruled out. What Petitioner does not argue, however, is how "he" was adversely affected by these revisions as required

by *Henderson*. The reason could very well be because he was not adversely affected. Petitioner has been well represented by three very capable and qualified attorneys in this case. Two attorneys appeared on behalf of the Petitioner at the 6/13/14 evidentiary hearing pertaining to adjudication of his Petitions for Benefits. The same two attorneys appeared on his behalf at the 2/14/14 evidentiary hearing on claimant's counsel's Verified Petition for Attorney Fees. [R. 6 and 118]. Now, he has a third, very capable appellate attorney. [Petitioner's Brief P. 51].

Petitioner's argument that §440.34(1), as amended, discourages representation by counsel [Petitioner's Brief P. 18] is based purely on conjecture and hypothetical situations. He does not and cannot establish that "he" was or will be affected by the 2009 revisions to §440.34 since he has been well represented. To support his argument the claimant relies on the hypothetical phrases:

1. "In fact, this provision impacts *all injured workers*." [Petitioner's Brief P. 9-10].
2. "In removing the term 'reasonable' from the statute, the Legislature has managed to successfully prevent *at least some injured workers* from pursuing what has been deemed, with few exceptions, their exclusive remedy..." [Petitioner's Brief P. 16].

3. "Such an outcome does not provide any incentive for attorneys to take *these types of cases* and, in fact, discourages representation." [Petitioner's Brief P. 18]

4. "It goes without saying that *injured workers* are ill equipped to navigate the legal morass that the Workers Compensation Law had become without the assistance of competent counsel for a variety of reasons." [Petitioner's Brief P. 19].

5. "The same will ring true for *all similarly situated injured workers…*"

6. "*injured workers with small value claims* will have to proceed without the assistance of counsel." [Petitioner's Brief P. 23]

7. "The legislatively imposed parameters established in §440.34(1), Fla. Stat. 2009, deprive *every injured worker*...the opportunity to be heard."

8. "this section does not provide an opportunity for *the injured worker* to make an offer of settlement." [Petitioner's Brief P. 38]

9. "the Legislature has created this conclusive fee schedule that greatly hinders *the injured worker's* ability to obtain counsel..." [Petitioner's Brief P. 39]

10. "the writing is on the wall for *an injured worker with a small value case…*" [Petitioner's Brief P. 41].

As this court explained, "the traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Sieniarecki v. State,* 756 So.2d 68, 74 (Fla. 2000). Petitioner cannot prove he was "affected adversely" by §440.34(1) or that the statute may not be constitutionally applied to him. He only relies on hypothetical situations that may be applied to others. Therefore, he has no standing to argue that the 2009 revisions prevent injured workers from obtaining counsel. *Henderson* at page 8, *Peregood* at 668, and *Sieniarecki* at 74.

B. Carriers unnecessarily resisting claims.

In addition, there is no evidence that the carrier unnecessarily resisted Henry Diaz claim. [Petitioner's Brief P.13-16]. There were conflicting medical opinions as to whether his employment was the Major Contributing Cause of his symptoms. Therefore, the JCC appointed an Expert Medical Advisor to sort out the dispute. [R.7 and 124]. In other words, the system worked the way it was designed to work pursuant to §440.13(9)(c).

Florida Statute §440.34(9)(c) states: "If there is a disagreement in the opinions of the health care providers...the department may, and the judge of compensation claims shall...order the injured employee to be evaluated by an expert medical advisor...The opinion of the expert medical advisor is presumed to

be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims." In this case the JCC was faced with conflicting medical opinions regarding the MCC of Petitioner's injuries and utilized the statute as prescribed to resolve such conflicts. [R.7 and 124]. There is no evidence that absent the 2009 revisions, the outcome or length of litigation would have been any different.

The carrier incentive argument is also based on conjecture and hypothetical situations, conceivably applied to others not before this court. Since the Petitioner provides no facts to show "he" was adversely affected by the Respondent "unnecessarily resisting" his claim, and can only point to hypothetical situations that apply to others, this argument must also fail. *Henderson* at page 8, *Peregood* at 668, and *Sieniarecki* at 74.

What Petitioner fails to point out is that Carriers have many incentives to timely provide benefits where appropriate other than the fear of paying attorney fees. Benefits are actually provided by an insurance adjuster who is required to be licensed by the State of Florida. §626.112(1), Fla. Stat. (2013). The adjuster can lose the coveted license if she does not exercise her duties in accordance with the statute. §626.611(7, 10 and 13), Fla. Stat. (2013). In addition, it is unlawful for any person to make a false statement for the purpose of denying a benefit. §440.105(4)(b) Fla. Stat. (2013). Employers and Carriers who "unnecessarily

resists claims" may also lose the immunity from a tort suit provided by §440.11. *Aguilara v. Inservices, Inc*. 905 So. 2d 84 (Fla. 2005). Carriers who fail to pay indemnity claims timely are required to pay penalties and interest on those benefits. §440.20 Fla. Stat. (2013). Insurance Carriers and Claims Handling Entities are examined and investigated by the Department of Financial Services to ensure that they are fulfilling their duties under F.S. Chapter 440. The Department has the authority to impose administrative penalties if it finds any violations. §440.525(1) Fla. Stat. (2013). If a Carrier or Claims Handling Entity does not comply with a JCC order within 10 days of the order becoming final, the Carrier's license to do business in Florida will be suspended. §440.24(2). Further, a carrier who unsuccessfully resists a claim is still required to pay an attorney fee per the prescribed schedule in §440.34. While several more incentives could be enumerated, the list would continue ad nauseum. It is therefore clear that Carriers and Claims Handling Entities do have incentives to properly handle claims, which are much broader and potentially more severe than paying attorney fees.

The Florida First DCA commented on standing in a very similar case stating:

> "the Employer/Carrier argues – not without force – that Claimant, who is, after all, represented by able counsel, does not for that reason have standing to raise these constitutional arguments, our supreme court at least implicitly concluded in *Murray* that a workers' compensation claimant has standing to challenge the validity of the fee provisions in section 440.34, even though she herself is adequately represented by counsel." *Kaufman*. at 921.

However, this Court declined to address the constitutional challenges brought in the *Murray* case at that time. *Murray v. Mariners Health,* 994 So.2d 1051,1053 (Fla. 2008). Thus, the Court should address whether *this* injured worker, who is represented by counsel, has standing. In doing so, this Honorable Court should rely on the longstanding rules it announced in *Henderson, Peregood* and *Sieniarecki* to find that he does not.

ARGUMENT TWO: THE 2009 AMENDMENTS TO §440.34 DID NOT RENDER THIS STATUTE FACIALLY UNCONSTITUTIONAL.

STANDARD OF REVIEW: DE NOVO

The Employer agrees that the standard of review is de novo because the constitutional challenge is a pure question of law. *Scott v. Williams,* 107 So.3d 379 (Fla. 2013).

The Petitioner alleges that §440.34 Fla. Stat. (2009) is unconstitutional on its face. To prevail on this argument Petitioner has the burden to prove that there is no set of circumstances that exist under which the statute can be constitutionally applied. *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014). "Generally, when we review the constitutionality of a statute, we accord legislative acts a presumption of constitutionality and construe the challenged legislation to effect a constitutional outcome when possible...we consider only the text of the statute, not its specific application...the act will not be invalidated as facially unconstitutional simply

because it could operate unconstitutionally under some hypothetical circumstances." *Id.* see also *Crist v. Ervin,* 56 So. 3d 745,747 (Fla. 2010) (if any state of facts, known or assumed, justify the law, the court's power of inquiry ends).

In this case, Petitioner argues that the 2009 Amendments are facially unconstitutional because "reasonable" fees were eliminated from the statute in favor of a statutorily prescribed fee. [Petitioner's Brief P. 33]. Petitioners argument must fail because there are a many circumstances where a fee under §440.39 can result in a reasonable fee. For example, an injured worker represented by an attorney prevails on a Permanent Total Disability (PTD) claim. During the litigation, the injured worker's attorney spends 103 hours securing this benefit. If the JCC awards him $300 per hour, as might have happened under the prior statute, the attorney would be entitled to a $30,900 fee. Under the current statute, claimant's attorney would be awarded a fee as prescribed by the formula outlined in §440.34(1). Assuming the present value of PTD is $300,000, the attorney would be awarded a fee of $30,750. Since the injured workers' attorney is paid more under the new statute and the difference is only $250 or less than 1%, it is hard to conceive that such a fee is not "reasonable". Therefore, even if this court accepts Petitioner's argument that reasonable as defined by *Lee Engineering.* There are

circumstances in which a reasonable fee can be obtained under the current section 440.34(1)1. Therefore, the statute is still facially constitutional.

On low value medical only claims the same is true. Florida Statute §440.39 allows for a $1,500 fee for medical only claims. If an injured workers attorney files a PFB for authorization of a doctor and the carrier agrees to authorize the doctor after 30 days have passed, an attorney is due a fee. Assuming the attorney spent five hours meeting with his client, obtaining medical information and filing the PFB, the attorney would be due $1,500 at $500 per hour under the old statute. Under the new statute, the award would be the same, $1,500. Numerous other examples could be provided, but the possibilities are however, endless.

As there are circumstances where the statute can produce a reasonable fee, the statute is not facially unconstitutional.

ARGUMENT THREE: THE 2009 AMENDMENT TO SECTION 440.34 DOES NOT VIOLATE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION OR THE DUE PROCESS CLAUSE OF THE FLORIDA OR FEDERAL CONSTITUTION.

STANDARD OF REVIEW: DE NOVO

The Employer agrees that the standard of review is de novo because the constitutional challenge is a pure question of law. *Scott v. Williams,* 107 So.3d 379 (Fla. 2013).

Once again, the claimant does not have standing to bring an access to courts challenge for the reasons stated in argument one above. Further, under the access to courts analysis, the statute is not facially unconstitutional as outlined in argument two above.

The Petitioner raises four arguments in support of his contention that the 2009 amendments to 440.34(1) violate Due Process and Access to Courts rights. First, he argues that the legislature took away the right to a "reasonable" attorney fee, which deprives "the Injured Worker" of the assistance of counsel "in the vast majority of cases". [Petitioner's Brief P. 10] Secondly, the claimant argues that the amendments violate Due Process rights. [Petitioner's Brief P. 23]. Thirdly, there is no overpowering public necessity for the amendments. [Petitioner's Brief P. 39]. Finally, Petitioner argues that the amendments are unconstitutional, either facially or as applied. As we will show below, all of these arguments lack merit.

A. The 2009 Amendment to §440.34(1) does not violate the Access to Courts provisions of the Florida or Federal Constitutions in this case because no rights were totally abolished, it did not deprive the injured worker of the assistance of counsel, claimant lacks standing to bring the challenge and if a right was totally abolished there is an overpowering public necessity to do so.

1. No rights were destroyed or abolished.

"The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay." *Fla. Const. art. 1, §21.* This provision of the Florida Constitution is commonly referred as the "access to courts" provision. To prevail on an access to courts challenge, Petitioner must prove that a right that existed prior to the 1968 adoption of the Declaration of Rights of the Constitution of the State of Florida has been abolished by the legislature without providing a reasonable alternative. Even if Petitioner were able to prove this, the statute would still be constitutional if there is an overpowering public necessity for passing it. *Kluger v. White*, 281 So.2d 1(Fla. 1973). The provision of a partial remedy as opposed to a remedy which existed in 1968 does not constitute an abolition of right without reasonable alternative as contemplated in *Kluger*. *Sasso v. Ram Property Management*, 452 So.2d 932, 934 (Fla. 1984). Even if the benefit may appear inadequate and unfair, it still does not render the statute unconstitutional. *Mahoney v. Sears*, 440 So.2d 1285, 1286 (Fla. 1983.

If this Court determines that a "reasonable attorney's fee" was a right that existed at the adoption of the Florida Declaration of Rights, §440.34 still does not violate the access to courts provision. Petitioner's attorney received a fee of $1,593.47 [R. 10], which is at least a partial remedy as compared to what Petitioner alleges is a "reasonable fee". Again, "[s]uch a partial remedy does not constitute

an abolition of rights without reasonable alternative as contemplated in Kluger…" *Sasso at 934*. Though the attorney fee award may appear inadequate or unfair, it does not render the statute unconstitutional. *Mahoney at 1286*.

If we look at the broader picture as contemplated in *Kluger*, the legislature did in fact abolish the injured worker's right to sue his employer in tort "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." *Kluger at 4*. After *Kluger*, this court announced the rules stated above that a partial remedy does not render the statute unconstitutional even if it seems inadequate or unfair. *Sasso at 934* and *Mohoney at 1286*.

In *Sasso,* this Court denied an access to courts challenge to 440.15(3) (b) (1979) which stopped wage loss benefits at age 65. Mr. Sasso argued that the legislature abolished his right to sue in tort without providing an adequate substitute. This Court found that Sasso was provided a reasonable alternative. He received medical benefits, temporary total disability benefits and would have received permanent total disability benefits had he been eligible.

In *Mahoney,* the injured worker lost 80% of his sight in one eye giving him a 24% permanent impairment rating of the body as a whole. The Court found that

Mahoney may have received more money for his permanent impairment prior to the 1979 amendments to §440.15(3), but also found that he received medical care and wage-loss benefits during recovery without the uncertainty and delay of a tort action. Therefore, the workers compensation system was still a reasonable alternative. *Mohoney at 1285-1286.*

The same is true in this case. Though the carrier initially denied benefits based on conflicting medical opinions, Petitioner was ultimately awarded TPD benefits, medical treatment, attorney fees of $1,593.47 and costs. [R. 7 and 10]. Therefore, he was provided at least a partial remedy and as such, there was no abolition of rights. *Sasso at 934.* Though the fee could be construed as inadequate or unfair, it does not render the statute unconstitutional. *Mohoney at 1286.* Because the 2009 amendments to §440.34 do not totally eliminate Petitioner's cause of action, the amendment does not violate article I, section 21 of the Florida Constitution. *Rucker v. City of Ocala*, 684 So. 2d 836, 842 (Fla. 1st DCA 1996).

2. **There is no evidentiary support that the 2009 amendment to §440.34 burdened Petitioner's ability to retain counsel.**

In *Lundy*, the 2003 amendments to §440.34 were challenged on similar grounds as in this case. The *Lundy* court found that a statute is presumed to be valid and that there was no showing that the statute denied access or that it impaired an

injured workers ability to retain counsel. *Lundy at 510.* The *Lundy* court relied on this Court's holding in *Golden.* In *Golden,* this Court stated:

> [I]f reasonably possible, doubts as to the validity of a statute should be resolved in favor of its constitutionality. Every presumption is to be indulged in favor of the validity of a statute and each cause should be considered in light of the principle that the State is the primary judge, and may, by statute or other appropriate means, regulate any enterprise, trade, occupation or profession if necessary to protect the public health, safety, welfare or morals. *Golden v. McCarty*, 337 So. 2d 388,389 (Fla. 1976), see also *Lundy at 509.*

The *Lundy* court looked at a similar access to courts challenge and found Appellant's argument that the statute denied access to courts as it impaired the claimant's ability to retain counsel unpersuasive. As in this case, there was no evidentiary support for the argument. *Lundy at 510.* Specifically, Petitioner has been well represented by three very capable and qualified attorneys. Two attorneys appeared on behalf of the Petitioner at the 6/13/14 evidentiary hearing with the JCC to determine the outcome of his Petitions for Benefits. The same two attorneys appeared on his behalf at the 2/14/14 evidentiary hearing on his attorney's Verified Petition for Attorney Fees. [R. 6 and 118]. Now, he has a third very capable appellate attorney. [Petitioner's Brief P. 51]. Therefore, there is no evidentiary support that §440.34 hindered his ability to retain counsel and the argument that he was denied access to the courts must fail.

3. Petitioners remaining access to courts arguments are abstract, conjectural or hypothetical and therefore he has no standing to challenge §440.34.

This Court has said: "The courts will not declare an act of the legislature unconstitutional unless its constitutionality is challenged directly by one who demonstrates that he is, or assuredly will be, affected adversely by it." *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952). *See* also *M.Z. v. State*, 747 So.2d 978, 980 (Fla. 1st DCA 1999) (stating: "It is a fundamental principle of constitutional law that a party cannot challenge the constitutionality of a statute unless it can be demonstrated that he has been, or definitely will be, adversely affected by its terms."). "To establish standing it must be shown that the party suffered injury in fact (economic or otherwise) for which relief is likely to be redressed…the injury must be distinct and palpable…it may not be abstract, conjectural or hypothetical." *Peregood v. Cosmides,* 663 So.2d 665, 668 (Fla. 5th DCA 1995). (citing multiple U.S. Supreme Court Cases, citations omitted).

Petitioner argues that the 2009 amendments to §440.34 made the law unsound because *an injured employee* will not be able to retain counsel and the carrier will have no motivation to fulfill their ethical obligations to provide benefits to injured workers who are entitled to same. [Petitioner's Brief 11 – 23] All these arguments are abstract, hypothetical, or pure conjecture. As outlined in argument

one above, Petitioner has not and cannot show that he has been affected by these amendments. Therefore, he lacks standing to challenge the statute on an access to courts basis.

4. There was an overpowering public necessity for the legislature to amend Chapter 440 of the Florida Statutes in 2003 and to further amend §440.34 in response to this Courts holding in *Murray*.

Should this Honorable Court find the 2009 amendments to §440.34 abolished a right that existed prior to 1968, the statute is still constitutional due to an overpowering public necessity for the amendment.

In 2003, there was a near crises in Florida related to Workers' Compensation. The premiums in the Joint Underwriting Association ("JUA") had increased from $5 million in 2000 to $26 million as of February 2003. At that time, the JUA premium rates had climbed to four to five times the rates in the voluntary market. (It should be noted that the JUA is insurance of last resort for employers who cannot obtain Workers' Compensation Coverage in the open market.) In addition, there was a growing concern over the availability and affordability of workers' compensation insurance in the state of Florida. The 2003 Amendments were designed to reduce costs, expedite the dispute resolution process, provide greater enforcement and compliance authority to the Division of Workers' Compensation, combat fraud, and provide affordable coverage for small employers. As a result of

passage of these revisions, the workers' compensation premium rates were reduced by 14% effective 10/1/2003. (*The Florida Senate Interim Project Report 2004-110* see Appendix "A" - P. 1 – 2).

As stated by the *Florida Office of Insurance Regulation* in its *2011 Workers' Compensation Annual Report*:

> A comprehensive slate of reforms was passed into law during the 2003 Legislative Session. The package known as Senate Bill 50-A (Chapter 2003-412 Laws of Florida), continues to dramatically impact Florida's workers' compensation insurance rates. Some of these reforms included a reduction (cap) in attorneys' fees, tightening construction industry requirements, doubling impairment benefits for injured workers, increasing the medical fee schedule, and eliminating the Social Security disability test.
>
> Subsequently, workers' compensation rates declined by 64.7% in Florida as of July 1, 2010. **In 2000, Florida had the highest workers' compensation insurance rates in the country.** In 2003, the OIR approved a 14 percent rate reduction, with an additional reduction of 5.2 percent in 2004. These annual rate reductions continued unabated through the rate reduction of 6.8 percent that took effect on January 1, 2010. The rate changes during this seven-year period include the three largest decreases ever in Florida, namely -18.6 percent for 2009, -18.4 percent for 2008, and -15.7 percent for 2007. These seven filings represent the largest consecutive cumulative decrease on record in Florida for workers' compensation rates – dating back to 1965. Even with the most recent rate increase effective January 1, 2012, the cumulative overall statewide average rate decrease since 2003 will be 58.6 percent. (Appendix "B" – P. 22).

Appellees urge this Court to take judicial notice of these documents per §90.202(11) and (12) Fla. Stat (2014). These reports restate generally known facts

within this court's jurisdiction and are capable of accurate and ready determination.

The 2003 amendments to Section §440.34 were a significant part of the effort to reduce costs and premium rates. The 2003 amendments to Chapter 440 were successful in reducing premium rates. From 10/1/2003 until this Court's decision in *Murray*, attorney's fees were calculated based solely on a percentage of benefits obtained. On 10/23/08, this Court entered an order essentially reinstating hourly attorney fees due to an ambiguity in the statute. In 2009, the legislature corrected the ambiguity and effectively once again, did away with attorney fees based on hourly rates in Workers' Compensation cases. Premium rates that employers were required to pay continued to decrease. *Kauffman at 920*.

The amendments originally passed in 2003, and refined in 2009, did fulfill an overpowering public necessity to avoid an impending crisis in the ability of Florida employers to be able to secure Workers' Compensation coverage at a reasonable price on the open market. The open market was compelled to charge rates approved by the state. The JUA could, and did, deviate upwards from those rates. The legislature had to do something to stop this trend, and therefore made major revisions to Chapter 440. Since these revisions, including §440.34, were based on an overpowering necessity and no alternative method has been shown, the amendments should be upheld.

B. The 2009 amendments do not violate Petitioner's due process rights.

Petitioner alleges that §440.34 is facially unconstitutional because the legislature must allow for due process for every injured worker. [Petitioner's Brief 23 – 30]. As explained in argument two above, Petitioner has the burden to prove that there is no set of circumstances that exist under which the statute can be constitutionally applied and further, that "the act will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some hypothetical circumstances." *Abdool at 538.* Petitioner admits "it is theortically possible, by mere happenstance, for an adequate fee to arise out of a claim." . [Petitioner's Brief 25]. Respondent argues that there are a multitude of circumstances where an "adequate fee" will arise out of §440.34 as outlined in argument two above. Therefore, the facial challenge is without merit.

Claimant also argues that the fee schedule constitutes a taking of property without due process. "No person shall be deprived of life, liberty or property without due process of law." *Fla. Const. art. 1, §9.* Procedural due process rights derive from a property interest, and Workers' Compensation benefits qualify as such a property interest. These interests are protected by the procedural safeguards of notice and the right to be heard, and the legislature may determine the procedure as long as such procedure provides reasonable notice and a fair opportunity to be heard before the rights are decided. *Rucker v. City of Ocala*, 684 So. 2d 836, 840 –

841 (Fla. 1st DCA 1996. See also, *Peoples Bank of Indian River County v. State*, 395 So. 2d 521, 524 (Fla. 1981). Due process requirements are satisfied if an opportunity for a meaningful hearing is provided. *Id.*

In this case, Petitioner had his right to a meaningful hearing. In fact, he was represented by two competent attorneys, prevailed at the hearing and was awarded benefits. [R.6-10]. Therefore, his due process rights have been protected and this argument too must fail.

Petitioner initially seems to rely on *Hall v. Recchi America,* 671 So. 2d 197 (Fla. 1st DCA 1996) approved by *Recchi America v. Hall,* 692 So. 2d 153 (Fla. 1997) for the proposition that all irrebuttable or conclusive presumptions are unconstitutional on their face. [Petitioner's Brief 25 – 26]. However, that simply is not what the *Hall* cases stand for. As later pointed out by Petitioner, in *Hall* the First DCA adopted a three part test, which this Court approved to determine whether an irrebutable or conclusive presumption is constitutional:

(1) Whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid;
(2) Whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence;

(3) Whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.

Applying the test to the instant matter, the legislature is reasonably aroused by the possibility of an abuse that it legitimately desires to avoid. In *Murray,* this Court stated: "We agree that delays and the enhancement of attorney fees should be controlled." *Murray at 1061.* The Legislature enacted provisions in 2003 to lower the cost of Workers Compensation and to return employers to the free market for their workers' compensation coverage. (see Appendix C – P. 1 – 2 and Appendix D – P. 22). Originally, the Workers' Compensation system provided that an injured worker paid their own attorney fees. Out of concern for injured workers ability to receive the bulk of their compensation benefits as opposed to his or her attorney, the legislature gave the JCC or appropriate administrative body oversight to approve such fees. In 1941, carrier paid fees were introduced on a limited basis. *Murray at 1057.* This Court acknowledged a concern in *Murray.*

The concern for abuse of the attorney fee provision was also discussed *in Lee Engineering:*

> The tendency to award fees in excess of those contemplated by the Act or even by the fee schedule adopted by the Florida Industrial Commission, may be attributed, in part, to the fact that in Florida the employer or carrier pays the claimant's attorneys' fees and they are not deducted from the claimant's award. (citations omitted) *Lee Engineering v. Fellows,* 209 So. 2d 454 (Fla. 1968).

Since *Lee Engineering* §440.34 (1) has been revised many times: In 1977, a fee schedule was adopted and *Lee Engineering* factors were incorporated into the statute as an option for the JCC to adjust the fee; and in 1979 claimant became responsible for his own attorney fee again with three exceptions: where claimant prevailed in a proceeding, a medical only claim, or the carrier committed bad faith or denied a claim and lost. Other revisions followed, however, 2003 was the most significant. In 2003, the legislature removed entitlement to a reasonable fee from §440.34 (1) but neglected to do so in section (3). This Court determined that under the rules of statutory construction, "reasonable" was still the standard for attorney fee awards. *Murray at 1053.* This ruling effectively reinserted hourly paid attorney fees back into the system. The legislature responded in 2009 by removing the word "reasonable" from section (3), which effectively again removed hourly paid attorney fees from the system. *Kauffman at 920.*

The implicit theme with all these changes that have all been held as constitutional, with one exception, is the legislature's reasonable concern over the abuse of attorney fees. So the first part of the test is passed. The one exception is *Jacobson,* wherein the statute was found unconstitutional to the extent that §440.34 in conjunction with §440.105(3)(c) made it impossible for an injured worker to legally retain counsel to defend against a claim for prevailing party costs brought by an employer or carrier against the injured worker. *Jacobson v. Southeast*

Personnel Leasing, 113 So. 3d. 1042, (1st DCA 2013). Such is not the case here as Petitioner did have counsel.

We turn to the second prong of the test, whether there was a reasonable basis to conclude that the statute would protect against such abuse. There is no doubt that §440.34(2009) protects against abuse of attorney fee awards as the fee is prescribed by statute without exception.

Finally, we look at whether the expense and other difficulties justify the inherent imprecision of a conclusive presumption. In the *Hall* case, the First DCA was dealing with the conclusive presumption that an accident was occasioned primarily by intoxication when there is a positive test and the employer had a Drug Free Workplace Program. Expert witnesses testified that a positive test was not scientifically conclusive evidence that the intoxication caused the accident because many drug metabolites remain in a person's system long after the intoxication has worn off. Thus, the inherent imprecision of that conclusive presumption differs dramatically from the conclusive presumption in §440.34. This presumption does not rely on scientific evidence, it merely reiterates the Legislatures decision to limit, but not abolish, attorney fees in Workers' Compensation cases.

In this case, the Legislature reasonably perceived the possibility of abuse of §440.34. It crafted a remedy that is substantially certain to curtail such abuse, and

thus any expense or other difficulties caused by such remedy are justified and in fact has achieved the legislature's stated goal of reducing costs and lowering premiums. "The fact that the legislature may not have chosen the best possible means to eradicate the evils perceived is of no consequence to the courts provided that the means selected are not wholly unrelated to achievement of the legislative purpose." *Fraternal Order of Police Metropolitan Dade County v. Department of State,* 392 So. 2d 1296, 1302 (Fla. 1980).

ARGUMENT FOUR: THE AMENDMENTS TO §440.34 DO NOT VIOLATE PETITIONERS RIGHT TO EQUAL PROTECTION BECAUSE PETIITONER IS NOT A MEMBER OF A PROTECTED CLASS AND THERE IS A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE PURPOSE FOR THE AMENDMENT.

Again, Petitioner does not have standing to bring an equal protection challenge for the reasons stated in argument one above and further, under the equal protection analysis, the statute is not facially unconstitutional as outlined in argument two above.

The First DCA addressed the equal protection argument in *Lundy* as follows:

Nor does section 440.34(1) violate equal the protection clause or the due process clause which, *inter alia*, protects the right to be represented by counsel. In limiting fees to a percentage of the benefits secured, section 440.34(1) bears a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant. See *Samaha v. State of Florida, 389 So. 2d 639,641.* Section 440.34(1) is not discriminatory, arbitrary or oppressive because it applies to all claimants in a workers' compensation proceeding, and sets forth a definite

formula for determining attorney's fees so as to protect the claimant's interest in retaining a substantial portion of the benefits secured. Therefore, section 440.34(1) does not deny a claimant equal protection, due process, or the right to be represented by counsel." *Lundy at 509-510.*

In *Acton,* this Court addressed an injured worker's equal protection argument and found that Workers Compensation claimants are not a member of a suspect class. Therefore, the Petitioner has the burden to show that the statutory classification, if one exists, "does not bear a reasonable relationship to a legitimate state interest." *Acton v. Fort Lauderdale Hospital,* 440 So. 2d 1282, 1284 (Fla. 1983). As the *Lundy* court stated, the state has a legitimate interest in limiting fees so that an injured worker retain a substantial portion of their benefits secured and §440.34 bears a reasonable relationship to this interest. *Lundy at 509-510.* The legislature also had a legitimate interest to reduce costs, expedite the dispute resolution process, provide greater enforcement and compliance authority to the Division of Workers' Compensation, to combat fraud, and provide affordable coverage for small employers. (Appendix "A" P. 1-2).

Petitioner attempts to establish that injured workers and employers/carriers are two similarly situated classes of persons. [Petitioner Brief 35 – 40]. The constitution provides equal protection only to persons similarly situated. *Level 3 Communication v. Jacobs,* 841 So.2d 447, (Fla. 2003), *City of Miami v. Haigley, 143 So. 3d 1025, (Fla. 3rd DCA 2014).* While a business can be considered a person, the injured worker and the E/C are not similarly situated. The employer

and carrier are both businesses, and Petitioner is a natural person. There is no similarity and therefore, Petitioner cannot show how his equal protection rights have been violated. *Level 3 at 454.*

<u>ARGUMENT FIVE:</u> THE AMENDMENTS TO §440.34 DO NOT VIOLATE SEPERATION OF POWERS OF THE CONSTITION.

Florida Statute §440.34(1) does not violate the separation of powers provisions of the Federal or Florida constitutions. The legislature is charged with enacting substantive law and the judiciary has exclusive authority to adopt rules of judicial procedure. Since §440.34(1) is substantive law, it is not the role of the judiciary to decide whether the limitation of attorney fees appropriate, such decisions are within the authority of the Legislature. In addition, the legislature has a legitimate interest in regulating attorney fees in workers' compensation cases.

This Court has clarified that sometimes there are blurred lines between the responsibilities of the Florida judicial and legislative branches. The legislature is charged with enacting substantive law and the judiciary has exclusive authority to adopt rules of judicial procedure. *Southeast Floating Dock v. Auto Owners,* 82 So. 3d 73, 78 (Fla. 2012). The difference between procedure and substantive law has been defined as follows:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix

> and declare *the primary rights of individuals with respect towards their persons and property.* On the other hand, practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." It is the method of conducting litigation involving rights and corresponding defenses. *Id.* (*Citations omitted*).

The court went on to say that the circumstances under which a party is entitled to costs and attorney's fees is substantive. *Id. at 79-80.*

Relying on *Pilon*, Petitioner concedes this point indicating that "it is the injured worker, not the attorney, who is the real or true party in interest in relation to attorney's fees to be recovered by the recalcitrant employer..." [Petitioner's Brief P. 24]. Per *Pilon,* "the payment of a fee to his counsel by the employer/carrier is, in effect, a benefit". *Pilon v. Okeelanta Corp.* 574 So.2d 1200 (Fla. 1st DCA 1991). As a workers' compensation benefit is a property right established by statute, it is a substantive right that the legislature is empowered to control. *Southeast at 79-80.*

The First DCA expressed concerns over §440.34(3), which provides that the prevailing party is entitled to reimbursement of costs from the other party. That court expressed a public policy concern that such a statute would impose a chilling effect on meritorious claims. However, the court went on to say: "It is not the role of the judiciary, however, to decide whether the imposition of certain costs is

appropriate, such decisions are within the authority of the Legislature" citing *Southeast at 79. Frederick v. Monroe County School Board,* 99 So. 3d 983, 984 (Fla. 1st DCA 2012). The same is true as it relates to the amount of attorney fees. As §440.34(1) is substantive law, it is not the role of the judiciary to determine whether the limitation of attorney fees appropriate, rather such decisions are within the authority of the Legislature.

The state has a legitimate interest in regulating attorney fees in workers' compensation cases, which is to protect injured workers. The award of fees must take into consideration the rights and equities of all the parties: employer, carrier and injured worker. *Samaha at 640.* "Where the legislature has set forth the specific criteria for determining reasonable attorney's fees to be awarded pursuant to a fee-authorizing statute, the trial judge is bound to use only the enumerated criteria whatever it is. *Shick v. Dept. of Agriculture,* 599 So. 2d 641, 643 (Fla. 1992). *See also Ingraham v. Dade County School Board*, 450 So. 2d 847 (Fla. 1984) (holding that the 25% cap on attorney fees found in F. S. §768.28(8)(1981) "does not amount to a legislative usurpation of the power of the judiciary to regulate the practice of law.")

Petitioner argues this Court should abandoned its holding in *Southeast* and follow a Minnesota case where that State's Supreme Court found that capping attorney fees violated its right to oversee attorney conduct and fees. [Appellate

Brief P.44 - 47]. However, in Florida, the legislature is empowered to establish substantive law. *Southeast at 79-80.* This Court has held that

> "where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will **not** impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail." *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).

There is no question that attorney fees are a benefit pursuant to *Pilon*, and therefore a substantive property right established purely by §440.34. Though this court has the authority to regulate attorneys, the legislature has the power to establish substantive laws which limit attorney fees and this challenge must fail. *Massey at 937.*

<u>ARGUMENT SIX:</u> AMENDMENTS TO §440.34(1) DO NOT VIOLATE THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND ASSOCIATION OR THE RIGHT TO CONTRACT.

A statute restricting the right to contract should not be invalidated if the restriction was enacted to protect the public's health, safety, or welfare. *Khoury v. Carvel Homes S., Inc.,* 403 So. 2d 1043,1046 (Fla. 1st DCA 1981). The restrictions set forth in §440.34(1) were enacted to protect the public's welfare by ensuring that a worker is able to retain a substantial portion of awarded benefits so as to prevent the burden of support for that worker from being cast upon society. *Lundy at 510.*

Petitioner's argument appears to have been cut off before completion. [Petitioner Brief P. 48]. However, we reiterate for reasons stated in argument one and two above, he does not have standing under a first amendment analysis to challenge this statute and further that it is not facially unconstitutional.

Petitioner begins to argue that his right to hire, consult and retain an attorney has somehow been violated. [Petitioner Brief P. 48]. As stated in argument one above, there is no evidentiary basis for this argument. Petitioner was represented by two attorneys at the hearing on the merits of his case and at the fees hearing. [R. 6 and 118]. Now he has a third appellate attorney. In addition, his right to free speech has not been violated, as he was heard by the JCC, the First DCA and now the Florida Supreme Court. Since there is no evidence in support of this argument, it must fail.

The *Lundy* court found that a very similar challenge to §440.34(1) failed and stated:

> A statute restricting the right to contract will not be invalidated if the restriction was enacted to protect the public's health, safety, or welfare. Khoury v. Carvel Homes S., Inc., 403 So. 2d 1043,1046 (Fla. 1st DCA 1981). The restrictions set forth in Section 440.34(1) were enacted to protect the public's welfare by ensuring that a worker is able to retain a substantial portion of awarded benefits so as to prevent the burden of support for that worker from being cast upon society. Therefore, the statute does not offend the right to freely contract. *Lundy at 510.*

This Court should find the same.

ARGUMENT SEVEN: SECTION 440.34(1) DOES NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT DUE PROCESS NOR DOES IT VIOLATE HIS RIGHT TO BE REWARDED FOR INDUSTRY.

As Petitioner raised Due Process in her first point on appeal, the argument is primarily addressed in "Argument Three" above. In addition, Florida Statute §440.34(1) does not create a taking without Due Process and did not violate his right to be rewarded for industry. Petitioner, not his attorney, is the real party in interest. It was not his effort in the practice of law which is sought to be rewarded. It was the effort of Petitioner's attorneys that are sought to be rewarded. Therefore, his rights could not have been violated. In addition, strict scrutiny does not apply as the practice of law is not a fundamental right. As limiting fees to a percentage of the benefits secured bears a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant, the statute is not unconstitutional.

Petitioner argues that "Mr. Diaz counsel spent valuable time and resources, securing benefits on behalf of her client…§440.34(1) Fla. Stat. (2009), provides a reward for that industry that was so scant, inadequate an unreasonable as to render it illusory." [Petitioner Brief P. 50]. As Petitioner correctly points out, "It is the injured worker, not the attorney, who is the real or true party in interest in relation to attorney's fees to be recovered…*Pilon* at 1201." [Petitioner Brief P. 24]. As the

real party in interest is the Petitioner, and he has not participated in any industry for which he could be rewarded, this argument is hollow.

Moreover, Petitioner's attorney in the case below knew that the case was being taken on a contingent fee basis and the statutory limitations on such a contingency fee under §440.34(1) when she took the case. Therefore, it is hard to imagine that this could be construed as a legitimate argument.

Petitioner argues that *De Ayala* demands strict scrutiny due to a violation of his right to be rewarded for industry. [Petitioner Brief P. 24]. However, *De Ayala* was an equal protection case where the court found that denying death benefits to the family of an illegal alien was unconstituitonal. That court found that the classification found in §440.16(7) was alienage, which is a traditional suspect class. *De Ayala v. Florida Farm Bureau Casualty, Ins. Co.*, 543 So. 2d 204, 207 (Fla. 1989). Petitioner's argument is basically that the practice of law is a fundamental right violated by §440.34(1). Addressing a similar issue, this court found that strict scrutiny did not apply because fishing was not a fundamental right. *Lane v. Chiles,* 698 So.2d 260, 263 (Fla. 1997). If fishing is not a fundamental right then the practice of law also is not and strict scrutiny would not apply. As discussed above, limiting fees to a percentage of the benefits secured though §440.34(1) bears a reasonable relationship to the state's interest in

regulating fees so as to preserve the benefits awarded to the claimant. See *Samaha at 641* and *Lundy at 509.*

CONCLUSION

For the reasons stated above, this Honorable Court should affirm the First DCA's opinion in this case. In addition, the First DCA referred to the certified question posed in *Castellanos,* which was:

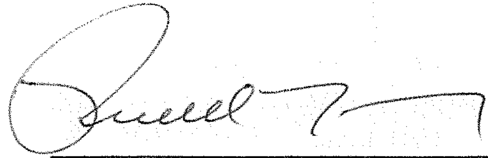
"Whether the award of attorney's fees in this case is adequate, and consistent with the access to courts, due process, and equal protection, and other requirements of the Florida and Federal Constitutions?"

As to the instant case, that question should be answered in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Answer Brief has been electronically filed with the Supreme Court of Florida and a true and correct copy has been sent, via electronic mail to: Kimberly A. Hill, Esquire, kimberlyhillappellatelaw@gmail.com, Martha D. Fornaris, Esquire, VValle@fornaris.com; fornaris@fornaris.com and Vanessa Lipsky, Esquire,

vlipsky@eglawmia.com; hbarnes@eglawmia.com, on this 2nd day of January, 2015.



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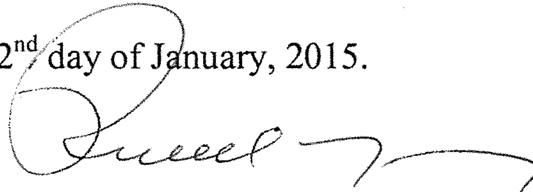

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