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IN THE SUPREME COURT OF FLORIDA

Henry Diaz,

Petitioner,
vs.

Palmetto General Hospital and
Sedgwick CMS,

Respondents.

_____/

SC Case No.: SC14-1916

DCA Case No.: 1D14-1676
D/A: 05/10/2010

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from an Order of the District Court of Appeal, First District,
State of Florida rendered on September 19, 2014

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

INTRODUCTION

In this brief, 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

Petitioner, Mr. Diaz, claimed that he sustained a repetitive trauma injury while working for Palmetto General Hospital. [R. 118 – 134]. After almost three years of litigation resulting from Petitions for Benefits filed on January 26, 2011, February 11, 2011 and April 2, 2012, all of Mr. Diaz's claims were finally determined on September 11, 2013, when the JCC entered an order determining the amount of his "patently unreasonable" attorney's fees. [R. 6 – 10, 118 – 134]. The E/C had denied the claim in its entirety and asserted a myriad of defenses to support their denial. [R. 120, 121].

At the time of pretrial hearing, Mr. Diaz made the following specific claims:

- Authorization of medical care to treat Claimant's right elbow/lateral tendonitis and right carpal tunnel.
- Determination of AWW to include overtime.
- Payment of TPD/TTD at the correct rate from date of accident to present and continuing.
- Authorization for TOPAZ and right carpal tunnel release, pursuant to the opinion of Dr. Ouellette.
- Penalties, interests, attorney's fees and costs. [R. 120].

In response to these five claims, the E/C raised a total of thirteen defenses, including:

- Claimant failed to report the alleged accident timely - not within 30 days.
- Claimant did not have an accident on 5/10/10.
- Claimant's work activity is not the MCC of any disability or need for treatment.

- Claimant's problems with his right arm are not work related.
- Although Claimant was an employee on 5/10/10, his condition/problems with his right arm did not arise out of or in the course and scope of the employment.
- Any lost wages are due to voluntary limitation of income.
- AWW is $854.00 based on 13 weeks - health insurance is continuing.
- There is no clear and convincing evidence that Claimant sustained an injury via repetitive trauma as of 5/10/10.
- Dr. Ouellette was designated as an EMA by the JCC to address the causal relation between the work activities and the alleged injuries and whether the work activities are the major contributing cause for those alleged injuries. Any recommendations by Dr. Ouellette for treatment of the alleged injuries are beyond the scope of the issues to be addressed by the JCC.
- Claimant's carpal tunnel syndrome and lateral epicondylitis are not related to Claimant's work with the employer.
- The TOPAZ procedure recommended by Dr. Ouellette is experimental and not FDA approved for lateral epicondylitis. As such, the TOPAZ procedure is not medically necessary pursuant to §440.13(1)(l), *Fla. Stat*.
- Claimant's employment activities do not constitute a repetitive trauma.
- No penalties, interest, cost or attorney's fees due. [R. 120, 121].

On June 13, 2012, the parties proceeded to final hearing before Judge Gerardo Castiello, who was the original JCC on the case. [R. 118 - 134]. At the final hearing, the parties presented a total of eighteen exhibits, including five physicians' depositions that involved complex medical testimony related to the repetitive trauma injuries sustained by Mr. Diaz. [R. 119]. Prior to taking these depositions, Mr. Diaz's attorney had to go onsite and obtain a video of precisely how his job was performed to enable the physicians to appreciate the nature of his job duties and the mechanism of the injury. [R. 11- 15, 141 – 175]. There were also

two live witnesses at the final hearing. [R. 120].

Dr. Easterling is the only physician who had treated Mr. Diaz for his injuries. [R. 124]. However, his opinion testimony was not admissible since he was not an authorized physician, so Mr. Diaz had to pay for his own IME to establish evidence to support compensability of his claim. [R. 124]. Mr. Diaz was also subjected to an evaluation with the E/C's selected IME, who disagreed with Mr. Diaz's IME, that the job duties caused his injuries. [R. 124]. As a result of the disagreement in medical opinions between the two IMEs, the JCC was required, by statute, to appoint an EMA. [R. 124]. Dr. Ouellette was appointed as the EMA, and the JCC was bound to accept her opinions, unless they were rebutted by clear and convincing evidence. [R. 126].

Dr. Ouellette opined that Mr. Diaz required two medically necessary and related surgeries, including one for the lateral epicondylitis, called TOPAZ, and another for the release of right carpal tunnel syndrome. [R. 124, 125]. The MCC of the need for treatment for Mr. Diaz's injuries was the repetitive work activities performed as a pharmacy technician, according to Dr. Ouellette. [R. 126]. In making his determination on the merits, Judge Castiello accepted the opinions of Dr. Ouellette [R. 126]. It was on this basis that the JCC ultimately awarded benefits. [R. 118 - 134].

After the final hearing concluded, the JCC entered an order determining that Mr. Diaz gave timely notice of his accident because he reported it as soon as he knew or should have known of the relationship between his injuries and his job duties. [R. 126, 132]. The JCC also determined that Mr. Diaz met his burdens of proving both that the accident was the MCC of the need for benefits and treatment and that clear and convincing evidence supported that the accident was compensable under a repetitive trauma theory of recovery. [R. 126, 132].

Accordingly, the JCC determined that this totally denied claim was compensable and awarded all of the claimed benefits, including lost wages and medical care. [R. 132]. In pursuing this win on behalf of Mr. Diaz, his attorney was successful in defeating twelve of thirteen defenses raised by the E/C. [R. 118 - 133]. Mr. Diaz was unsuccessful only to the extent he was seeking an increase in his AWW. In addition, the JCC ordered the E/C to pay Mr. Diaz's attorney's fees and costs because Mr. Diaz prevailed in a proceeding in which the E/C denied that an accident occurred for which compensation benefits are payable. [R. 132].

On September 11, 2013, Mr. Diaz's attorney filed a Verified Motion for Attorney's Fees and Costs payable by the E/C pursuant to §440.34, *Fla. Stat.* (2010). [R. 11 – 15]. At this point, the case was pending before Judge Margaret Kerr. [R. 6 – 10]. Mr. Diaz's attorney sought a reasonable attorney's fee for her time premised on Rule 4-1.5(b) of the Rules Regulating the Florida Bar [*Lee*

Engineering factors[1]], rather than the statutory percentage fee conclusively mandated by the 2009 amendment to §440.34(1), *Fla. Stat*. [R. 11 – 15]. Mr. Diaz's attorney asserted that the statute, as amended in 2009, is unconstitutional because it does not allow for an award of adequate attorney's fees. [R. 8, 11 - 15].

Mr. Diaz's attorney testified that her client would not have been able to meet the stringent burden of "clear and convincing" evidence required for proving his repetitive trauma claim without the assistance of an attorney. [R. 154]. The E/C's attorney did not cross examine Mr. Diaz's attorney to refute her testimony, but she did assert that the issue was controlled by §440.34(1), *Fla. Stat*. (2009), and testified that the attorney fee award should be limited to a statutory fee because the JCC is mandated by statute to award a fee of $1,593.47 based on benefits secured of $8,956.44. [R. 17, 162, 165, 172].

After considering the evidence, including the fact that the defense attorney expended 175 hours defending the case, the JCC found that 120 hours were necessarily and reasonably expended by Mr. Diaz's attorney in securing the benefits, based on the nature of the case and because the claim was denied in its entirety by the E/C. [R. 6 - 10]. The JCC's determination of a "reasonable" fee was predicated on the relevant factors set forth in Rule 4-1.5(b) of the Rules Regulating the Florida Bar (*Lee Engineering* factors), as outlined in Mr. Diaz's

[1] *Lee Engineering & Construction Co. v. Fellows*, 209 So.2d 454 (Fla. 1968).

attorney's verified petition and put forth in her testimony. [R. 6 – 10]. The JCC noted in her order that, throughout the litigation, both counsel vigorously represented the interests of their clients. [R. 6 – 10].

However, the JCC found that she had no authority or discretion to deviate from the conclusive fee schedule and that she was constrained by §440.34(1), *Fla. Stat*. (2009), to award $1,593.47, which is a statutory fee based on benefits secured of $8,956.44. [R. 6 – 10]. The JCC specifically found that the statutory fee of $1,593.47, which produced an hourly fee of $13.28, was "patently unreasonable." [R. 6 - 10]. The JCC explicitly found that Mr. Diaz would not have received the benefits that were ultimately awarded to him without the aid and assistance of counsel. [R. 6 - 10].

Mr. Diaz filed a timely notice of appeal in the First District Court of Appeal on April 11, 2014. On September 19, 2014, the First District Court of Appeal affirmed the order of the JCC. The court specifically found that "Based on *Castellanos v. Next Door Co.,* 124 So.3d 392 (Fla. 1st DCA 2013), we AFFIRM. Our disposition passes upon the same question we certified in *Castellanos*." The question certified in *Castellanos* was:

> 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.

This Court had already accepted jurisdiction of *Castellanos* [SC13-2082]. Petitioner filed a notice to invoke the discretionary jurisdiction of this Court on September 30, 2014. On October 8, 2014, this Court entered an order staying the proceedings in this case pending the disposition of *Castellanos*. On November 7, 2014, two days after the oral argument in *Castellanos*, this Court entered an order, on its own motion, lifting the stay order and accepting jurisdiction of this case. The Petitioner was ordered to submit an Initial Brief on the Merits by December 1, 2014.

STATEMENT OF THE FACTS

Prior to his compensable accident, Mr. Diaz had been with Palmetto General Hospital for approximately six years and regularly performed duties both as a pharmacy technician and pharmacy intern. [R. 121, 122]. Mr. Diaz's daily duties included a variety of repetitive tasks in the mix area of the pharmacy where he constantly engaged in the same motion for a significant portion of his shift preparing the IV bags for the hospital's patients. [R.121, 122].

Sometime in February of 2010, Mr. Diaz began to feel pain in the right lateral elbow, as well as numbness and tingling in the fingertips. [R. 123]. Prior to February 2010, Mr. Diaz had not suffered any accidents in which he injured his right arm, elbow or hand and never had any similar complaints. [R. 123]. Mr. Diaz first complained about right elbow pain and numbness in his fingers to his primary

care physician, Dr. Mijares. [R. 121].

Dr. Mijares referred Mr. Diaz to an orthopedist, Dr. Easterling, who he saw for the first time on May 10, 2010. [R. 123, 124]. When Mr. Diaz first saw Dr. Easterling, he did not appreciate the relationship between his work duties and his complaints, thus, he did not request medical care from his employer. [R. 125, 126]. Dr. Easterling was not, nor was any other medical care, authorized by the E/C at any point prior to the final order being entered by the JCC. [R. 120, 121].

Dr. Easterling diagnosed right lateral elbow tendonitis and carpal tunnel syndrome on the right based on objective testing. [R. 123]. Dr. Easterling injected Mr. Diaz's elbow with Kenalog and Lidocaine. [R. 123]. Dr. Easterling also provided Mr. Diaz with a tennis elbow strap to wear while working and a brace to wear at night for the carpal tunnel syndrome. [R. 123]. During the initial visit, Dr. Easterling gave Mr. Diaz a medical note for work in which he instructed that he should not work in the IV room for seven days. [R. 123]. Mr. Diaz immediately gave this medical note to his supervisor. [R. 123].

On October 25, 2010, Mr. Diaz returned to Dr. Easterling because his pain had returned, despite the use of the elbow cushion and carpal tunnel brace. [R. 123]. Mr. Diaz advised Dr. Easterling that the pain he was experiencing was aggravated by his work. [R. 123]. Upon physical exam, Dr. Easterling noted that there was tenderness of the lateral epicondylitis and a positive wrist extension test.

[R. 123]. Dr. Easterling ordered an MRI and gave Mr. Diaz another injection. [R. 123]. He gave Mr. Diaz another medical note in which he restricted him from lifting greater than 3 pounds and required that he avoid repetitive squeezing and grasping with the right hand. [R. 123]. The MRI was performed on October 26, 2010, which documented tendinopathy of the common extensor tendon attachment. [R. 123].

Following the October 25, 2010 appointment with Dr. Easterling, Mr. Diaz was unable to work in his normal capacity as a pharmacy technician, due to the work restrictions imposed. [R. 124]. Mr. Diaz returned to work on January 5, 2011 after being released by Dr. Easterling. [R. 124]. However, Mr. Diaz was still unable to go back to performing his regular duties as a pharmacy technician. [R. 124]. Upon his return to work, Mr. Diaz's duties were modified so that he could work in the pharmacy, but performing job duties that did not require the repetitive use of his right upper extremity. [R. 124]. Mr. Diaz was still on modified work duties at the time of his final hearing. [R. 124].

SUMMARY OF ARGUMENT

The fee award in this case was patently unreasonable, as determined by the JCC, because application of the "statutory fee," pursuant to 440.34(1), *Fla. Stat*. (2009), resulted in an hourly rate of $13.28, and the JCC had no discretion to depart from the conclusive fee schedule. This is not an isolated case. In fact, this provision

impacts all injured workers throughout our state in an unconstitutional way. The provision, as amended in 2009, is inconsistent with access to courts, due process, equal protection and other requirements of the Florida and Federal Constitutions. In order to avoid the unconstitutional result, the JCC must be permitted to determine a "reasonable" attorney's fee, as opposed to using a conclusive fee schedule that produces inadequate or excessive fees. *See, e.g. Murray v. Mariner Health Care, Inc.*, 994 So.2d 1051 (Fla. 2008). Therefore, the 2009 amendment to this section should be declared unconstitutional either on its face or as applied.

ARGUMENT

POINT I

THE AMENDMENT TO SECTION 440.34(1), FLA. STAT. (2009), MANDATING A CONCLUSIVE FEE SCHEDULE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

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

A. The Conclusive Fee Provision Violates the Access to Courts Provision Where the Legislature Took Away an Existing Right to "Reasonable" Attorney's Fees, which Deprives the Injured Worker of the Assistance of Counsel in a Vast Majority of Cases.

The access to courts provision of Florida's Constitution requires that "[T]he courts shall be open to every person for redress of any injury, and justice

shall be administered without sale, denial or delay." Art. I, §21, *Fla. Const.* In *Kluger v. White*, 281 So.2d 1 (Fla. 1973), this Court set forth the limits imposed on the Legislature by the access to courts provision as follows:

> 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. *Kluger at 4*.

This provision has been construed liberally in order to "[g]uarantee broad accessibility to the courts for resolving disputes." *Psychiatric Associates v. Siegel*, 610 So.2d 419, 424 (Fla. 1992).

The enactment of Florida's Workers' Compensation Law abolished the injured worker's right to sue his employer, in tort, for a job-related injury. In 1973 this Court found the Workers' Compensation Law to be an adequate, sufficient, and even a preferable safeguard 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*. Nevertheless, much has changed in the Workers' Compensation Law since this Court last addressed the viability of the Workers' Compensation Law as a reasonable alternative to common-law tort remedies in

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

In 1991 this Court held that although the 1989 and 1990 amendments to the Workers' Compensation Law undoubtedly reduced benefits to injured workers, it was still a reasonable alternative to tort litigation because it ***"[c]ontinues to provide injured workers with full medical care and wage-loss payments for total and partial disability regardless of fault and without the delay and uncertainty of tort litigation***." [Emphasis added]. *Scanlan at 1172*. In the twenty plus years since *Scanlan* was decided, the injured worker's right to benefits has become largely illusory because of the extensive revisions to the Workers' Compensation Law.

Using *Scanlan* as the baseline for what was "enough" to satisfy the access to courts provision back then, the erosion of the law as a reasonable alternative began with the 1993 revisions. The problem was compounded by what amounted to a full-scale rewrite of the Workers' Compensation Law in 2003. In fact, the amendments that came about in 1993 and 2003 have made the Workers' Compensation Law unrecognizable as "a system of compensation without contest" that provides "full medical care and wage loss payments for total or partial disability regardless of fault," and where employers "surrender [their] traditional defenses and superior resources for litigation," in accordance with *Scanlan; See also, Mullarkey v. Florida Feed Mills, Inc*., 268 So.2d 363, 365, 366 (Fla. 1972).

The aggregate effect of the gradual depletion of available benefits through

legislative reforms has had a grave impact on the injured worker's rights, but the Legislature's removal of the injured worker's right to "reasonable" attorney's fees sounded the death knell for the Workers' Compensation Law as a reasonable alternative to tort litigation. Simply put, the final affront or burden that caused the collapse or inability of the Workers' Compensation Law to exist as a reasonable alternative to tort litigation was brought about by the legislative dismantling of the "reasonable" attorney's fee provision in 2009, in the aftermath of this Court's decision in *Murray, supra*. In fact, the 2009 amendment to the fee provision, in response to *Murray*, represents the "tipping point" in the Legislature's rendering of Florida's Workers' Compensation Law constitutionally unsound.

Significantly, the notion of "reasonable" E/C paid attorney's fees, where benefits have been wrongfully denied or unreasonably delayed, has existed as a mandatory and integral part of the Workers' Compensation Law since 1941. *See* Ch. 20672, §11, Laws of Fla. (1941). So, for more than 67 years, Florida law had allowed the recovery of "reasonable" attorney's fees at the expense of the E/C for a variety of statutorily enumerated reasons that involved the denial or unsuccessful resistance of the payment of claims [i.e., the fee shift].[2] *Great American Indemnity*

[2] (3) . . . A claimant shall be responsible for the payment of her or his own attorney's fees, except that a claimant shall be entitled to recover a ***reasonable attorney's fee*** from a carrier or employer:
(a) Against whom she or he successfully asserts a petition for medical benefits only, if the claimant has not filed or is not entitled to file at such time a claim for

Co. v. Smith, 24 So.2d 42, 44 (Fla. 1945). With the 2009 revision, there is no longer a "reasonable" attorney's fee requirement in the statute, but it still exists in the law of this state. *Id.*

In *Murray*, discussing the precursor to the 2009 amendment challenged here, this Court quoted *Pilon v. Okeelanta Corp.*, 574 So.2d 1200, 1201 (Fla. 1st DCA 1991), for the proposition that imposition of fees against E/Cs in certain scenarios reflects a public policy decision "[t]hat claimants are entitled to and are in need of counsel under those conditions." *See also, Lockett v. Smith*, 72 So.2d 817, 819 (Fla. 1954). Since 1941, the statute had always reflected recognition by the Legislature and this Court, as well as other courts throughout the state, that in specific circumstances, explicitly those covered by the fee shifting provision, attorney intervention may become necessary and that without a legitimate threat of reasonable attorneys' fees being awarded against the E/C, and without the intervention of an attorney acting for the injured worker, medical or compensation benefits are likely to be delayed or denied. *See Crittenden Orange Blossom Fruit v.*

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disability, permanent impairment, wage-loss, or death benefits, arising out of the same accident;
(b) In any case in which the employer or carrier files a response to petition denying benefits with the Office of the Judges of Compensation Claims and the injured person has employed an attorney in the successful prosecution of the petition;
(c) In a proceeding in which a carrier or employer denies that an accident occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability . . .[Emphasis added]. §440.34(3), *Fla. Stat.* (2008).

Stone, 492 So.2d 1106 (Fla. 1st DCA 1986).

This Court addressed the policy reasons for the enactment of the fee shifting provision in *Ohio Casualty v. Parrish*, 350 So.2d 466, 470 (Fla. 1977). In *Ohio Casualty*, this Court recognized the relative imbalance of power between the injured worker desperate for his benefits and an E/C who seeks to delay or deny benefits. The fee shifting provision "discourages the carrier from unnecessarily resisting claims." *Ohio Casualty* at 470. This Court emphasized the fact that the fee shifting provision was "enacted to enable an injured employee who has not received an equitable compensation award to engage competent legal assistance and, in addition, to penalize a recalcitrant employer. If the services of an attorney become necessary, and the carrier is ordered to pay compensation, attorney's fees must be assessed against the carrier so that the benefits awarded the employee will constitute a net recovery." *Id.* This Court added that an attorney would be inclined to represent the injured worker on a meritorious case "realizing that a reasonable fee will be paid for his labor." *Ohio Casualty at 470.*

Notably, the fee shifting provision is still firmly in place in the statute, so the Legislature continues to recognize that attorney assistance is necessary for the enumerated policy reasons by maintaining the provision. Although the Legislature acknowledges that the fee shifting provision is essential, it has wholly eviscerated its intended consequences by repealing the injured worker's

entitlement to "reasonable" attorney's fees. The purpose of the fee shifting provision can only be achieved if the injured worker engages competent counsel to pursue wrongfully denied or delayed benefits, and the E/C has an incentive (avoidance of potentially costly, but reasonable, attorney's fees as a result of extensive litigation) to provide benefits without delay or denial. *See Sam Rogers Enterprises v. Williams*, 401 So.2d 1388 (Fla. 1st DCA 1981).

Section 440.34(1), *Fla. Stat.* (2009), currently provides no such incentive. In removing the word "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 for work related injuries and in its place inserted a provision that encourages E/Cs to be behave badly [unreasonably delay or wrongfully deny benefits]. In the process, the Legislature has taken away the only recourse an injured worker had for such behavior, which was the right to "reasonable" attorney's fees. The eradication of "reasonable" fees in 2009 obliterates the balanced playing field that the fee shifting provision was intended to create, turning it on its head, and rendering the threat of attorney's fees payable by the E/C effectively meaningless.

Furthermore, E/Cs have no impetus to avoid being obstinate when there is no countervailing consequence, punishment or even a significant repercussion beyond inadequate or manifestly unfair fee awards that do not equate to the effort

required of the injured worker's attorney to secure the benefits in dispute. This means that the E/C has free reign, in any given case, to wrongfully deny or delay payment of a claim, at its whim, with relative impunity so long as the 2009 amendment stands. In the absence of the ramifications that are intended by the fee shifting provision for the E/C's mishandling of a claim, there is simply no accountability in the statute to encourage its main purpose, which is to the place the needed benefits in the hands of the injured worker who has given up his right to sue his employer in tort. *See* §440.015, *Fla. Stat*. (2010).

Now, with no threat of a "reasonable" fee award against an E/C, the "discouragement" factor for resisting claims has been taken out of the equation, giving way to defiant, reckless and even bad faith litigation handling. *See Aguilera v. Inservices, Inc.*, 905 So. 2d 84 (Fla. 2005)(an insurance adjuster's behavior was so egregious it rose to the level of an intentional tort). Significantly, in *Aguilera*, this Court held that "minor delays in payments, and conduct amounting to simple bad faith in claim handling procedures of the employee's compensation claim have been captured within the immunity." Therefore, it stands to reason that if, as this Court said in *Aguilera*, these bad faith delays and denials by E/Cs are captured within their immunity, the system fails to exist as an adequate remedy if the injured worker no longer has the right to "reasonable" attorney's fees to compensate, once the fee shift is triggered, because injured workers gave up their right to sue their employers in tort for

an adequate remedy, including "reasonable" attorney's fees.

If the injured worker does not prevail, the fee shifting provision is not triggered, and the injured worker will not receive any benefits whatsoever, including attorney's fees or costs payable by the E/C. Plus, the injured worker will be required to pay the E/C's costs of litigation, which was never a statutory requirement prior to 2003. *See, e.g.* §440.34(3), *Fla. Stat.* (2010). On the other hand, the upshot of the successful pursuit of benefits, wrongly denied and withheld by the E/C, where the amount of benefits is small, but the legal issues are complex and time consuming, and require skill, knowledge, and experience to recover the small but payable benefits, is the injured worker's attorney will be "rewarded" with a clearly inadequate fee, contrary to the dictates of *Murray*. Such an outcome does not provide any incentive for attorneys to take these types of cases and, in fact, discourages representation. Moreover, the end result does not penalize the E/C for its wrongful denial and delay in providing benefits.

It is noted that the conduct of the E/C in the instant case falls squarely within the policy considerations of the fee shifting section of the statute requiring the E/C to pay for the injured worker's attorney's fees, and if we were still operating under pre-2009 law, arising from *Murray*, Mr. Diaz would have been awarded a reasonable attorney's fee payable by the E/C. It should not go unnoticed that the E/C paid its

own attorney a non-contingent fee based on 175 hours expended throughout the litigation, as compared to the 120 hours expended by Mr. Diaz's attorney.

Aside from the already acknowledged and accepted public policy considerations supporting the need for "reasonable" fees, the Workers' Compensation Law, which once worked as a reasonable alternative, is no longer "quick and efficient," "cost effective" or "self-executing," nor does it promote "prompt delivery of benefits," in accordance with the Legislature's stated intent. §440.015, *Fla. Stat*. (2010). In fact, the Workers' Compensation Law is procedurally and evidentiary arduous and substantively complex, even though it was intended to be quite the opposite. The Legislature has injected a myriad of complicated legal/medical issues into the law, has included a fraud provision which carries criminal consequences, added a heightened burden of proof that applies in a majority of cases [major contributing cause], and a heightened, almost impossible, burden of proof that applies in other types of cases [clear and convincing evidence]. These burdens of proof far exceed what a plaintiff would have to prove in a tort setting.

It goes without saying that injured workers are ill equipped to navigate the legal morass that the Workers' Compensation Law has become without the assistance of competent counsel for a variety of reasons. It would be imprudent and nearly impossible, in most instances, for the injured worker to go without attorney

representation in this, now, highly complex field of law.[3] The complex nature of the law, as it currently exists, has been recognized by the First District Court of Appeal and this Court. *See e.g., Bysczynski v. United Parcel Serv. Inc.*, 53 So.3d 328 (Fla. 1st DCA 2010), where the court stated, "[T]his case illustrates the complex nature of Florida's current Workers' Compensation Law, and the myriad of thorny legal and medical issues which accompany even the most fundamental decisions regarding an injured worker's entitlement to, and a carrier's liability for, medical treatment." *See also Murray*, in which this Court indicated that the "issues were complex and time consuming, and require skill, knowledge, and experience to recover the small but payable benefits." *Id.*

Here, the JCC specifically found that Mr. Diaz would not have been successful in proving his claims and securing benefits without an attorney, as would undoubtedly be the case in the broad spectrum of cases arising under the Workers' Compensation Law. As previously discussed, this case mandated the application of the clear and convincing evidence standard to support compensability of Mr. Diaz's repetitive trauma claim, a nearly insurmountable

[3] Workers' Compensation cases are not comparable to "small claims" court cases. In fact, the practice is so specialized that the Florida Bar offers a Board Certification program for workers' compensation attorneys.

burden, especially for a non-attorney.[4]

As part of overcoming the burden of proof, Mr. Diaz's attorney had to go onsite and obtain a video of precisely how his job was performed to enable the physicians to appreciate the nature of his job duties and the mechanism of the injury. Mr. Diaz did not possess the experience to go onsite and obtain a video of how his job was performed nor could he have appreciated why that was important to his case. Aside from this, Mr. Diaz's attorney had to attend five complex physicians' depositions in order to prove his case and rebut the myriad of defenses set forth by the E/C. Mr. Diaz, as a non-attorney, would not have had any conceivable idea what questions to ask or how to cross examine a physician who did not support his position. Mr. Diaz, likewise, would not have the expertise to overcome the major contributing cause defense or comprehend what "clear and convincing" evidence means, which were his burdens of proof. *See Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964)("Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries.") *Id.*

[4] [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla.4th DCA 1983). (Emphasis added.)

In *Davis v. Keeto, Inc.*, 463 So.2d 368, 371 (Fla. 1st DCA 1985), *review denied, Keeto, Inc. v. Davis*, 475 So.2d 695 (Fla. 1985), citing *Neylon v. Ford Motor Company*, 27 N.J. Super. 511, 99 A.2d 664 (1953), the court recognized that without the assistance of competent counsel, the injured worker is as "***helpless as a turtle on its back***." [Emphasis added]. The court further noted in *Davis* that "[T]he amount of benefits obtained, though an important factor to be considered in setting fees, is not the only factor and does not set the maximum amount that can be awarded as a fee. Were it otherwise, the employer/carrier could resist payment of smaller claims, and those claims would be virtually uncollectable." *Id.* The First District also warned that "[A]part from a statute that requires the fee to be keyed to the amount of the award, ***there should be no rigid relation between recovery and fee***." [Emphasis added].

The consequences of Mr. Diaz going forward without the assistance of counsel would have been dire because, as the JCC determined, he would not have won his case and would have received no benefits. Here, Mr. Diaz's entire livelihood was at stake because even at the time of final hearing, he was unable to perform his regular job duties. Like the claimant in *Davis*, Mr. Diaz, would have been as helpless as a turtle on its back without the assistance of counsel. *Id.* The same will ring true for all similarly situated injured workers, who have or will suffer injuries on the job where minimal benefits are at issue because based on the

state of affairs, going forward, injured workers with small value claims will have to proceed without the assistance of counsel and undoubtedly will not be successful after enduring prolonged litigation.

Where the injured worker is unrepresented by competent counsel, he or she can be practically assured that the E/C will resist payment every step of the way. The fate of the injured worker under this recurring scenario will be an unreasonable delay or wrongful denial of the benefits to which he or she is entitled, which, in turn, is a denial of access to courts. On the other hand, if the injured worker is equipped with an advocate, acting on his behalf, armed with the knowledge that her efforts, if successful, will be rewarded with reasonable attorney's fees, as mandated by Rule 4-1.5(b)(*Lee Engineering* factors) of the Rules Regulating the Florida Bar, there will be a legitimate opportunity to level the playing field and restore the injured worker's guarantee of meaningful and broad accessibility to the courts for resolving disputes.

B. The Conclusive Fee Provision Constitutes the Taking of Property without the Due Process of Law Where it Imposes an Irrebuttable Presumption.

The Petitioner maintains that the conclusive fee provision is facially unconstitutional because every injured worker is entitled to broad access to courts for resolving disputes, and the Legislature must allow for due process in resolving those disputes. Under the current statute, every injured worker who prevails in his

or her pursuit of benefits, and otherwise meets the requirements of the fee shifting statute, is entitled to an attorney's fee payable by the E/C. 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 from the recalcitrant employer who wrongfully denies or delays the payment of benefits. *Pilon* at 1201. In all other cases, the injured worker is responsible for his own attorney's fees.

The legislatively imposed parameters established in §440.34(1), *Fla. Stat.* (2009), deprive every injury worker, not just injured workers who have small value claims, the opportunity for a meaningful hearing to determine whether application of the conclusive fee formula produces a reasonable fee in his particular case. This entitlement to a "reasonable" fee really has nothing at all to do with whether the benefits at issue have a small value or a large value, except to the extent that the resultant hourly fee will likely, but not necessarily, be more pronounced where the benefit at issue has a minimal value, and the E/C pulls out all the stops to vigorously defend. Nevertheless, an inadequate fee can result from pursuing a large value claim, just as it can in a small value claim. It is also possible that the injured worker's attorney could be entitled to an excessive fee, but in either case it is not a "reasonable" fee as the law of our state demands. *Murray* at 1061.

As such, the focal point of this Court should not be whether the statute will result in an adequate fee in some cases; rather, the question should be whether

application of the conclusive fee schedule results in a "reasonable" fee in every case because the law does not support inadequate or excessive fees. *Murray* at 1061. The law only supports reasonable fees. *Id.* Unless the JCC, as the fact finder in a workers' compensation case, is allowed to engage in an analysis of the facts, which is precluded by the conclusive fee provision, it is impossible to determine whether the fee is reasonable in any given case regardless of the value of the case. So, even though it is theoretically possible, by mere happenstance, for an adequate fee to arise out of a claim, this is not the basis of the constitutional challenge and does not render the facial attack invalid.

The facial challenge relates to whether the conclusive fee provision prevents the injured worker from presenting evidence to prove that the fee is inadequate in his or her specific case. Petitioner maintains that without a hearing where he can present evidence to the JCC, relating to all of the relevant factors prescribed by this Court in *Lee Engineering* and Rule 4-1.5(b) of the Rules Regulating the Florida Bar[5] for determining inadequate or excessive fees, the

[5] (1) Factors to be considered as guides in determining a reasonable fee include:

> (A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
> (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

statute is unconstitutional on its face because it produces an irrebuttable or conclusive presumption that the attorney's fee produced by the statutory fee schedule is "reasonable" in each and every case. This violates the due process rights of every injured worker who proves entitlement to an E/C paid fee under the fee shifting statute. *Hall v. Recchi America Inc*., 671 So.2d 197 (Fla. 1st DCA 1996).

Hall involved an irrebuttable presumption to incentivize drug free workplace programs, pursuant to 440.09(3), *Fla. Stat*. (1991). This Court adopted the District Court's analysis in *Hall*, noting that the expense and other difficulties of individual determinations did not justify the inherent imprecision of the conclusive presumption. *Recchi America Inc. v. Hall*, 692 So.2d 153 (Fla. 1997). This Court's holding invalidated the irrebuttable presumption and found that the appropriate remedy is to excise the irrebuttable presumption provision from

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(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
(F) the nature and length of the professional relationship with the client;
(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation. *Id.*

§440.09(3), *Fla. Stat*. (1991) by removing the words "[i]n the absence of a drug-free workplace program."

A presumption is considered conclusive if a party is not given a reasonable opportunity to disprove either the predicate fact or the ultimate fact presumed. *City of Coral Gables v. Brasher*, 120 So.2d 5, 9 (Fla. 1960); *Chandler v. Department of Health & Rehabilitative Servs*. 593 So.2d 1183 (Fla. 1st DCA 1992). The ultimate fact presumed in relation to §440.34(1), *Fla. Stat.* (2009), is that the conclusive fee schedule produces a "reasonable fee," as required by this Court's decisional law and the Rules Regulating the Florida Bar, in every case in which the fee shifting provision is triggered. However, that clearly is not the circumstance, as is well illustrated by this case and the three other cases currently pending before this Court on this issue.[6] The injured worker in this case, and in every case in which he or she is entitled to an E/C paid fee under the fee shifting statute, is deprived of the opportunity to present evidence in violation of their right to due process.

As noted by the First District Court of Appeal and this Court in *Hall*, the constitutionality of a conclusive presumption under the due process clause is measured by determining (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

[6] *Castellanos v. Next Door Company, et. al*., SC13-2082, *Richardson v. Aramark, et. al*., SC14-738 and *Pfeffer v. Labor Ready Southeast, Inc., et. al*.,SC14-1325.

would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption. *Markham v. Fogg*, 458 So.2d 1122, 1125 (Fla. 1984); *Bass v. General Dev. Corp.*, 374 So.2d 479 (Fla. 1979). Section 440.34(1), *Fla. Stat.* (2009), fails the due process test on all three counts.

As to the first prong of the due process test set forth in *Hall*, if the concern of the Legislature regarding compelling a conclusive fee schedule was the fear of excessive attorney fees awards, the concern is unfounded because there were already other checks and balances in place to prevent excessive attorney's fees. *See e.g.* Rule 4-1.5(b) of the Rules Regulating the Florida Bar, which prohibits "clearly excessive" fees, and mandates that fees be "reasonable." Even if the concern of the Legislature were reasonably aroused by the possibility of excessive fee awards, it would be rectified by application of the factors found in Rule 4-1.5(b) of the Rules Regulating the Florida Bar. Under the second prong, assuming the conclusive presumption was put in place to protect against excessive attorney fee awards, there is no reasonable basis to conclude that it would protect against such awards because in some cases the fee schedule will produce excessive fee awards. Finally, the conclusive presumption also fails to satisfy the third prong of the *Hall* test because of the high potential for inadequate fees resulting from the conclusive

presumption, and the feasibility of individualized determinations does not justify the inherent imprecision resulting therefrom.

A presumptive fee schedule by its nature precludes a determination on the merits as to whether a fee is inadequate or excessive. The fact-finding, by JCCs, on an individualized basis must be required to afford each injured worker due process. It is not impractical for JCCs to make these individualized determinations, as it relates to attorney's fees utilizing Rule 4-1.5(b) of the Rules Regulating the Florida Bar [*Lee Engineering* factors] because it was done this way for years prior to the Legislature mandating the conclusive presumption relating to attorney's fees. It can be done again and would avoid inadequate fee awards and bring the statute into compliance with this Court's decisional law and the Rules Regulating the Florida Bar.

This Court has already decided that a fee schedule cannot be conclusive or presumptive. Specifically, this court held that a "minimum schedule of fees" is "helpful, but is not conclusive" when it addressed the fee schedule promulgated by the Florida Industrial Commission, noting that "[I]n addition to the minimum schedule it appears to us that supplemental evidence should be presented." *See e.g.*, *Lee Engineering & Construction Co., supra; Florida Silica Sand Co. v. Parker*, 118 So.2d 2, at 5 (Fla. 1960). When last faced with this very issue in *Murray*, this Court addressed why a mandatory or conclusive fee schedule, as the exclusive

method for determining the amount of injured worker's attorney's fees, does not work in a constitutional way.

In *Murray*, this Court specifically set forth:

> It is obvious, as demonstrated by the present case, that applying the formula in ***all*** cases will not result in the determination of reasonable attorney fees in ***all*** cases. In some circumstances, applying the formula will result in inadequate fees, and in some circumstances, applying the formula will result in excessive fees. [Emphasis added] *Murray* at 1061.

In fact, in footnote number 4 of *Murray,* this Court highlighted the inequity that would occur if the statute provided for a mandatory or conclusive fee schedule. This court stated:

> In some cases such as the present case, the amount of benefits is small, but the legal issues are complex and time consuming, and require skill, knowledge, and experience to recover the small but payable benefits. In other cases, the amount of benefits is substantial, but the legal issues are simple and direct, and do not require exceptional skill, knowledge, and experience. In the former case, a mandatory, rigid application of the formula results in an inadequate fee; in the latter, such application of the formula results in an excessive fee.

In order to avoid declaring the statute unconstitutional in *Murray*, this Court focused on the rules of statutory construction because the word "reasonable" still appeared in §440.34(3), *Fla. Stat*. (2008). In analyzing the statute, this Court noted "[I]f we construed subsection (3) as being controlled by the formula of subsection (1), the reasonable attorney fees requirement of subsection (3) would be rendered meaningless and absurd ***because the application of the formula in all cases would***

result in inadequate fees in some cases and excessive fees in other cases." [Emphasis added]. This Court determined that inadequate and excessive fees are not "reasonable" fees. *Murray* at 1061.

In line with *Murray*, this Court recently reiterated the same principle in *First Baptist Church of Cape Coral, Florida, Inc. v. Compass Construction, Inc*., 115 So.3d 978 (Fla. 2013), where this Court held:

> ***[O]nce a fee-shifting statute*** . . . triggers a court-awarded fee, the trial court is constrained by *Rowe* and its progeny ***in setting a fee that must be reasonable***. This alleviates any concern that enforcing an alternative fee recovery clause will result in the nonprevailing party paying an unreasonable fee. [Emphasis added]. *Id.*

Accordingly, as a result of this Court's mandates, the only way to tell whether a fee awarded under the fee schedule is reasonable [not inadequate or excessive] is to allow the fact finder [the JCC in workers' compensation cases] to consider the factors prescribed by Rule 4-1.5(b) of the Rules Regulating the Florida Bar (*Lee Engineering* factors).

C. <u>There is no Overpowering Public Necessity for the Conclusive Fee Schedule</u>.

There is no overpowering public necessity for the abolishment of the reasonable fee provision, and with it, the effective abolition of the injured worker's right to hire an attorney. There is absolutely no legitimate basis to support that injured workers would no longer require the protections afforded them for all of

these years by the allowance of reasonable fees, from the point at which the Legislature first attempted in 2003 to do away with "reasonable" fees, and ending in 2009, when it actually removed the word "reasonable" from the statute. It is imperative that this Court recognizes that injured workers are only entitled to have their fees [reasonable or not] paid by the E/C, if the E/C unreasonably delays or wrongfully denies benefits as set forth in the fee shifting provision of the statute. In addition, there are certainly alternatives, such as the one that previously existed for meeting the public necessity.

D. <u>The Facial Versus As Applied Challenge.</u>

This Court has explained how the common-law tort rights of the injured worker are reasonably exchanged under the Florida Workers' Compensation system because the E/C is "***surrendering his traditional defenses and superior resources for litigation," and the "employee trades his tort remedies for a system of compensation without contest, thus sparing him the cost, delay and uncertainty of a claim in litigation***." [Emphasis added]. *Mullarkey*, *supra*. It is evident that we are no longer operating under such a system; rather, this is a system where injured workers are denied full medical care and wage loss payments; where cases are heavily contested, and the burdens of proof are high; and where the E/C's superior resources for litigation are amplified rather than surrendered, as exemplified by the instant case where a myriad of defenses were

asserted for minimal benefits due, forcing the injured worker to expend substantial time and resources for a wholly inadequate and manifestly unfair fee result.

Because in 2009 the Legislature chose to eliminate the discretion of the JCC and restrict fees to the staunch application of the already restrictive statutory fee formula, it pushed a largely inadequate system over the brink, and the Workers' Compensation Law can no longer be deemed a reasonable alternative to common-law tort litigation. The only way to rectify the problem is to declare §440.34(1), *Fla. Stat*. (2009), unconstitutional either on its face or as applied.

The solution to the facial constitutional problem caused by §440.34(1), *Fla. Stat*. (2009), is to reinstitute the "reasonable" fee provision that existed prior to the amendment. This would require the application of Rule 4-1.5(b) of the Rules Regulating the Florida Bar (*Lee Engineering* factors). However, if this Court is not inclined to find the statute unconstitutional on its face, then it is suggested that it is, at the very least, unconstitutional as applied whenever it produces an inadequate fee resulting from the E/C's unreasonable denial or wrongful delay in benefits, and the fee shift is triggered.

The remedy to the "as applied" challenge can be found in the statute, pursuant to §440.33(1), *Fla. Stat*. (2010) and §440.015, *Fla. Stat.* (2010). The former provision allows the JCC to "do all things conformable to law which may be necessary to enable the judge effectively to discharge the duties of her or his

office." *Id*. The latter provision speaks to the legislative intent and purpose of the Workers' Compensation Law, as well as the manner in which it is to be executed.

§440.015, *Fla. Stat.* (2010), provides in pertinent part:

> . . . It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits . . . It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The . . . Division of Administrative Hearings shall administer the Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments. *Id.*

Aside from the fact that the 2009 amendment to §440.34(1), *Fla. Stat.* (2009), violates various constitutional provisions, it is also at odds with the explicit legislative intent, as set forth above, in a variety of ways. In reality, the amendment precludes JCCs from properly discharging the duties of their office because the conclusive fee provision gives the JCCs no discretion to depart from a statutory guideline fee, which is contrary to the explicit intent of the Legislature that cases be decided on their merits. Moreover, the prompt delivery of benefits to the injured worker pursuant to a system that is not an economic or administrative burden is one of the primary goals of the Legislature.

Not only would requiring these cases to be reviewed at the district court level unreasonably delay the delivery of attorney's fees to the injured worker, it would be an administrative burden on the system for every case that deals with

attorney's fees to be heard by the First District Court of Appeal for a determination of the "reasonableness" of the fee. Moreover, the District Court of Appeal is a reviewing court, not a fact finding court and, therefore, has no authority under the statute or otherwise to set a fee amount in a workers' compensation case.

On the other hand, JCCs act as the fact-finding "judicial body" in workers' compensation cases. So, it is suggested that when the fee schedule produces an inadequate fee, as applied, to any given case, which is decidedly not in conformance with the law of this state, this Court should hold that JCCs have discretion, in accordance with Rule 4-1.5(b) of the Rules Regulating the Florida Bar, to apply the factors because all fees must be "reasonable," as a matter of law. *Murray, supra*. This recommended fix to the "as applied" constitutional problem allows JCCs to discharge their duties in conformance with the law and the intent of the Legislature as set forth above.

POINT II

THE AMENDMENT TO SECTION 440.34(1), FLA. STAT. (2009), MANDATING A CONCLUSIVE FEE SCHEDULE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE.

Standard of Review: The standard of review is de novo. *Scott, supra.*

Both the United States Constitution and the Florida Constitution guarantee equal protection of the laws. U.S. Const. Amend. XIV; Fla. Const. Art. I § 2. The equal protection clause mandates, "[A]ll natural persons, female and male like, are

equal before the law." As is evident from the statutory limitation on attorney's fees for injured workers, but no corresponding limitation for employers and their carriers, the Legislature has created two "classes" of "persons," which provides for disparate treatment in relation to injured workers being able to obtain counsel and E/C's ability to obtain counsel. This arbitrary distinction cannot withstand an equal protection challenge.

The right to equal protection is a basic, fundamental right and is subject to heightened scrutiny where a suspect class or fundamental right is involved. *See De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So.2d 204 (Fla. 1989). On the other hand, it is submitted if a suspect class or fundamental right protected by the Florida Constitution is not implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge. *See e.g. Estate of Michelle Evette McCall v. United States of America*, 134 So.3d 894 (Fla. 2014). Even under the lesser rational basis test, the distinctions between the classes of persons created by the Legislature cannot pass constitutional muster because they are completely arbitrary.

A. The Conclusive Fee Provision Violates Equal Protection of the Law Because it Creates an Unequal Contest Between Two Classes of "Persons."

The 2009 amendment is state action because courts are expected to give effect to the discriminating statute. *Sasso v. Ram Property Management*, 431 So.2d

204 (Fla. 1st DCA 1983). Section 440.34(1), *Fla. Stat.* (2009), is mandatory, conclusive and rigid in determining the first class of "persons" (injured workers) attorney's fees, regardless of who is responsible for the fee, and regardless of whether the fee is reasonable by the standard set forth in Rule 4-1.5(b) of the Rules Regulating the Florida Bar. By contrast, the conclusive statutory cap does not apply to the latter class [Employers and their Carriers]. In addition to being unencumbered by a statutory cap, the latter class may freely contract with lawyers to represent their interests. In fact, there is no limit of any kind on the attorney fees which the employer or carrier may pay for their own legal services.

E/Cs and their attorneys may contract for any rate the E/C is willing to pay because they are not subject to any cap or conclusive presumption. On the other hand, the former class [injured workers] is strictly prohibited from freely contracting with an attorney under threat of criminal prosecution. The law permits no exception and no procedure to address the individual injured worker's capacity and desire to contract with a lawyer for services. Plus, the injured worker's attorney only gets paid if he or she is successful in securing benefits, whether under the basis of the fee shifting provision or otherwise, based on the value of monetary benefits, and in no way compensated for legal services rendered. To the contrary, the E/C's attorneys are guaranteed payment of their fee by virtue of contract, regardless of whether they win or lose.

There are other arbitrary distinctions drawn between injured workers and their employers and carriers. For example, it is a crime for an injured worker's attorney to receive an attorney's fee without approval of the JCC, but an E/C's attorney is not required to get approval of their fee from the JCC. §440.105(3)(c), *Fla. Stat.* (2010), which provides "(3) Whoever violates any provision of this subsection commits a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083." Furthermore, subsection (3)(c) provides that if an attorney accepts a fee from or on behalf of an injured worker, without approval of the JCC, that attorney has committed a crime. The section does not equally apply to E/Cs and their attorneys. *Altstatt v. Florida Department of Agriculture*, 1 So.3d 1285 (Fla. 1st DCA 2009).

Additionally, §440.34(2), *Fla. Stat.* (2010), the offer of settlement statute, enables E/Cs to reduce the amount of their exposure by making an offer to settle. In so doing, the E/C has the potential of mitigating their attorney fee exposure if they are required to pay the injured worker's attorney's fee under the fee shifting statute, by reducing what constitutes "benefits secured" for purposes of calculating the injured worker's attorney fees. However, this section does not provide an opportunity for the injured worker to make an offer to settle. Simply stated, the offer to settle provision only cuts one way. The purpose of the offer to settle statute is to encourage litigants to settle by penalizing those who decline offers that would

otherwise satisfy the statutory requirements. *Allstate Property and Casualty Insurance Company v. Lewis*, 14 So.3d 1230 (Fla. 1st DCA 2009).

As noted earlier in this brief, it would be foolish for the injured worker to go without attorney representation in this, now, highly complex field of law because it is unlikely that he or she could win. *See Bysczynski, supra.* Nevertheless, despite the overwhelming need for legal representation, as already demonstrated herein, the Legislature has created this conclusive fee schedule that greatly hinders the injured worker's ability to obtain counsel, and along the way created a provision that provides disparate treatment of an injured worker's ability to obtain counsel, as opposed to an E/C's ability to obtain counsel. There are absolutely no limits on the E/C's ability to obtain counsel created by the statute.

There is no legitimate state interest for the imposition of the inflexible fee cap. Specially, there is no current need to reduce workers' compensation premiums. *See e.g. Estate of Michelle Evette McCall, supra.* In *Estate of Michelle Evette McCall,* this Court decided that a statutory cap on wrongful death non-economic damages did not bear a rational relationship to the state purpose that the cap was proposed to address, the alleged malpractice insurance crisis in Florida. Similarly, when §440.34(1), *Fla. Stat.* (2009), was passed with an effective date of July 1, 2009, there was not a worker's compensation crisis in Florida that warranted the passage of an inflexible and conclusive cap on attorney's fees as

illustrated by the Florida Staff Analysis on HB 903, in which it was observed:

> "the office of Insurance Regulation (the OIR) has approved six consecutive decreases in workers compensation rates, resulting in a cumulative decrease of overall statewide average rate by more than 60 percent." Florida Staff analysis, HB-903, page 1.

Likewise, according to the 2012-2013 OJCC Annual Report, the number of Petitions for Benefits filed between 2003-2004 and 2008-2009 had dropped from 127,611 to 67,971.

Significantly, the Supreme Court of Mexico struck down a similar provision on equal protection grounds 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). In *Corn*, the Supreme Court of New Mexico considered the constitutional validity of a statutory cap of $12,500 on injured worker's attorney fees. 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 E/C as there was no limit on attorney fees paid by the E/C to its own attorney. The court specifically noted "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 same holds true here.

B. **The Conclusive Fee Provision Violates Equal Protection of The Law Because it Discourages Representation of Injured Workers with Small Value Claims.**

Section 440.34(1), *Fla. Stat*. (2009), also creates two classes of injured workers. Specifically, the statute in its application distinguishes between injured workers who have small value claims where the fee will almost always be inadequate and large value claims where the fee could be, depending on the case, inadequate, excessive or reasonable. If it is obvious to the attorney considering representation of the case that an injured worker has a disputed "large value" case, there will be a much greater likelihood that an injured worker with such a case will be able to secure competent counsel. However, the writing is on the wall for an injured worker with a small value case because attorneys simply cannot afford to work for a manifestly unfair attorney's fees, and they will be unwilling and unable to take such cases going into the future, if the amendment to §440.34(1), *Fla. Stat*. (2009), is upheld.

Here, the Legislature may have unwittingly drawn a distinction between injured workers who are denied a minimal benefit, but are required to put forth a great deal of effort to secure those benefits, as compared to an injured worker who is not required to put forth a great deal of effort to secure more substantial benefits. Regardless of the Legislature's intent, §440.34(1), *Fla. Stat.* (2009) arbitrarily discriminates against injured workers with small value claims because they will not have access to counsel and, thus, will not have access to courts. Whereas an injured worker with a large value claim will likely, but not necessarily, have

reasonable access to courts.

This case hinges on the constitutional rights of injured workers – not their attorneys because, as pointed out previously, injured workers are the true parties in interest when it comes to attorney's fees under the fee shifting provision. *Pilon, supra*. While the legislature certainly has authority to dictate the mechanism for computing attorney's fees, it may not attach conditions to those computations that discriminate against persons based on constitutionally impermissible grounds. Under both our federal and state constitutions, as well as our common law heritage, all similarly situated persons are equal before the law. All injured workers, not just those with large value claims, are entitled to engage competent counsel. In evaluating claims of statutory discrimination, a statute will be regarded as inherently "suspect" and subject to "heightened" judicial scrutiny if it impinges too greatly on fundamental constitutional rights flowing either from the federal or Florida Constitutions. The amendment to this statute cannot on its face pass a rational basis test because there is no state purpose that would justify the arbitrary distinction amongst injured workers themselves.

POINT III

THE AMENDMENT TO SECTION 440.34(1), FLA. STAT. (2009), MANDATING A CONCLUSIVE FEE SCHEDULE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SEPARATION OF POWERS PROVISION.

Standard of Review: The standard of review is de novo. *Scott, supra.*

Article II, Section 3, of the Florida Constitution provides as follows:

> **Branches of government.—**The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Pursuant to Florida's Constitution, the judicial branch has a duty and the authority to guarantee the rights of the people to have access to a functioning and efficient judicial system for the purposes of administration of justice and to safeguard the rights of individuals. In fact, "[t]he courts have authority to do things that are absolutely essential to the performance of their judicial functions." *Rose v. Palm Beach Cnty*, 361 So.2d 135, 137 (Fla. 1978). This authority emanates from the courts' powers as set forth in the Florida Constitution. *See Art.* II, § 3, *Fla. Const.* ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided therein."); Art. V, § 1, *Fla. Const.* This doctrine of inherent judicial power "exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government."

The judicial branch is composed of judges and attorneys, both of whom take oaths to administer justice and are duty bound by their oath and rules promulgated by this Court to continuously pursue justice. An attorney is "not only

a representative of the client, but also an officer of the court." *Moakley v. Smallwood*, 826 So.2d 221, 224, (Fla. 2002). As an officer of the court, the practice of law is "intimately connected with the exercise of judicial power in the administration of justice." *In re Hazael H. Russell*, 236 So.2d 767, 769 (Fla. 1970). The United States Supreme Court also said "[T]he right to representation by counsel is not a formality. . . It is the essence of justice." *Kent v. United States*, 383 U.S. 541, 561 (1966).

In *Irwin v. Surdyk's Liquor*, 599 N.W. 2nd 132 (Minn. 1999), the Supreme Court of Minnesota considered the validity of an amendment to the Minnesota Workers' Compensation Act which limited injured worker's attorney's fees to $13,000. *Id*. at 139. Significantly, the court held that the statute violated the separation of powers doctrine because the courts oversaw the conduct of attorneys and awards of attorney fees by the workers' compensation agency, executive branch officers, whose awards were subject to judicial review. The court specifically noted "[L]egislation that prohibits this court from deviating from the precise statutory amount of awardable attorney's 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." *Id*. at 141, 142.

Since Florida follows the same principles relating to the conduct of attorneys and attorney fee awards, the same logic utilized by the Minnesota

Supreme Court applies here to render §440.34(1), *Fla. Stat.* (2009), invalid because it too violates the separation of powers doctrine on the same grounds asserted in *Irwin*. The provisions at issue are similar in that they both impose an arbitrary statutory cap on attorney's fees of injured workers, and in the process effectively deprive the judiciary of its power of independent review of attorney's fees from executive branch officials who adjudicate workers' compensation claims in both Florida and Minnesota. In Florida, JCCs perform quasi-judicial functions and act as a "judicial body," for purposes of satisfying due process concerns. *See Jones v. Chiles*, 638 So.2d 48 (Fla. 1994). Although JCCs are executive branch officials, they must still abide by the Code of Judicial Conduct. *See* §440.442, *Fla. Stat*. (2010). Moreover, their attorney fee awards are subject to judicial review by the District Court of Appeal, First District, and this Court. §440.271, *Fla. Stat.* (2010).

Attorneys representing injured workers in Florida's adversarial and increasingly complex workers' compensation system play a critical role as advocates searching for the truth and assuring that the JCCs reach a decision on the merits in accord with the specific intent of the Legislature. §440.015, *Fla. Stat*. (2009). In *Amendments to Rules Regulating the Florida Bar – 1-3.1(a) and Rules of Judicial Administration*, 573 So.2d 800, 804 (Fla. 1990), this Court held:

> [I]n the courtroom, lawyers present evidence and examine witnesses to aid the judge and the jury in their search for the truth...

> An adversarial system of justice requires legal representation on both sides in order for it to work properly. Without adversaries, the system would not work. Consequently, the obligation to represent the "defenseless and oppressed" is critical to our judicial system if it is to work properly for all segments of our society.

It is well established that in order to carry out their duties to both the client and public at large, attorneys as officers of the court must be paid fair and reasonable fees or the system will not work properly. *See e.g. Baruch v. Giblin*, 164 So. 831, 833 (Fla. 1935). In *Giblin*, this Court held:

> . . . Lawyers are officers of the court. . . The attorney's fee is, therefore, a very important factor in the administration of justice and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation. *Id* at 833.

The practice of law is "intimately connected with the exercise of judicial power in the administration of justice." *In re Hazel H. Russell*, supra. Attorney's fees must be reasonable because if fees are too low, justice for individual clients and the public suffers, and if fees are too high, the credibility of the legal system is called into question. Florida courts have not hesitated to overturn attorney fee awards that are either excessive or inadequate in accordance with the Rule 4-1.5(b) of the Rules Regulating the Florida Bar. *See e.g., Marchion Terrazzo v. Altman*, 372 So.2d 512 (Fla. 3rd DCA 1979).

Under the current statutory scheme, the injured worker's evidence relating to Rule 4-1.5(b) of the Rules Regulating the Florida Bar, if put forth to build a record for a constitutional challenge, is rendered meaningless because it must be ignored by the JCC due to the conclusive fee cap imposed by the Legislature. The JCC is duty bound to award a statutory fee no matter how unreasonable or manifestly unfair the resulting fee might be, such as the fee award of $13.28 per hour that resulted from the conclusive fee schedule in this case.

Since the imposition of an inflexible cap on attorney's fees provides no discretion for the JCC to deviate from the conclusive attorney fee provision, even when the "statutory fee" results in an inadequate or excessive fee, the provision violates the separation of powers doctrine because the Legislature has unconstitutionally encroached on the power of the judiciary's exclusive right to regulate attorneys' conduct. *Makemson v. Martin County*, 491 So.2d 1109, 1112 (Fla. 1986). Moreover, the Legislature is without authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties as an officer of the court. *See Florida Bar v. Massfeller*, 170 So.2d 834 (Fla. 1964). As noted in Point I B., what a compulsory fee schedule does is prohibit a JCC from considering factors that are to be considered pursuant to Rule 4-1.5(b) of the Rules Regulating the Florida Bar.

POINT IV

THE AMENDMENT TO SECTION 440.34(1), FLA. STAT. (2009), MANDATING A CONCLUSIVE FEE SCHEDULE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND ASSOCIATION AND THE RIGHT TO CONTRACT.

Standard of Review: The standard of review is de novo. *Scott, supra.*

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Similarly, Florida's Constitution provides that "[n]o law shall be passed to restrain or abridge the liberty of speech." Art. I, §4, Fla. Const. Furthermore, the Florida Constitution and the United States Constitution protect the right to contract. Art. I, § 2, Fla. Const.; XIV Amendment, U.S. Const. Statutes that abridge fundamental rights are subject to strict scrutiny. *See e.g., Mitchell v. Moore*, 786 So.2d 521 (Fla. 2001).

Included in the First Amendment's fundamental guarantee of freedom of speech, association, and petition is the right to hire and consult an attorney. *See Wayte v. United States*, 470 U.S. 598 (1985). The Florida Constitution provides a similar right: "**[**T]he people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances." Similarly, in *Brotherhood of R.R. Trainmen, supra*, the United States Supreme Court recognized the right of unions and its members to consult with and retain counsel of their choice in order to engage in collective activity to obtain meaningful access to

courts.

POINT V

THE AMENDMENT TO SECTION 440.34(1), FLA. STAT. (2009), MANDATING A CONCLUSIVE FEE SCHEDULE IS UNCONSTITUTIONAL BECAUSE IT CONSTITUTES THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW AND THE RIGHT TO BE REWARDED FOR INDUSTRY AND IT IS CONFISCATORY OF THE INJURED WORKER'S ATTORNEY'S TIME.

The standard of review is de novo. *Scott, supra.*

Article I, Section 2 of the Florida Constitution provides:

> **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***. . .

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. This fundamental right is subject to the strict scrutiny standard. *See De Ayala, supra.* 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," this 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. Section 440.34(1), *Fla. Stat.* (2009), impermissibly infringes on the fundamental right to be rewarded for industry.

Here, Mr. Diaz's counsel spent valuable time and resources, securing benefits on behalf of her client, that the E/C wrongfully withheld, but §440.34(1), *Fla. Stat.* (2009), provides a reward for that industry that was so scant, inadequate and unreasonable as to render it illusory. As such, this inherent right was denied when the JCC was mandated to award a conclusive fee that was unreasonable and confiscatory. The conclusive fee guidelines restrict the ability of attorneys to engage in business in the State of Florida for representing injured workers to the point that if the attorney fees limitations are deemed constitutional, attorneys will not be able to competently represent them, if at all. Such a result constitutes an unconstitutional infringement on the inherent right of liberty to engage in business and must be found unconstitutional.

CONCLUSION

Based upon the arguments asserted herein, this Court should declare the 2009 amendment to §440.34(1), *Fla. Stat*., to be facially invalid prospectively. Alternatively, this Court should declare the 2009 amendment to §440.34(1), *Fla. Stat*., invalid as applied to any case in which the attorney's fee, payable by the E/C for the wrongful denial or unreasonable delay of benefits, is not "reasonable" as mandated by this Court's decisions and the Rules Regulating the Florida Bar.

Respectfully submitted,

/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was sent via electronic mail on this 1st day of December to: Cindy Galen, Esquire, Attorney for the E/C, 2030 Bee Ridge Rd., Sarasota FL 34239-6108 cgalen@ejlawsrq.com, kfoss@eraclides.com; Vanessa Lipsky, Esquire, Attorney for the E/C, 2875 NE 191st Street, Suite 802 Aventura, FL 33180 vl@eraclides.com; Russell H. Young, Esquire, Attorney for the E/C, 2030 Bee Ridge Rd., Sarasota FL 34239-6108 ryoung@eraclides.com, edie@eraclides.com; Martha Fornaris, Esquire, Attorney for Claimant, 65 Almeria Ave., Coral Gables FL 33134-6118 mfornaris@fornaris.com, fdlaz@fornaris.com; Grethel San Miguel-Callejas, Esquire, Attorney for the Claimant, 65 Almeria Ave., Coral Gables FL 33134-6118 grethel@fornaris.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font and spacing requirements of Rule 9.210, Florida Rule of Appellate Procedure.

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