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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 REPLY BRIEF

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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ARGUMENT

RESPONDENTS' ARGUMENT ONE: LACK OF STANDING:

The rudimentary theme of Respondents' answer brief is that Petitioner lacks standing to challenge the constitutionality of the 2009 amendment to §440.34(1), *Fla. Stat*., which mandates the payment of a presumptive guideline fee. In support of this contention Respondents urge that Petitioner has not been "adversely affected" by the amendment, as required by test set forth in *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952).[1] First it should be noted that Respondents never raised such a defense before the JCC or the First District Court of Appeal. Notwithstanding the fact that the Respondents waived the standing argument because it is being made for the first time before this Court, the argument is also without merit which will be discussed infra. *See e.g., Krivanek v. Take Back Tampa Political Comm.*, 625 So.2d 840, 842 (Fla. 1993). Respondents fail to appreciate the direct impact the inadequate fee award, in this case, had on Petitioner and the harm capable of being repeated in relation to future claims resulting from other work accidents to this and other injured workers as well as the proper definition of standing.

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[1] "[T]he 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, supra.*

A. Difficulties Obtaining Legal Representation:

Although Respondents concede that in some "hypothetical situations" injured workers may have difficulty obtaining counsel as a result of the 2009 amendment to §440.34(1), *Fla. Stat*., they claim that because Petitioner retained three competent attorneys -- two that represented him at the trial level and one that has represented him both before the First District Court of Appeal and before this Court -- he has not met the requirement of showing he has been adversely affected. Parenthetically, it is noted that appellate attorney's fees are not impacted by §440.34(1), *Fla. Stat*. (2010), because appellate fee awards are controlled by §440.34(5), *Fla. Stat*. (2010), and are awarded by the reviewing "court" in its discretion. Moreover, appellate fees are subject to Rule 4-1.5(b) of the Rules Regulating the Florida Bar. As will be shown infra, the fact that Petitioner actually had representation is irrelevant to the issue of standing. *See e.g*. in *Murray v. Mariner Health Care, Inc.,* 994 So.2d 1051 (Fla. 2008)

While Petitioner does not dispute that Respondents have cited the correct test for determining standing, their argument as to why Petitioner lacks standing is is illogical and ignores the plain language of §440.34(3), *Fla. Stat*. (2010), which places entitlement to attorney's fees with the Claimant.[2] Respondents' argument

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[2] "A claimant is responsible for the payment of her or his own attorney's fees, ***except that a claimant is entitled to recover an attorney's fee in an amount equal***

also disregards the decisional law of this Court, and the First District Court of Appeal, establishing that the injured worker is the true party in interest in relation to the award of attorney's fees under the fee shifting provision of the Workers' Compensation Law. In fact, citing *Pilon v. Okeelanta Corporation*, 574 So.2d 1200 (Fla. 1st DCA 1991), this Court recognized in *Murray, supra*, that the injured worker had standing to challenge the attorney's fee provision, even though she had adequate representation. *Id*.

In fact, Respondents' concession that it may be difficult for injured workers to secure counsel in "hypothetical" situations is significant and reveals their absurdity of the argument against standing. The purpose of the fee shifting provision is the transference of the burden of attorney's fees to the E/C and the public policy behind the provision is recognition by the Legislature that injured workers are ***entitled to and in need of counsel under the enumerated conditions.*** *Id.* So, the fact that Petitioner was able to secure competent counsel at both the trial and appellate levels does not undermine his constitutional arguments or denote that he has not been adversely or injuriously affected by the amendment, as set forth by the Respondents. Not only was Petitioner an actual party to the proceedings before the JCC but he is also the true party in interest and intended

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to the amount provided for in subsection (1) or subsection (7) from a carrier or employee. . ." §440.34(3), *Fla. Stat*. (2010)

beneficiary of the fee shifting provision. *Id.*

Veritably, Respondents take the concept of standing too far by making the absurd suggestion that the injured worker must actually proceed without counsel, and suffer prejudice as a result, before he can raise a constitutional challenge to the presumptive guideline attorney's fee provision. A similar argument was rejected in relation to a mandatory fee cap 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). While it is accurate that if the 2009 amendment to §440.34(1), *Fla. Stat*., is declared unconstitutional either on its face or as applied and a "reasonable" fee is ultimately awarded to the "claimant" the fees will not be paid directly to him. Nevertheless, the "unreasonable" fee award has injuriously or adversely impacted him in a real and unconstitutional way. In fact, it is difficult to imagine how the de minimis attorney's fee awarded in this case could more profoundly affect Petitioner, and other injured workers who find themselves entangled in similar circumstances, who have to battle for benefits [property interest] to which they are rightfully entitled.

Despite Respondents' assertion to the contrary, it is evident from the facts of this case that Petitioner was adversely affected by their resisting the claim because he had to litigate for almost three years and was, ultimately, awarded a fee of $13.28 per hour, which is completely incongruous with the fee shifting provision.

One need look no further than the stated purpose of the fee shifting provision to realize that it was intended to protect this and other injured workers by affording them the right and opportunity, conferred by the Legislature, to retain an attorney who will be paid a "reasonable" fee, to preserve their constitutionally protected property right to workers' compensation benefits, including attorney's fees under the fee shifting provision of the statute. *See Rucker v. City of Ocala*, 684 So.2d 836 (Fla. 1st DCA 1986)(explaining that workers' compensation benefits qualifies as a property interest).

There is no question that Petitioner's right to attorney's fees payable by the E/C under the fee shifting provision of the statute is a protected property right -- just as his entitlement to indemnity and medical benefits under the Workers' Compensation Law fall within the sphere of a "protected property interest." *Id.* The applicable decisional law recognizes that while fee awards are not paid to the claimant, they are in effect a benefit. *See Pilon, supra*. In other words, the fee award is a benefit to the claimant, even though the beneficiary of the award is the injured worker's attorney. Specifically, the question in *Pilon* was whether injured worker's attorney as the "beneficiary" of the fee award being challenged was entitled to rely on his client's insolvent status to obtain a waiver of the cost of the record. It was determined that he was. *Id.* Additionally, more recently, the First District Court of Appeal reversed the JCC's dismissal of a claim on statute of

limitations grounds where it was determined that the pending attorney's fee issue served to toll the limitations period. *See Longley v. Miami-Dade County School Board*, 82 So. 3d 1098 (Fla. 1st DCA 2012).

Here, attorney's fees were awarded to Petitioner, but the award was viewed even by the JCC as "patently unreasonable." Rule 4-1.5(b) of the Rules Regulating the Florida Bar contemplates that attorneys will be "reasonably" compensated for their services. This means this Court in enacting Rule 4-1.5(b) of the Rules Regulating the Florida Bar did not expect attorneys to receive fees that would result in an unreasonable financial burden. In assessing the "reasonableness" of the attorney's fee award in this case, the JCC characterized the issues as being vigorously defended by both sides, recognized the complexity of the case, difficult burdens of proof and, most importantly, explicitly found that Petitioner would not have received the benefits that were ultimately awarded to him without the aid and assistance of counsel. So, Petitioner has shown that he has a current injury because of the unreasonably low fee award. Moreover, if Petitioner has another work accident in the future, there is a very real possibility that will not be able to secure counsel which shows that there is also a risk of future injury from the mandatory application of the presumptive guideline fee and, therefore, he has standing.

B. Carriers unnecessarily resisting claims.

The E/C avers that there is no evidence that the E/C unnecessarily resisted

Petitioner's claim – noting that the system worked the way it was designed to work. The absurdity and inaptness of this statement is reflected in the fact that Respondents denied Petitioner's claim in its entirety and he was forced to litigate his claim. Petitioner was ultimately successful in his pursuit of benefits owed by Respondents and he was entitled to a fee under the fee shifting provision of the statute. So, regardless of what terminology is utilized to explain the wrongful denial or delay of benefits, Petitioner was entitled to recover a fee payable by the E/C based on the fee shifting provision of the statute for one of the enumerated reasons set forth therein. *See* §440.34(3), *Fla. Stat*. (2009). Consequently, it is extraneous to the issue on appeal that the Respondents do not see themselves as unnecessarily resisting the claim. The fact remains that they owed a fee under the fee shifting provision.

Respondents advocate on pages 14 and 15 of their brief that there are plenty of punitive measures in place for employer/carriers that unnecessarily resist the payment of claims and that there are innumerable incentives for E/C's to properly handle claims. While Petitioner has no quarrel with this statement none of the provisions referenced by the Respondents pertain to the fee shifting provision nor do they incentivize or effect the punishment intended by the fee shifting provision. The last "incentive" for properly handling claims, mentioned by Respondents, is that "a carrier who unsuccessfully resists a claim is still required to pay an attorney

(sic) fee per the prescribed schedule." Respondents' declaration in this regard is undermined by the fee awarded because it is irrational to think that $13.28 per hour serves as any type of punishment for doing the wrong thing or incentive for doing the right thing. The fee shifting provision is directly linked to the payment of attorney's fees to the injured worker and the only issue pending before this court is the constitutionality of the fee provision which undoubtedly produced a patently unreasonable fee in this case.

RESPONDENTS' ARGUMENT TWO: THE FACIAL CONSTITUTIONAL CHALLENGE:

Despite Respondents' assertion to the contrary, Petitioner contends that he has met his burden of proving that there are "no set of circumstances that exist under which the statute can be constitutionally applied." *Abdool v. Bondi*, 141 So.3d 529, 538 (Fla. 2014). The reason being is that when the fee shifting provision was triggered, Petitioner was constitutionally deprived of any meaningful opportunity for a hearing. This is true because, regardless of the nature or amount of the evidence submitted, the JCC was mandated to award the presumptive guideline fee. In line with their argument, Respondents assert that there are "many circumstances where a fee under §440.39 (sic) can result in a reasonable fee." However, Respondents' analysis proves faulty because regardless of whether "they" think that a $30,750.00 guideline fee is reasonable on $300,000.00 worth of benefits, it fails to take into account Rule 4-1.5(b) of the

Rules Regulating the Florida Bar for determining "reasonable" fees. In fact, Respondents assert that Petitioner had a right to a meaningful hearing, which is preposterous under the circumstances.

In Respondents' example, if the claimant's counsel only had 5 hours into the case that resulted in a guideline fee of $30,750.00 based on benefits secured of $300,000.00 it would result in an hourly fee of $6,150.00 (likely excessive or unreasonable, if the factors were applied). However, on the other hand, if the claimant's counsel had 103 hours in Respondents' example it would result in an hourly fee of $298.54 per hour, which may or may not be reasonable depending upon consideration of the factors found in Rule 4-1.5(b) of the Rules Regulating the Florida Bar. This Court in *Murray* indicated that an excessive or inadequate fee was improper because it is not a "reasonable" fee, so Respondents' suggestion that the statute "might" result in a reasonable fee in some random scenario does not support the argument that the statute is constitutional on its face. The point is that it is impossible to make the "reasonableness" determination without analysis of the factors found in Rule 4-1.5(b) of the Rules Regulating the Florida Bar. In other words the facial constitutionality question does not revolve around whether $298.54 might turn out, by pure chance, to be reasonable. In fact, the amount of $298.54 could be deemed reasonable in one case, but not in another case depending on application of the factors.

The factors represent an objective basis upon which the determination of "reasonableness" can be made. As pointed out in *Murray,* footnote number 4, "[I]n 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." It seems that this Court has already made the case for facial unconstitutionality in *Murray* because one simply cannot reach a decision on reasonableness without analysis of the evidence and, in particular, consideration of the factors found in Rule 4-1.5(b) of the Rules Regulating the Florida Bar.

The focal point of the inquiry is not whether a "reasonable" fee could result from the statute in some hypothetical scenario. Rather, the facial unconstitutionality of the attorney's fee provision lies in the fact that the injured worker is deprived of the opportunity to present evidence in relation to the attorney's fee aspect of his workers' compensation claim, which is a protected property right, as to what is "reasonable" for that case. This means that the injured worker cannot alter the amount mandated by the statute, regardless of what the

evidence provides. *See De Ayala v. Florida Farm Bureau Casualty Ins. Co*., 543 So.2d 204, 206 n. 6 (Fla. 1989). This protected "property interest" would undoubtedly include attorney's fees payable by the E/C under the fee shifting provision of the statute as discussed previously herein.

As such, there "must be procedural safeguards including notice and an opportunity to be heard because once acquired, a property interest falls within the protections of procedural due process." *Metropolitan Dade County v. Sokolowski*, 439 So.2d 934 (Fla. 3rd DCA) petition for review denied, 450 So.2d 488 (Fla.1984);. See Art. I, § 9, Fla. Const.. ("No person shall be deprived of life, liberty or property without due process of law...."). It has also been established by this Court that the right to attorney's fees granted by statute are substantive rather than procedural. *See e.g., Moser v. Barron Chase Securities, Inc.*, 783 So.2d 231 (Fla. 2001). In *Moser*, this Court cited *Rucker, supra*, for the proposition that "the due process standards necessary in safeguarding such a right must provide for a "meaningful, full, and fair" hearing to the affected individual. *See also*, *Crocker v. Pleasant*, 778 So.2d 978 (Fla. 2001)(Procedural due process rights derive from a property interest in which the individual has a legitimate claim. Once acquired, a property interest falls within the protections of procedural due process).

Despite the fact that Petitioner's right to E/C paid fees is a protected property right, under the 2009 amendment to §440.34(1), *Fla. Stat*., there is no

need for the JCC to even hold a hearing, except to allow the injured worker to build a record for appeal to challenge the constitutionality of the statute. In fact, the evidence submitted in such a proceeding is for naught, except as relates to a constitutional challenge, since the JCC is mandated to apply the presumptive guideline fee, regardless of the facts of the case. The JCC has no discretion to make exceptions or veer from conclusive guideline fee statute. So, 2009 amendment to §440.34(1), *Fla. Stat*., does not meet any of the above stated procedural safeguards. Application of the mandatory and presumptive guideline fee with no opportunity to present evidence that will be or even can be considered in "changing" the fee award deprives the injured worker of his property interest without due process because there is no opportunity for a meaningful hearing.

RESPONDENTS' ARGUMENT THREE: ACCESS TO COURTS:

Respondents assert on pages 20 and 21 of the answer brief that the 2009 amendment to §440.34(1), *Fla. Stat*., did not abolish an existing right because it allows for a "partial" remedy, in this case a fee of $1,593.47. This so-called "partial" remedy is illusory because the amendment obliterates the indented effect of the companion provision which is the fee shifting provision and, contrary to Respondents' position, the Legislature did abolish an existing right to "reasonable" attorney's fees. Moreover, the alternative to reasonable fees, put in its place, is not a "reasonable alternative." In fact, the alternative resulted in an inadequate fee in

this case, which is not a reasonable fee. The Respondents maintain that even if Petitioner did prove that the Legislature did not provide a “reasonable alternative” to the “reasonable” fee provision, the statute would still be constitutional since there was an overpowering public necessity for passing it.

In support of this argument, Respondents refer to a “near crises in Florida related to Workers Compensation.” The “near crisis,” according to the Respondents, was in 2003. The Respondents note that the legislative changes, effective 2003, had reduced rates significantly by July 2010 (64.7%). There is no evidence, however, that the reduction in premiums has anything to do with attorney’s fees and the mandatory fee cap. Even if that were the case, "A statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies. A past crisis does not forever render a law valid," and there has been no showing here that there was still an ongoing crisis in 2009 See e.g., *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp Fund*, 284 Wis. 2d 573, 701 N.W. 2d 440, 468 (2005), which was cited in *Estate of Michelle Evette McCall v. United States of American*, 134 So.3d 894 (Fla. 2014).

Clearly, a crisis in relation to Claimant paid attorney’s fees did not exist in 2009 when the amendment in dispute was passed by the Legislature. The Staff Analysis accompanying the 2009 Amendments states: "The bill should have no

more than a minimal fiscal impact on State and Local government". (Emphasis added). (Appendix to Petitioner's Reply Brief, p.1). As acknowledged by the Respondents, workers' compensation costs were down over 60% as a result of all of the changes made in 2003. (Appendix to Petitioner's Reply Brief, p. 3). According to the Deputy Chief Commissioner's report of 2007-2008 at the time of the 2009 Amendment, claimants' attorneys' fees amounted to $188,701,2561 of a $3.3 billion program. (Appendix to Petitioner's Reply Brief, pages 33-34). This number includes employee paid fees as well as employer/carrier paid fees. This is less than 5% of the costs of the program. E/C's fees were $270,501,574. (Appendix to Petitioner's Reply Brief, p. 34).

There is certainly no showing based on these numbers that there was a "crisis" or overpowering public necessity for the passage of the 2009 amendment. Nevertheless, Respondents repeatedly discuss concern by the Legislature of the "reasonably perceived" possibility of "abuse" §440.34(1), *Fla. Stat*., which overlooks the glaring problem of defense attorneys' fees exceeding those paid out by both E/C's and injured workers to injured workers by an astounding 82 million dollars. If this doesn't speak to the issue of employer/carriers running amok due to the limitation on attorney's fees payable by the E/C, where warranted, nothing will. If the Legislature was concerned with abuse then it should have turned its attention to the amount of attorneys' fees insurance carriers were paying their own attorneys

to defend claims. The possibility for “abuse” and “overpowering public necessity” due to a “crisis” cannot stand as valid reasonable for the 2009 amendment to §440.34(1), *Fla. Stat*.

RESPONDENTS’ ARGUMENTS FOUR, FIVE, SIX AND SEVEN: EQUAL PROTECTION, SEPARATION OF POWERS, FREE SPEECH AND ASSOCIATION AND TAKING OF PROPERTY WITHOUT DUE PROCESS:

As to Respondents’ remaining arguments (four, five, six and seven) Petitioner relies on the Initial Brief.

CONCLUSION

This Honorable Court should declare the 2009 amendment to §440.34(1), *Fla. Stat*., unconstitutional on its face and/or as applied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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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