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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

CYNTHIA RICHARDSON
Petitioner,

vs.

ARAMARK and SEDGWICK CMS,
Respondents.
_____/

Case No: SC14-738

Lower Tribunal Nos:
1D13-4138
09-030957TWS

INITIAL BRIEF OF PETITIONER CYNTHIA RICHARDSON ON THE MERITS

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INTRODUCTION AND QUESTION PRESENTED

This workers' compensation case seeks review of a decision of the First District Court of Appeal that affirmed an amended final compensation order entered by Judge of Compensation Claims (JCC) Thomas W. Sculco on 8/6/2013. See Richardson v. Aramark/Sedgwick CMS, 134 So.3d 1133, 1134 (Fla. 1st DCA 2014). The order limited the amount of the fee awarded to claimant's attorney for prevailing on a claim seeking the authorization of pain management care to the guideline amount provided in section 440.34(1), Florida Statutes (2009), which the JCC found was $1,750, despite evidence that a reasonable fee was in the range of $22,500 to $31,500, based on the reasonable expenditure by counsel of 90 hours to prevail on the claim at the rate of $250 to $350 per hour (R. 842-843).

The case is now before the court by reason of its acceptance of jurisdiction on 11/7/14, as a result of a certified question from the First District Court of Appeal, No. 1D13-4138, which, in rejecting as-applied constitutional challenges to section 440.34(1), the statute setting the amount of the attorney fee to be received by claimant's counsel, and 440.105(3)(c), the statute requiring JCC approval of any fee received by claimant's attorney, passed upon the same question it certified in Castellanos v. Next Door Company, 124 So. 3d 392, 394 (Fla. 1st DCA 2013), that asked, "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."

Petitioner, Cynthia Richardson, will be referred to in this brief as "claimant" or by her surname. Respondents, Aramark and Sedgwick CMS (the employer/carrier), will be referred to collectively as the "E/C." References to claimant's verified motion for attorney fees will be indicated by the letters "VM," and those to the one-volume record as "R," followed by the page number on which the information can be found.

The question presented in this appeal is the following:

> ARE SECTION 440.34(1) (2009), LIMITING CLAIMANT'S COUNSEL TO AN ATTORNEY'S FEE IN THE AMOUNT OF $1,750, AND SECTION 440.105(3)(c), FLORIDA STATUTES (2009), FORBIDDING APPROVAL OF A FEE MORE THAN THAT ALLOWED BY THE STATUTORY FEE SCHEDULE, UNCONSTITUTIONAL AS APPLIED TO FACTS SHOWING THAT COUNSEL REASONABLY EXPENDED 90 HOURS IN PREVAILING ON A CLAIM FOR REQUESTED BENEFITS?

STATEMENT OF THE CASE AND FACTS

The record of the proceedings in this case relates to the amount of attorney's fees and costs awarded by the JCC to be paid by the E/C to claimant's counsel for securing authorization of pain management treatment (R 675).

The facts recited in claimant's VM for attorney's fees, filed on 6/4/13, and

admitted into evidence at the hearing for prevailing party attorney fees[1] as Claimant's Exhibit No. 1, were that claims were filed for the authorization of a pain management physician, preferably Dr. Melvin, together with penalties, interest, costs and attorney fees (R. 20). The motion alleged that after Dr. Patel, the authorized pain management physician, had rescinded his services, a petition for benefits (PFB) was filed for a new pain-management provider on 10/2/12, and the E/C's motion to dismiss the PFB was denied, resulting in the parties proceeding to mediation, but no issues were resolved (R. 20). On 2/22/13, the E/C's nurse case manager contacted claimant and her attorney, notifying them that claimant was scheduled for an evaluation with Dr. Yatham, a pain management provider, on 2/27/13, which claimant attended (R. 20).

A follow-up appointment was arranged for claimant with Dr. Yatham on 3/11/13; however, the E/C's adjuster canceled it, saying that Dr. Yatham was not authorized to treat the claimant (R. 20). Thereafter, on 3/18/13, a second PFB was filed seeking the authorization of a pain management provider. The E/C next responded on 3/22/13 that Dr. Yatham was authorized (R. 20-21). Despite its concession, the E/C thereafter denied claimant's entitlement to a fee through a fee-motion hearing before the JCC (R. 21).

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[1]Filed pursuant to the provisions of sections 440.34(1) and 440.34(3), Florida Statutes (2009).

The VM alleged that claimant's counsel had reasonably expended 105.45 hours in attorney time in succeeding on the claim, which at $250-$300 per hour results in a total fee ranging from $26,362.50 to $31,635, and claimant had incurred taxable costs of $2,469.15 (R. 21, 24). The VM thereafter set out the factors enumerated in Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454 (Fla. 1968), for ascertaining the reasonableness of the fee requested (R. 21-23), which included the facts that Mr. Leo had been board-certified in the field of workers' compensation since 1998, was named a Super Lawyer by his peers for several years, was chosen as one of the top 100 trial lawyers in Florida by the National Trial Lawyers, and is currently AV rated by Martindale Hubbell (R. 23, 841). Moreover, and not insignificantly, the certainty of Mr. Leo's obtaining a fee was, pursuant to the provisions of section 440.34, contingent upon his client prevailing on the claim, all of which are positive factors (R. 23). In support of his VM, counsel attached affidavits as to the amount of time expended by him, e-mail correspondence between him and the E/C's office, various filed pleadings, cost ledgers, and numerous detailed time sheets (R. 25-73).

On 6/14/13, the E/C filed a response to the verified motion for fees, which was admitted into evidence as Claimant's Exhibit No. 2, stating that because the date of claimant's occupational accident was 10/26/09, claimant's motion for fees was governed by the 2009 version of section 440.34, and, because the claim was one

seeking only medical benefits, the maximum fee allowable was, pursuant to subsections (3) and (7) thereof, $1,500, an amount it was willing to concede. If, however, the JCC was of the opinion that subsections 440.34(3)-(7) were inapplicable to the determination of the fee permitted, defense counsel in the alternative addressed the Lee Engineering factors, asserting that the maximum hourly fee should be only $150, and claimant's attorney's time should be at most 12.8 hours, which would entitle him to no more than $1,920. The E/C further asserted that all time claimed by Richardson's attorney after it provided notice on 2/21/13 of claimant's appointment with Dr. Yatham should be excluded, and, in particular, the time expended "from 4/22/13, through the present...should not be considered, as it is both unrelated to the provision of Dr. Yatham as a treating provider and entitlement to a fee was admitted by the Employer/Carrier on 4/22/13" (R. 58). As for costs, the E/C answered the maximum taxable amount allowable, if invoices were provided, was $300.46 (R. 58). The E/C attached to its response claimant's attorney's fees and costs sheets, which it had edited to support its response (R. 60-73).

David E. Mallen, an attorney at law, submitted an affidavit, together with attachments, admitted into evidence as Claimant's Exhibit No. 3, as to the reasonableness of the fee sought (R. 74-126). Mr. Mallen, who had extensive experience in the practice of workers' compensation cases, opined that a reasonable

fee for the time expended by Mr. Leo was, based on the various Lee Engineering factors, between $26,362.50 to $31,635, together with taxable costs of $2,469.15 (R. 78). The affidavit particularly pointed out that if claimant's counsel was limited to the guideline fee permitted by the workers' compensation fee statute, Mr. Leo would be entitled to a fee of only $1,750, for securing benefits in the amount of $10,000, which, in the affiant's opinion, would "lead to a severely limited attorney's fee for the benefits obtained for the claimant despite the 105.12 hours required to pursue the benefits" (R. 76).

His affidavit asserted that the legislative limitation was an unwarranted intrusion on the courts' power to award fees that were not confiscatory of an attorney's time and efforts, as required by the Florida Supreme Court's decision in Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), and its progeny (R. 76). In his opinion the guideline amount provided in section 440.34(1) should not apply to E/C paid fees, which are unilaterally enforced only against claimants' attorneys, despite the language in section 440.105(3)(c), requiring that all fees received by any attorney be approved by the JCC (R. 76-77). He was also of the opinion there was no compelling state interest in requiring scrutiny of carrier fees paid only to claimant's counsel, because the plainly stated language of section 440.105(3)(c) requires both defense attorneys and claimants' lawyers to seek approval, thereby placing carriers' counsel in violation of the law by not submitting to JCCs for

approval fees received by them from their clients.

He continued that under the circumstances, the only reasonable interpretation that should be placed on the guideline-fee formula in section 440.34(1), when considered together with section 440.105(3)(c), is that its provisions should be applied only to fees received by attorneys from their clients[2] (R. 77).

Mr. Mallen explained that the average cost to an attorney necessary for operating a workers' compensation claimant's practice, including staff, space, advertising, and overhead is approximately $245,000-$275,000 per year before any profit can be obtained (R. 78). He continued that his average fee per hour for dates of accidents prior to October 1, 2003[3] was at least $250.00, whereas his current average fee per hour for dates of accidents after October 1, 2009[4] is under $75.00. As applied to the statutory fee in the present case, Mr. Mallen expressed the opinion

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[2] Such an interpretation is consistent with Samaha v. State, 389 So. 2d 639 (Fla. 1980), and Khoury v. Carvel Homes South, Inc., 403 So. 2d 1043, 1046 (Fla. 1st DCA 1981), which recognized that the only interest of the state in regulating the amount of fees paid to workers' compensation attorneys are those paid by claimants, because allowing attorneys to obtain fees from benefits paid to claimants "would thwart the public policy of affording the claimant necessary minimum living funds and cast the burden of support for that person on society generally." Samaha, 389 So. 2d at 640.

[3] October 1, 2003 is the effective date of the 2003 amendment to section 440.34(1), Florida Statutes, basing the amount of attorney fees payable by the E/C on a percentage of the benefits obtained by claimant's counsel.

[4] The date of the 2009 amendment to the fee statute.

that the guideline fee of approximately $1,750.00 “is clearly confiscatory of claimant's attorney's time and is insufficient to cover even overhead expenses during the proceeding’ which took 105.45 hours of Charles H. Leo's time” (R. 79).

In support of his opinions Mr. Mallen attached to his affidavit the Florida Department of Administrative Hearings (DOAH) statistics from 2002 through 2012, compiled in the Annual Reports of the Office of the Judges of Compensation Claims (R. 107-126), showing a steady decline in both the numbers of PFBs filed and the amount of fees paid claimants’ and E/Cs’ attorneys during such period. For example, the total number of PFBs filed in 2002-03 was 150,801, compared with the total of 61,354 during the fiscal year 2011-012 (R. 125, 108). As for attorneys’ fees, the Department’s statistics disclose that of a total of $416,870,962 paid to attorneys for both claimants and the defense during the fiscal year 2011-12, $152,848,003, was paid claimants’ lawyers and $264,022,959 to E/Cs’ counsel, or a percentage of approximately 37 to 63 percent respectively (R. 108, 129). The total amount of fees paid in fiscal year 2002-03, before the effective date of the legislative “reforms” enacted by chapter 2003-412, was $430,705,423, of which nearly 49 percent consisted of fees paid to attorneys for claimants and the remaining 51 percent to those of the E/Cs (R. 128).

The above two categories of statistics, *i.e.* the total of the PFBs filed and fees paid claimants’ attorneys, generally show a decline from the period 2002-03 to 2011-

12 (R. 107-129), and support Mr. Mallen's opinion that the primary reason for the reduction in PFBs and fees was the enactment of the 2003 and 2009 amendments, thereby severely restricting the ability of injured workers to obtain attorneys to represent them in the pursuit of their claims (R. 78-79).

In addition to the above admitted evidence, an article published in *Insurance Journal Publication* was admitted into evidence as Claimant's Exhibit No. 4 (R. 127-132), stating, as a result of the passage of House Bill (HB) 941[5] during the 2012 legislative session, workers' compensation insurers would no longer be subject to the state's excess profits law which had formerly required them to refund money to their policyholders if the carriers' underwriting gains were greater than their anticipated profits by more than five percent over the three preceding calendar years. The article continued that insurers had paid out about $200 million in excess profits since 2003, which was less than one percent of the state's total premium base (R. 127).

On 7/11/13, a hearing was held on the issue of the amount of fees to be paid claimant's counsel for prevailing on the PFB (R. 13). Because the JCC was not empowered to address claimant's constitutional challenges as applied to section 440.34(1), much of the time involved at the fee hearing was devoted to building a

[5] Section 627.215, Florida Statutes (2012).

record in support of the challenge for its use by the appellate court[6] (R. 800).

The parties initially agreed that under the guideline formula of section 440.34(1), the value of the benefits obtained by claimant's counsel in succeeding on the requested authorization of a pain management physician was $10,000, resulting in a statutory fee of $1,750, and claimant's recoverable costs were $1,250 (R. 826). Additionally, the JCC allowed into evidence various exhibits, including Mr. Mallen's affidavit (Claimant's Exhibit No. 3), together with certain attachments, in particular the DOAH statistics, and the E/C's counsel waived his objection to their admission on the grounds of relevance and hearsay (R. 801-802).

At the hearing, claimant's counsel asserted that the total number of hours expended by him in prosecuting the claim was 90 hours, which was through 4/22/13, the date the parties stipulated claimant was entitled to the authorized care, whereas the E/C maintained counsel was entitled to 12.8 hours at $150 per hour, as permitted by the statutory fee schedule (R. 828-829).

Mr. Mallen was called by Mr. Leo as his expert witness, and he generally testified consistently with the statements set out in his affidavit. To support his opinion as to the reasonableness of Mr. Leo's requested fee, he reviewed claimant's

[6] See Anderson Columbia v. Brown, 902 So. 2d 838, 841 (Fla. 1st DCA 2005), recognizing that because a JCC cannot decide a constitutional challenge, a "Claimant has every right...to build his record for appeal."

file and acknowledged his familiarity with the Lee Engineering criteria. He was of the opinion that what made the case unusual and exceptional were the numerous motions, depositions, and defenses raised by the E/C, particularly that of misrepresentation by claimant,[7] which required an extensive amount of time and significant skill by claimant's counsel to overcome (R. 833).

Mr. Mallen outlined what he considered were inordinate delaying tactics by defense counsel, commenting that ordinarily litigation in a workers' compensation case can be very simply streamlined. If, however, the carrier's attorney, as in the present case, decides to delay the payment of benefits to an injured worker by raising numerous defenses, the frequent result is what Mr. Mallen described as the "Keeto effect,"[8] meaning that because of the small fee amount frequently resulting from applying the guideline statutory formula and the excessive amount of time involved

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[7] Section 440.105(4)(b)1 makes it unlawful for a person to present any false statement "for the purpose of obtaining any benefit" under chapter 440, and 440.09(4)(a) prohibits the payment of benefits to an employee who knowingly makes false statements in order to obtain benefits.

[8] See Davis v. Keeto, Inc., 463 So. 2d 368, 371 (Fla. 1st DCA 1985) ("The 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 uncollectible." Moreover, if claimant did not have the assistance of counsel, the all too often result is that he or she "'would have been helpless as a turtle on its back.'"), quoting Neylon v. Ford Motor Co., 27 N.J. Super. 511, 99 A.2d 665 (1953).

in processing claims resulting in minimal benefits, it is often difficult for an injured employee to find counsel willing to handle such claims (R. 834-835).

Mr. Mallen particularly noted that the tactics of E/C's counsel had resulted in the Keeto effect by his refusal, among other things, to admit medical records administratively; by raising a potential misrepresentation defense; thereby possibly exposing claimant to criminal sanctions; all of which increase the difficulty of handling a claim for the authorization of pain management care, which otherwise could have been resolved much more informally and expeditiously (R. 835-837).

In Mr. Mallen's opinion, an attorney such as Mr. Leo with 21 years' experience in representing injured workers, who is board certified in the field of workers' compensation and designated a "Super Lawyer," should be entitled to an hourly rate of from $250 to $350, multiplied by the number of hours (90) reasonably expended, for a total fee ranging between $22,500 to $31,500 (R. 842-843).

In turning to the DOAH statistics and their reports of ever decreasing numbers in PFBs filed from 2003, when the legislative amendments were enacted, Mr. Mallen attributed much of the decline to the Keeto effect, resulting in numerous injured workers being unable to find lawyers willing to handle their claims because of the sharply restricted fee amounts caused by the elimination of hourly fees (R. 846-847). In particular he noted an approximate 60 percent drop in PFBs filed from 2003 to 2012 (R. 847). He continued that as applied to the present case it would be very

difficult for the employee to obtain an attorney to process a claim involving the expenditure of 90 hours for the statutory fee of only $1,750, with much of the time involved in litigating multiple defensive delays and other tactics that are endemic to the system (R. 847).

Mr. Mallen next turned his attention to the article in the *Insurance Journal*, noting that following the 2012 enactment of HB 941, carriers are now allowed to keep excess profits, which in his opinion encourages them to deny workers' compensation claims (R. 850). His reason why excess profits are now greater than before is that since the 2003 legislative reforms, the insurers have been paying less in benefits; as a result they succeeded in having legislation passed in 2012, permitting them to keep the profits so acquired (R. 851-852). Mallen continued that the $200 million refunded to insureds as excess profits since 2003, representing less than one percent of the total premium base, which it can now retain, is more than all of the $152,848,03 in fees paid to claimants' attorneys during the fiscal year 2011-2012, a figure Mallen believed to be no more than one-half of one percent of the state's total premium base, thereby negating in his opinion any conjecture that a legislative suppression of claimants' attorneys' fees was necessary as a means of containing employers' expenses, but rather the fee reduction was sought for the purpose of denying injured workers the ability to obtain needed benefits (R. 853).

Mr. Mallen testified he could conceive of no compelling state interest in

regulating the amount of provisional fees paid to the claimants' bar by E/Cs, because, unlike fees paid by employees to their attorneys, which could deplete benefits owed injured workers, there is no need to provide claimants similar protection in that prevailing-party fees paid by losing E/Cs would not be separately funded from benefits owed (R. 855-56). He further opined that the statutory guideline fee, which in this case is $1,750, payable to claimant's counsel for securing his client $10,000 in benefits, despite his reasonable expenditure of 90 hours in obtaining them, was confiscatory of counsel's time and efforts (R. 867). He also considered the state had no compelling interest in requiring the claimants' bar to obtain approval for any carrier-paid fees, while allowing the defense bar to receive fees without approval, as section 440.105(3)(c) has been interpreted, in view of the clearly stated language therein requiring approval of all fees paid to any attorney (R. 869-870).

In Mr. Mallen's opinion, whatever interest the state might have in protecting the defense bar's fees over claimants' fees did not outweigh the claimant's attorney's fundamental right to be rewarded for industry, which the Florida Constitution provides is a fundamental, basic right (R. 871).

Mr. Mallen was of the opinion that because of the relatively small amount of benefits in controversy in many cases, injured workers are often unable to find attorneys willing to handle their claims, causing them to become uncollectible, as demonstrated by DOAH statistics showing the number of PFB filings down by over

60 percent during the past 10 years. Claimants' fees moreover have decreased, while those of the E/Cs have increased (R. 875-876). On cross-examination, Mallen answered that the sole reason in his opinion for the drastic decline in the number of PFB filings was the legislative amendments of 2003 and 2009, leading to injured workers being unable to find attorneys to handle their claims (R. 878).

A final order on contested attorney's fees and costs was entered on 8/1/13 (R. 674-678), which recited that because the parties had stipulated the value of pain management treatment secured by claimant's counsel was $10,000, counsel was entitled to an attorney-fee award of $1,750, pursuant to the guideline formula in section 440.34(1), together with $1,250 in costs (R. 675-676). The JCC also briefly mentioned claimant's constitutional challenges to the 2009 fee statute, stating that although he lacked the inherent judicial power to decide such issues, he had permitted the parties to build a record for possible challenges on appeal (R. 677).

On 8/2/13, a motion to vacate and/or for rehearing was filed, asserting that the order had failed to address the distinctions between the supreme court's opinion in Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008), and the district court's opinion in Kauffman v. Community Inclusions, 57 So. 3d 919 (Fla. 1st DCA 2011), as well as other constitutional arguments raised in the proceedings before the JCC (R. 669-673). On 8/6/13, the JCC entered the amended order which is the subject of the present appeal, approving the same awards for fees and costs as in the prior order, and

in addition he acknowledged his agreement with claimant's attorney

> that Kauffman only addressed the facial constitutionality of the statute, and does not foreclose an "as applied" challenge under Florida's "separation of powers" doctrine pursuant to Makemson. No Florida court has addressed the applicability of Makemson to a workers' compensation attorney's fee cap (though courts in Minnesota and Delaware have specifically applied Makemson to "separation of powers" challenges to workers' compensation attorney's fee caps in those states). See Joseph v. Oliphant Roofing Co., 711 A.2d 805, at 810-11 (Del. Super. 1997); Irwin v. Surdyk's Liquor, 599 N.W. 132 (Minn. 1999).

(R. 7-8.)

The JCC's amended order also expressed its disagreement with the Kauffman opinion's statement that although Murray v. Mariner Health had expressly disapproved decisions[9] of the First District which had rejected challenges to the 2003 amended fee statute, the supreme court neither decided any constitutional issues nor did it "cast any doubt on the reasoning used in [those decisions] in rejecting constitutional claims like those made here." Id. at 921. The order continued that while Murray did not explicitly reach the constitutional claims before it, but decided the case on the basis of statutory construction, it did "'so as to avoid an unconstitutional result' Murray, supra, at 1056" (R. 9). The order concluded with the following observation: "The only logical reason the Supreme Court would make the

[9] Campbell v. Aramark, 933 So.2d 1255 (Fla. 1st DCA 2006); Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506 (Fla. 1st DCA 2006); and Wood v. Florida Rock Industries, 929 So. 2d 542 (Fla. 1st DCA 2006).

above statements is if it had serious concerns about the constitutionality of the attorney's fee cap as construed in those [First District] cases." Id.

On 8/28/13, claimant appealed the fee order to the First District Court of Appeal, and on 2/18/14, the court affirmed the order, while certifying to this court as a question of great public importance the same question certified by it in Castellanos v. Next Door Company, 124 So. 3d 392 (Fla. 1st DCA 2013). See Richardson v. Aramark/Sedgwick CMS, 134 So. 3d 1133, 1134 (Fla. 1st DCA 2014). On 11/7/14, this court accepted jurisdiction and ordered briefing on the merits.

SUMMARY OF ARGUMENT

Issue: The question asked in the present case is whether the inflexible fee cap required by section 440.34(1), and section 440.105(3)(c), Florida Statutes (2009), disallowing approval of any attorney fee exceeding such cap, is, as applied to facts showing a reasonable expenditure of 90 hours by the attorney for the claimant and yielding an hourly fee of $19.44, constitutionally valid?

Sub-Issue A: The separation of powers provision of the Florida Constitution, as interpreted by this court, instructs that a judicial tribunal can depart from a statutory fee formula in an extraordinary case where to fail to do so would be confiscatory of the attorney's time, energy, and talents. Claimant's expert witness testified that there was no compelling reason for the enactment of an inflexible guideline fee schedule as a means of protecting employer workers' compensation

premiums from exorbitant increases. Instead, the evidence showed a decline in both the number of PFBs filed and the amount of fees paid claimants' attorneys since the enactments of the 2003 and 2009 amendments, which restricted such fees to the guideline formula provided in section 440.34(1), as support for the expert's opinion that the application of the statutory guideline schedule results in a fee that is confiscatory of claimant's attorney's time, as well as an inability of injured employees to obtain counsel to handle their claims.

The E/C moreover failed to offer any evidence rebutting the testimony of claimant's expert opining that the primary reason for the reductions was the enactment of the 2003 and 2009 amendments to the fee statute, which caused injured workers to become unable to secure representation in the pursuit of their claims. If claimants are unable to obtain legal assistance, it is moreover highly unlikely, given the complexity of the workers' compensation system as it presently exists, that unrepresented injured workers would be able to prevail on their claims for benefits.

The inherent judicial doctrine has not been applied in Florida only to criminal cases but has been extended to dependency and parental termination cases as well, and to executive clemency proceedings by statute. The law is clear that once the legislature creates a statutory right to attorney's fees, it must do so in a non-discriminatory manner. The fee amount allowed cannot be illusory. Yet, the amount resulting from the application of the statutory fee schedule in the present case,

yielding an hourly fee of $19.44, was precisely that. The evidence at the fee hearing showed the fee awarded was insufficient for counsel to satisfy even his overhead office expenses. Under the circumstances, it is submitted that the appropriate resolution of this case is for the court to declare the challenged statutes unconstitutional as applied and to construe their mandatory language as only directory.

Sub-Issue B: This alternative sub-issue pertains to the question of whether statutes that allow no departure from a fee schedule restricting an attorney's fee award to no more than $1,750, despite evidence in the record that claimant's counsel reasonably spent 90 hours in prevailing on a claim for benefits, are unconstitutional as applied because they are in violation of the Florida Constitution's mandate guaranteeing all natural persons the inalienable right to be rewarded for industry. As this court explained in State v. J.P., 907 So.2d 1101, 1109 (Fla. 2004), a fundamental right is one that "has its source in and is explicitly guaranteed by the federal or Florida Constitution." Once a fundamental right is implicated, the statutes challenged are subjected to the test of strict scrutiny, meaning a showing must be made by those seeking to uphold the statutes – not the challengers – that they are necessary to promote a compelling governmental interest, are narrowly tailored to advance that interest, and accomplish their goal through the use of the least intrusive means. Id. at 1110.

The First District Court in Jacobson v. Southeast Personnel Leasing, Inc., 113 So.3d 1042, 1049 (Fla. 1st DCA 2013), identified the following compelling state interests necessary for validation of the statutes there under attack, which are the same statutes now challenged: (1) the general regulation of attorney's fees, (2) lowering the cost of the overall workers' compensation system, and (3) protecting the body of workers' compensation benefits from depletion. The court concluded its analysis by finding that none of the possible interests were compelling and ruled the statutes invalid as applied. Id. at 1045. It should be noted that the fundamental right involved in Jacobson was claimant's right to freedom of association under the First Amendment of the United States Constitution.

By applying a similar analysis to the statutes at bar, they also fail the test of strict scrutiny. The evidence offered and admitted in support of claimant's constitutional challenge showed both declining attorneys' fees paid claimants' attorneys and declining PFBs since the date of the enactment of the 2003 legislative reforms through the latest reporting period of 2011-12, as well as the passage of legislation allowing insurers to no longer refund to their policyholders excess profits of $200 million, which were more than the $152,848, 003 amount paid claimants' attorneys during the fiscal year 2011-12. As a result, no compelling state interest was demonstrated to support the argument that a fee cap was needed to reduce the cost of the workers' compensation system by, among other things, reducing the cost of

employers' workers' compensation insurance premiums

In De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So. 2d 204, 206 (Fla. 1989), the Florida Supreme Court applied the strict scrutiny test to a statute that impaired a deceased worker's right to be rewarded for industry. In doing so, it declared: "Florida's worker's compensation program was established . . . to see that workers . . . were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents." Id. at 206.

ARGUMENT

ISSUE: ARE SECTION 440.34(1), FLORIDA STATUTES (2009), WHICH LIMITS CLAIMANT'S COUNSEL TO AN ATTORNEY'S FEE IN THE MAXIMUM AMOUNT OF $1,750, AND SECTION 440.105(3)(c), FLORIDA STATUTES (2009), FORBIDDING APPROVAL OF A FEE MORE THAN THAT ALLOWED BY SECTION 440.34(1), UNCONSTITUTIONAL AS APPLIED TO FACTS SHOWING THAT COUNSEL REASONABLY EXPENDED 90 HOURS IN PREVAILING ON A CLAIM FOR REQUESTED BENEFITS?

Standard of Review: This court's review standard of a constitutional challenge is *de novo*. See Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).

Analysis: The two challenges to the 2009 version of sections 440.34(1) and 440.105(3)(c) now before the court, are whether those statutes, as applied to facts showing they inflexibly limit a prevailing party's attorney's fee to $1,750, despite the reasonable expenditure by claimant's counsel of 90 hours, which equates to an hourly fee of $19.44, constitute violations of the separation of powers provisions of Article

II, section 3, and Article I, section 2 of the Florida Constitution, delineating the basic rights accorded all natural persons, particularly the right to be rewarded for industry.

As of the time claimant suffered his compensable workers' compensation injury on 10/26/09, section 440.34(1) then provided, as it does currently:

> A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of the benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. The judge of compensation claims shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter which provides for an attorney's fee in excess of the amount permitted by this section. The judge of compensation claims is not required to approve any retainer agreement between the claimant and his or her attorney. The retainer agreement as to fees and costs may not be for compensation in excess of the amount allowed under this subsection or subsection (7).

Section 440.105(3)(c) provides:

> It is unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims or by the Deputy Chief Judge of Compensation Claims.

The above statutes should be measured by the following provisions of the Florida Constitution. The separation of powers provision in Article II, section 3 states: "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."

In addition, the basic rights declaration, Article I, section 2, provides:

> **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**, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. **No person shall be deprived of any right because of** race, religion, national origin, or **physical disability**.

(Emphasis added.)

A. The Application of the Fee Schedule Provided in Section 440.34(1), Florida Statutes (2009), is, as Applied to the Facts, a Violation of the Separation of Powers Doctrine.

The first Florida case to hold a statutory fee cap violates the separation of powers doctrine as applied appears to be Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), in which this court addressed the validity of a statute that set inflexible fee caps on compensation provided to attorneys who represented defendants accused of crimes at trial and their appeals therefrom. Although there is

language in part of the opinion suggesting that the court's decision was based on the Sixth Amendment right of a person charged with the commission of a crime "to have the assistance of counsel for his defence," id. at 1112, the court's opinion otherwise clarified that its paramount concern was the statute's intrusion upon a judicial function. This point is shown by the following:

> [W]e find the statute unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused. At that point, the statute loses its usefulness as a guide to trial judges in calculating compensation and becomes an oppressive limitation. As so interpreted, therefore, the statute impermissibly encroaches upon a sensitive area of judicial concern, and therefore violates article V, section 1,[10] and article II, section 3 of the Florida Constitution.

Id. In addition to holding the statute unconstitutional as applied for violating the separation of powers provision, this court, as it had done previously in Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978), found the statutory fee maximum[11] "directory rather than mandatory in nature." Id. at 1115.

In reaching its decision the Makemson court followed the same analysis earlier applied by it in Rose:

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its

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[10] This section limits judicial power to the supreme court, district courts of appeal, circuit courts and county courts.

[11] The challenge in Rose was directed to statutory maximums on witness compensation and travel expenses.

> jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safeguarding of fundamental rights.

Rose, 361 So. 2d at 137 (emphasis added).

The Makemson court concluded by stating, "[I]t is within in the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has defended the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents" Id. at 1115. Makemson, as stated, reached this result by construing the statutory fee language directory rather than mandatory. It is submitted that this court could similarly follow this approach as a means of carrying out the legislative intent recognizing that the Workers' Compensation Law shall be administered "in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments." § 440.015, Fla. Stat. (2009).

Two years following the court's decision in Makemson, the Second District Court of Appeal in White v. Bd. of Cnty. Commiss'rs of Pinellas Cnty., 524 So. 2d

428 (Fla. 2d DCA 1988), denied a petition for writ of certiorari sought from an order refusing to award fees in excess of the statutory maximum to an attorney who had represented a defendant accused of a capital crime. In a dissenting opinion, Judge Lehan explained the reason why the inherent judicial powers doctrine should be used to test the validity of the statutory fee cap in the following terms:

> Makemson relied upon the inherent powers doctrine. Under that doctrine, the courts not only have the inherent power to regulate the practice of law, but also have the power to prohibit legislative regulation of the practice of law. "[C]ase law is overwhelmingly in support of" the proposition that any "invasion of the legislature into an area within the inherent and exclusive authority" of state supreme courts is "impermissible." Pennsylvania Public Utilities Comm'n v. Thornburgh, 62 Pa.Commw. 88, 434 A.2d 1327 (Pa. Commw. Ct. 1981), aff'd, 498 Pa. 589, 450 A.2d 613 (Pa. 1982).
>
> The cornerstone of the doctrine of the inherent powers of the courts to regulate the practice of law is the doctrine of separation of powers. An attorney is part of the judicial system which is, of course, a separate, independent branch of government. Rules Regulating the Florida Bar (Preamble to ch. 4, Rules of Professional Conduct), 61 Fla.B.J. 64, 65 (Sept. 1987). An attorney is "an officer of the Court and a member of the third branch of government." DeBock v. State, 512 So.2d 164, 166 (Fla. 1987). To fulfill the separation of powers doctrine the inherent powers doctrine may be invoked when there is the necessity to protect the independence of the judicial branch from the executive or legislative branches so as to provide the checks and balances to which the success of this country's form of government is to a large extent attributable.

Id. at 431.

Judge Lehan's dissenting opinion was expressly approved by this court in its reversal of the majority's decision. See White v. Bd. of Cnty. Commiss'rs of Pinellas

Cnty., 537 So. 2d 1376, 1378 (Fla. 1989). As the court had decided in Makemson, White held the statutory maximum fee cap unconstitutional as applied. Id. at 1379.

The broad sweep of the court's inherent power to prohibit legislative incursions into the court's regulation of the practice of law does not end with a criminal defendant's Sixth Amendment right to the assistance of counsel. As Judge Lehan's dissent points out: "[T]he inherent powers doctrine may be invoked when there is the necessity to protect the independence of the judicial branch from the executive or legislative branches so as to provide the checks and balances to which the success of this country's form of government is to a large extent attributable." White, 524 So. 2d at 431.

The doctrine's applicability was recently mentioned in Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261, 271-72 (Fla. 2013), in a challenge brought to section 27.5303(1)(d), Florida Statutes (2007), which prohibited a trial court from granting the public defender's motion to withdraw based on "conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client," where this court ruled the statute could be unconstitutional in its application as a violation, among other things, of the separation of powers doctrine by legislatively interfering with the judiciary's inherent authority to provide counsel and the Florida Supreme Court's exclusive control over ethical rules governing lawyer conflicts of interest.

Article V, section 15 of the Florida Constitution places in the supreme court the power "to regulate the admission of persons to the practice of law and the discipline of persons admitted." See also In re The Florida Bar, 316 So. 2d 45, 47 (Fla. 1975) ("The authority for each branch to adopt an ethical code has always been within the inherent authority of the respective branches of government. . . . The judicial branch has both a code of conduct for the judiciary and a code of professional responsibility for lawyers. . . .").

Pursuant to its powers of regulation, Rule Regulating the Florida Bar 4-1.5(b)(1)(A) was adopted, which, among the factors to be considered in assessing a reasonable fee, includes "the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly." This court in Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454, 458-59 (Fla. 1968), ruled those factors should also be considered in determining reasonable fees in workers' compensation cases. The legislature has, however, since abrogated that judicially approved factor through its enactment of section 440.34(1), Florida Statutes (2009), which deletes any reference to the time and labor required by claimant's counsel, contrary to the admonition by this court in White, 537 So. 2d 1376, 1380, that "the focus should be on the time expended by counsel and the impact upon the attorney's availability to serve other clients, not whether the case was factually complex."

As for the inherent judicial power to regulate the amount of the fee awarded in a workers' compensation case, a decision of the Minnesota Supreme Court is highly instructive. In Irwin v. Sturdyk's Liquor, 599 N.W. 2d 132 (Minn. 1999), the court noted that a finding had been made at the trial level, which it approved, that the statutory contingent fee award failed to reasonably compensate claimant's attorney. The court continued that the Minnesota fee statute, as does Florida's, prohibited any deviation from the statutory maximum. As a result it decided that the statutory fee cap was an unconstitutional violation of separation of powers, as applied, stating:

> Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees. This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers. . . . Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional.

Id. at 142.

It is interesting to note that in reaching its decision, the Minnesota Supreme Court specifically referred to Makemson, observing that while the Florida court had decided that the statutory fee maximums as applied interfered with the accused's Sixth Amendment right to counsel, it had also concluded the statutory restrictions were "a violation of the Florida Constitution's separation of powers provision." Id. at 146 n.3.

Moreover, in addressing the dissent's assertion that because of the American Rule forbidding an award of fees against the unsuccessful party in the absence of a statute or contract, it is the legislature, not the courts, which has the power to determine when, or if, an attorney should be awarded attorney fees against unsuccessful litigants, the Irwin majority answered that "the American Rule applies only when attorney fees are not provided for by statute. See Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 257, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)." Id. at 146 n. 3.

In addressing the dissent's argument that the fee statute should be upheld because "most states have statutory restrictions on workers' compensation fees[,]" id. at 146, the court replied "that the majority of state statutes include a provision whereby attorney fees may be increased when necessary, and . . . those statutes which do not include such a provision almost universally do not make the attorney's acceptance of additional compensation a crime, as does Minn. Stat. § 176.081, subd. 10 (1998)." Id. at 146 n.3. Section 440.105(3)(c), Florida Statutes,[12] similarly makes it unlawful for an attorney to receive a fee not approved by the JCC, which, as applied to the fee litigated in the present case, could not be approved because it exceeded the fee schedule.

[12] Section 440.105(3) provides that a violation the above provision is a misdemeanor of the first degree.

Florida jurisprudence also follows the America rule regarding the right of the prevailing party to recover attorney's fees from the losing party, meaning that in the absence of statutory or contractual authority, the prevailing party is not entitled to be awarded fees at the expense of the loser. See Dade County v. Pena, 664 So. 2d 959 (Fla. 1995). Whether the legislature is empowered to repeal the statutory right to provisional prevailing-party fees is not an issue now before the court. As of the date of claimant's compensable accidental injury, section 440.34 continued to accord claimant such substantive right, and the rule has long been established that the parties' respective rights under the Workers' Compensation Law are fixed at the time of an employee's compensable injury. See Sullivan v. Mayo, 121 So. 2d 424, 428 (Fla. 1960).

Another rule applicable to the facts in the present case is that once the legislature confers a statutory right, it must furnish such right to all persons without invidious discrimination or run afoul of the equal protection clause. Cf. Florida Dep't of Transp. v. E.T. Legg & Co., 472 So. 2d 1336, 1337-1338 (Fla. 4th DCA 1985). Accord Rini v. State, Dep't of Health & Rehabilitative Servs., 496 So. 2d 178, 180 (Fla. 1st DCA 1986). In the present case, although the legislature has extended to claimant a statutory right to attorney's fees, it has required, through the application of section 440.105(3)(c), only claimant's counsel, not the E/C's, to seek approval by the JCC of the fee amount to be paid.

The above rule is illustrated by Pullen v. State, 802 So. 2d 1113 (Fla. 2001), in which appointed counsel sought to withdraw from representing a patient seeking review of an involuntary civil commitment order under the Baker Act. Before allowing the attorney's withdrawal, this court required his compliance with the procedure formulated in Anders v. California, 386 U.S. 738 (1967), as to defense counsel's withdrawal from a criminal appeal. In so deciding, Pullen particularly observed that although "the federal Constitution does not require the states to create appellate review . . . constitutional constraints are imposed on the state when it chooses to do so." Id. at 1118.

An example of a case involving a statutory – not a constitutional – right to counsel is Remeta v. State, 559 So. 2d 1132 (Fla. 1990), in which a private attorney, appointed to represent Remeta at his executive clemency proceeding, sought fees in excess of those set by the statute. On appeal, this court ruled, in rejecting the State's argument that the court's inherent judicial authority did not extend to appointments of counsel in executive clemency proceedings, that the statutory right to counsel in clemency proceedings for death penalty cases "necessarily carries with it the right to have effective assistance of counsel." Id. at 1135.

The same reasoning applies to the facts in the present case. The statutory right to counsel in workers' compensation cases necessarily carries with it the right of the injured worker to have access to counsel. Claimant's statistical evidence at the fee

hearing, however, showed the availability of representation had been substantially reduced over the 10-year period following the legislative reforms beginning in 2003. Claimant's expert witness attributed a substantial portion of the decline to the enactment of the statutory fee schedule prohibiting JCCs from exceeding the amounts specified therein.

Although a legislative provision is not presumed to be illusory, the maximum fee allowed by the schedule in this case, resulting in an hourly fee of $19.44, is precisely that. Under the circumstances the evidence patently supports Mr. Mallen's opinion that the fee awarded "is clearly confiscatory of claimant's attorney's time and is insufficient to cover even the overhead expenses during the proceeding" (R 79).

The inherent judicial doctrine has not been confined in Florida jurisprudence only to criminal cases, but it has been extended to parental termination and dependency cases as well. See In the Interest of D.B., 385 So. 2d 83 (Fla. 1980), and Bd. of Cnty. Comm'rs of Hillsborough Cnty. v. Scruggs, 545 So. 2d 910 (Fla. 2d DCA 1989). In D.B. and Scruggs, the courts observed that while there is no fundamental, constitutional right to counsel in dependency proceedings, the right to same might arise through the application of the Due Process of Law Clause, depending on the nature or complexity of the proceeding required by statute. In Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968), this court noted that "[t]he Workmen's Compensation Act was originally passed as

administrative legislation to be simple, expeditious, and inexpensive so that the injured employee, his family, or society generally, would be relieved of the economic stress resulting from work-connected injuries." The simplicity of the system as originally designed has since evolved into an extremely complex mechanism for obtaining workers' compensation benefits, as the First District observed in Davis v. Keeto, Inc., Inc., 463 So. 2d 368, 371 (Fla. 1st DCA 1985) ("Without the assistance of competent counsel, claimant would similarly have been 'helpless as a turtle on its back,' . . .and could very well have not recovered her impairment benefits.").

The following language in Scruggs has particular relevance to the facts in the present case:

> Although the right to counsel in criminal cases emanates from the sixth amendment, and in civil dependency and termination of parental rights proceedings, from due process considerations, counsel is required in each case because fundamental constitutional interests are at stake. See In the Interest of D.B., 385 So.2d at 90 (preserving the family unit and raising one's children are important and fundamental constitutionally protected interests); Makemson, 491 So.2d at 1113 (sixth amendment's guarantee of effective assistance of counsel is fundamental and important).

Id. at 912 (emphasis added).

It clearly appears from a review of pertinent Florida case law that Article V courts have inherent judicial power under the separation of powers doctrine to invalidate statutes which inflexibly and arbitrarily restrict fees to a specified, maximum amount, regardless of the time expended by the party's attorney, and that

power is not limited only to criminal cases inhering in the Sixth Amendment right to counsel.

To date this court has made no exception to the inherent judicial power of the judiciary to regulate the amount of attorney's fees to be paid a party because the case in litigation is civil rather than criminal. In fact, pertinent language in Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008), which decided that the 2003 amended version of section 440.34(1) was ambiguous in determining that the fee schedule was not the sole means for awarding claimant's counsel an attorney's fee, strongly suggests that if this court had ruled the statutory language prevented departure from the fee schedule, it would have decided the statute was unconstitutional as applied to facts showing the schedule resulted in an hourly fee of $8.11.

Despite Murray's failure to address any of the constitutional issues raised, the court otherwise stated that for the purpose of avoiding a holding that the statute was unconstitutional, it would interpret the statute in a way to avoid any constitutional infirmity. In so doing, it quoted State v. Giorgetti, 868 So. 2d 512, 518 (Fla. 2004), stating: "'We are also obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional.'" Id. at 1053.

An additional reason for concluding the Murray court decided the case based on statutory interpretation in order to avoid a decision on the statute's validity is demonstrated by facts showing that only 28 days before Murray was decided, the

supreme court issued its opinion in Maas v. Olive, 992 So. 2d 196 (Fla. 2008) (Olive II), which construed a somewhat similar statutory fee limitation as not precluding a trial judge from exceeding the maximum fee cap imposed on the services of capital collateral representatives on behalf of death-row inmates.

The history of the litigation leading up to the court's decision in Olive II shows that the legislature, similar to its action in amending section 440.34 following the supreme court's decision in Murray, also amended the fee statute (section 27.7002) shortly after the supreme court decided Olive v. Maas, 811 So. 2d 644, 654 (Fla. 2002) (Olive I), which had held "trial courts are authorized to grant fees in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collateral cases." Olive II, in addressing the state's argument that the rationale of Olive I was no longer effective because the legislature had since enacted section 27.7002 for the purpose of clarifying its intent that the fee caps could not be exceeded under any circumstances, answered:

> While this may have been the Legislature's intent, such an interpretation of the statute would render it unconstitutional. . . . [T]he decision in Olive I rests on the courts' inherent power to ensure adequate representation for death row inmates in postconviction challenges. "[The] courts have authority to do things that are absolutely essential to the performance of their judicial functions." Rose v. Palm Beach County, 361 So.2d 135, 137 (Fla.1978). This authority emanates from the courts' constitutional powers 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. ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts.").

Id. at 203-204.

This court in Olive II concluded by interpreting the fee statute "as permitting compensation in excess of the statutory fee caps where a trial court exercises its inherent authority to grant such fees in light of extraordinary circumstances in a case." Id. at 204. While claimant's expert in the present case opined that the litigation of a claim for pain management care does not ordinarily involve an extraordinary amount of time, the case became so because of the numerous defensive ploys raised by the E/C's attorney, particularly its misrepresentation defense, which required an extensive amount of time and skill by claimant's counsel to overcome (R. 833).

The facts in Murray and Olive II are strikingly similar. In both cases the legislature indicated its intent that the fee caps could not be exceeded; in both cases, however, this court avoided directly reaching the constitutional issues raised by interpreting the language in the respective statutes as allowing the statutory fee limitations to be exceeded.

An out-of-state case, Joseph v. Oliphant Roofing Co., 711 A.2d 805, 810-11 (Del. Super. 1997), specifically cited Makemson in addressing a separation of powers challenge to a Delaware statute which had imposed a fee cap on workers' compensation fees awarded claimants' counsel. Although the court upheld the cap

because the record did not show that counsel's time, energy, or talents were confiscated by its application, it nonetheless acknowledged that an unreasonably low cap could materially impair the ability of counsel to effectively represent his or her client.

A somewhat similar result was reached in United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990), in which the Court, while rejecting a challenge to the Department of Labor's administration of the Black Lung Benefits Act of 1972 (30 U.S.C. § 901, et seq.), prohibiting an attorney's acceptance of fees for the representation of claimants, unless such fees are approved by the Department or a court, nonetheless recognized that a contingency fee cap may impact a person's federal due process rights if the statutory scheme affects the person's ability to obtain counsel. The contention made by the affected attorney was that the Secretary of Labor's manner of implementing the fee restriction violated the Due Process Clause of the Fifth Amendment because the delay in payment under the Act's regulatory scheme rendered qualified attorneys unavailable, and thereby deprived claimants of legal assistance in the prosecution of their claims. The Court held the challenger had failed to satisfy his evidentiary burden of showing that the statutory scheme made attorneys unavailable to prospective clients.

Unlike Triplett, and Joseph, competent and substantial evidence admitted in the present case supports a fee award in an amount more than that allowed by the

statutory schedule. Among other things, statistical evidence obtained from the DOAH shows a 60 percent decline in claims filed since the enactment of the legislative amendments beginning in 2003 (R. 108, 125), and a substantial decrease in attorneys' fees paid during the same period, from 49 percent in 2002-2003 to 37 percent of the total fees paid in 2011-2012 (R. 108, 128-29). This evidence was offered as support for Mr. Mallen's opinion that the statutory reductions were the primary reason injured workers were increasingly unable to find attorneys willing to handle their claims during such time (R. 78-79).

When the above evidence is coupled with that showing the application of the statutory fee schedule results in a fee that is clearly confiscatory of the lawyer's time, energy, and talents, claimant submits this court should follow the same approach it took in Makemson by holding the mandatory language in the two statutes to be only directory, thereby authorizing the administrative tribunal to exceed the fee schedule and award counsel a fee which is not confiscatory of his efforts.

B. In the Alternative, the Provisions of Sections 440.34(1), and 440.105(3)(c), Florida Statutes (2009), By Restricting Claimant's Attorney to the Amount Provided in Section 440.34(1), Regardless of the Amount of Time Required to Successfully Prosecute the Claim for Benefits, Are, As Applied to the Facts in The Present Case, Invalid As a Violation of Counsel's Basic, Fundamental Right to Be Rewarded for Industry.

Claimant raises as an alternative challenge to sections 440.34(1) and 440.105(3)(c) that they are, as applied to the facts, a violation of claimant's counsel's

fundamental right to be rewarded for industry, which, under Article I, section 2 of the Florida Constitution is a basic, fundamental right that has its source in and is explicitly guaranteed by the federal or Florida Constitution. See State v. JP, 907 So. 2d 1101, 1109 (Fla. 2005). A statutory deprivation of such right subjects the disputed statutes to the heightened equal protection test of strict scrutiny -- not rational basis.[13] See De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So.2d 204, 206-207 (Fla. 1989). To survive strict scrutiny, the burden is placed on the state, not the challenger, to establish that the law is "[a] necessary to promote a compelling governmental interest and [b] must be narrowly tailored to advance that interest," and "[c] accomplishes its goal through the use of the least intrusive means." J.P., 907 So. 2d at 1110.

In this regard, the analysis the court used in the very recent case of Estate of McCall v. U.S., 134 So.3d 894 (Fla. 2014) (per Lewis, J., with one justice concurring and three justices concurring in result), in holding the statutory cap (section 766.118) on wrongful death noneconomic damages recoverable in medical malpractice actions violates the right to equal protection under the rational basis test because it imposes

[13] The burden a challenger must surmount under the rational basis standard is much more difficult than strict scrutiny because the rule applied to such standard is that the statute will be upheld "[i]f the goal is legitimate and the means to achieve it are rationally related to that goal." Fraternal Order of Police v. Dep't of State, 392 So. 2d 1296, 1302 (Fla. 1981).

unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants, is highly instructive to the facts in the present case. Although the court explained that unless a suspect class or fundamental right protected by the Florida Constitution is implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge, and in the present case the fundamental right to be rewarded for industry is protected by Article 1, section 2, it is doubtful the statutes at issue here could even withstand scrutiny under the rational basis standard. Observe the following:

> Section 766.118, Florida Statutes, has the effect of saving a modest amount for many by imposing devastating costs on a few — those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction simply based upon the existence of the cap. Under the Equal Protection Clause of the Florida Constitution, and guided by our decision in Phillipe [St. Mary's Hospital, Inc. v. Phillipe, 769 So.2d 961 (Fla.2000)], we hold that to reduce damages in this fashion is not only arbitrary, but irrational, and we conclude that it "offends the fundamental notion of equal justice under the law."

Id. at 903 (quoting Phillipe, 769 So. 2d at 972) (emphasis added). Similarly, while the application of the fee schedule may result in a reasonable, if not generous, fee award in a possible rare case where the benefits are substantial and the time involved insubstantial, the inflexible fee demanded by the schedule in a number of cases such as the present, without factoring in any of the time reasonably expended by the injured worker's lawyer, "is not only arbitrary, but irrational."

The First District Court in Jacobson v. Southeast Personnel Leasing, Inc., 113 So. 3d 1042, 1049 (Fla. 1st DCA 2013), reviewed strict scrutiny challenges to the same statutes as those challenged here. As to the first possible compelling government interest, suggested to be the basis of the legislation at issue there, *i.e.*, the general regulation of attorney fees, the court noted from its review of pertinent cases that such interest pertained "specifically to the state's interest in protecting the amount of benefits secured by an injured worker under chapter 440 from depletion to pay a lawyer's bills," and that no showing had been made that such interest was applicable to the facts before it.

In the case at bar, the challenge raised is to the amount of the provisional fee aspect of section 440.34(1), *i.e.* the fee to be paid by the E/C as the unsuccessful party. Similar to the facts in Jacobson, because claimant needs no protection to keep her benefits secure from depletion for the reason she is under no obligation to pay her lawyer's fees, the legislature has failed to demonstrate any compelling interest for regulating the amount of attorney's fees payable to her attorney.

The lack of any such interest is also shown by the disparate manner in which section 440.105(3)(c) has been construed, *i.e.* by requiring only JCC approval of any fee to be received by claimant's attorney, whether from the client or to be paid by the E/C, while exempting E/C's counsel from similar scrutiny. See Jacobson v. Southeast Personnel Leasing, Inc., 113 So. 3d 1042, 1046 (Fla. 1st DCA 2013) ("Even though

the plain language of this subsection does not limit its application only to attorneys representing claimants, it has long been interpreted as such in practice."); Alstatt v. Fla. Dep't of Agriculture, 1 So. 3d 1285, 1286 (Fla. 1st DCA 2009) ("We find it unnecessary to decide whether the legislature intended section 440.105(3)(c) to apply to requests for payments made by attorneys representing employers, carriers and servicing agents, as well as to those made by attorneys representing claimants."

A second governmental interest mentioned in Jacobson, 113 So. 3d at 1049, decreasing the cost of workers' compensation premiums by reducing the amount of attorney fees to be paid by E/Cs, has not been offered by the state in rebuttal to claimant's proof showing that the legislature had repealed the excess profits tax on carriers, the proceeds of which had previously been refunded to the employers responsible for paying the premiums (R 127). In addition, DOAH statistics in evidence show a steady decline in the amount of fees paid claimants' lawyers over the past 10 years. For example, of the total $416,870,962 paid to both claimants' and defense attorneys for the fiscal year 2011-12, $152,848,003 was paid claimants' attorneys and the remaining $264,022,959 to defense counsel, or a percentage of approximately 37 to 63 percent (R. 108, 129). In contrast, the amount of fees paid in fiscal year 2002-03, before the effective date of the legislative amendments enacted by chapter 2003-412, was $430,705,423, of which nearly 49 percent consisted of fees paid to claimants' attorneys, or approximately $211,045,657, with the remaining 51

percent to carriers' counsel (R. 128).

Jacobson noted a third suggested governmental interest was "protecting the body of workers' compensation benefits from depletion." Id. at 1049. Once again, however, the state failed to show that the amendments to section 440.34 in 2009 were motivated by that interest. Among other things, the number of PFBs declined from 127,611 in fiscal year 2003-2004 to 61,354 in 2011-2012 (R 128). Moreover, while the evidence admitted at the fee hearing showed an overall decline in the amount of fees paid claimants' counsel, the reverse was demonstrated as to carriers' attorney fees, which generally disclosed an increase in the amounts paid, from a percentage of 51.1 percent of the total in 2002-2003 to 63.3 percent in 2011-2012 (R 128-129).

Claimant's expert, David Mallen, testified that the $200 million refunded to insureds as excess profits since 2003, representing less than one percent of the total premium base, which it can now retain, is more than all of the $152,848,03 in fees paid to claimants' attorneys during the fiscal year 2011-2012, a figure Mallen believed to be no more than one-half of one percent of the state's total premium base, thereby negating in his opinion any conjecture that a legislative suppression of claimants' attorneys' fees was necessary as a means of containing employers' expenses, but rather the fee reduction was sought for the purpose of denying injured workers the ability to obtain needed benefits (R. 853).

If this court were to declare the guideline statutory fee invalid as applied with

the result that the amount of claimants' attorneys' fees returned to their 2003 level of $211,045,657,[14] or approximately $60 million more than that paid claimants' attorneys in fiscal year 2011-12, the total of such fees would constitute less than one percent of the entire premium base (R. 852), a cost which could easily be offset by the legislative repeal of HB 941, requiring insurers once again to refund excess profits to their insureds.

In De Ayala, the court, in evaluating the validity of a statute (section 440.16(7), Florida Statutes (1983)), limiting the amount of death benefits available to certain nonresident alien beneficiaries to $1,000, rather than the $100,000 otherwise afforded resident and other alien beneficiaries, applied a strict scrutiny analysis to the statute because it impacted the deceased worker's right to be rewarded for industry. As a result, the statute was invalidated because it impinged too greatly on such fundamental, constitutional right.

It appears that the primary basis for the court's decision in De Ayala was that "Florida's worker's compensation program was established . . . to see that workers . . . were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents." Id. at 206. The link between unreasonable

[14] This amount is as reported in the DOAH statistics approximately 49 percent of the total amount of fees ($430,705,423) paid to both claimants' and E/Cs' attorneys for the fiscal year 2003-04 (R. 128).

statutory fee caps and the resulting lack of representation for injured workers has long been judicially recognized. As the supreme court observed in Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986): "[W]e must not lose sight of the fact that it is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus. We find the two inextricably interlinked."

Under the circumstances the DOAH statistics and the *Insurance Journal* article admitted into evidence support the opinion of claimant's expert witness that the state failed to meet its burden of showing a compelling interest in enacting fee caps as applied to the facts at bar for the purpose of curtailing the cost of the workers' compensation system.

It should also be pointed out that the application of the strict scrutiny test requires the state to demonstrate not only a compelling state interest in the enactment of the statute challenged, but that such interest was accomplished through the least intrusive means. In State v. J.P., 907 So. 2d 1101, 1118 (Fla. 2004), the supreme court concluded that although challenged municipal ordinances had satisfied the initial compelling governmental interest prong of the strict scrutiny test, no showing was made that they were narrowly tailored to advance such interest "because the broad coverage of the curfews provided in the ordinances included otherwise innocent and legal conduct by minors even where they had the permission of their parents, and the ordinances imposed criminal penalties for curfew violations."

A final judgment of the circuit court also used a similar analysis in holding section 466.0282, Florida Statutes (2008), unconstitutional by requiring a disclaimer be placed on the advertising of credentials by a dental professional association because it impinged too greatly on the dentists' fundamental right to be rewarded for industry. See Ducoin v. Ros, No. 2003-CA-696 (Fla. 2nd Cir. Ct. Apr. 3, 2009).

In the present case, even if a showing was made of a compelling state interest in the passage of the statutes under attack, no demonstration is evident that the statutes were narrowly tailored to accomplish a state interest, such as reducing the cost of insurance premiums. It is claimant's position that goal could be achieved by means other than the draconian measure of inflexible fee caps, such as, for example, by the legislature requiring insurers once again to reduce the expense of their insureds' premiums by refunding to them the amount of excess profits retained. It should be noted that while the excess profits tax remained in existence, it had no effect on the amount of fees paid to carriers' attorneys in that DOAH statistics reveal from 2003 until the repeal of the tax in 2012, the fees paid to them generally increased.

Mr. Mallen's opinion that the statutory guideline fee caps were responsible for the reduction in claims filed from the time of the 2003 amendments creating the caps through the last reporting period of 2011-12 was supported not only by DOAH statistics, but also by statistics showing a substantial decrease in the amount of fees

paid to claimants' attorneys during the same period; evidence that was admitted without objection. Mr. Mallen further observed that the combination of insurance biased legislation, together with the carriers' continued intransigent tactics of delay often resulted in the "Keeto effect," rendering the injured worker helpless as a turtle on its back (R. 834-35).

Under the circumstances, the statutes challenged fail the test of strict scrutiny and should be held invalid as applied to the facts before this court as a violation of claimant's attorney's basic, fundamental right to be rewarded for industry.

CONCLUSION

For the reasons stated, the court should hold sections 440.105(3)(c), and 440.34(1), Florida Statutes (2009), to be, as applied to the facts, an invalid legislative intrusion into the inherent powers of the judiciary, and as such be declared in violation of the powers delegated to the judicial branch of government. In the alternative, the statutes are as applied unconstitutional as to facts showing that the $1,750 fee awarded pursuant to the guideline schedule in section 440.34(1) is in violation of the basic rights provision of the Florida Constitution for the reason that it deprives claimant's counsel of the right to be rewarded for industry. In either case, the language of the statutory fee schedule should be held directory rather than mandatory, thereby giving the JCC the authority to exceed the statutory maximum amount of $1,750 required by the fee schedule, and to award claimant as the

prevailing party a fee at the E/C's expense which is not confiscatory of her attorney's time, labor, and talents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by electronic mail to James H. Wyman, Esq., attorney for Appellees/Employer/Carrier, Hinshaw & Culbertson LLP, 2525 Ponce de Leon Blvd., 4th Floor, Coral Gables, FL 33134, at jwyman@hinshawlaw.com, and to Pam Bondi, Attorney General, State of Florida, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, at oag.civil.eserve@myfloridalegal.com, on this 1st day of December 2014.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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