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

REPLY BRIEF OF PETITIONER CYNTHIA RICHARDSON ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner will use the same identifiers as in the initial brief. Petitioner, Cynthia Richardson, will be referred to in the reply 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 the record will be made by "R," followed by the page number on which the information can be found. The judge of compensations claims will be designated by the letters “JCC,” and references to the E/C’s answer brief by the letters “AB,” followed by the appropriate page number(s)

REBUTTAL SUMMARY ARGUMENT

In its summary argument the E/C makes general arguments why the statutes challenged should be upheld. As to its argument that “[t]he cases upon which Richardson relies to support her argument are fundamentally grounded in the judicial branch’s role in protecting the constitutional right to effective assistance of counsel, which is inapplicable in the workers’ compensation context” (AB 6), claimant answers that section 440.34(3) provides that a claimant, not his or her attorney, is entitled to the statutory recovery of attorney fees under certain specified circumstances, which, as applied to the facts in the present case, includes the successful assertion of a petition for medical benefits. As to the E/C’s argument

that "while the inherent power of the judiciary in Florida encompasses the regulation of attorneys, that power does not extend to the right to attorney's fees, which is a substantive right within the domain of the Legislature" (AB 6), the E/C ignores or overlooks abundant case law from this court in both the criminal and non-criminal sectors invalidating fee caps as unlawful intrusions on the inherent powers of the judiciary.

The E/C further asserts that claimant's evidence in support of its applied challenge to sections 440.34(1) and 440.105(3)(c) was "conclusory and anecdotal," and therefore insufficient to overcome the presumption of the statute's validity. Claimant will not repeat here the extensive statistical evidence introduced by her lawyer at the hearing on the challenges to the statutes showing a steady decline in both the numbers of petitions for benefits and claimants' attorneys' fees over a 10-year span since the passage of legislation creating the guideline fee formula, thereby severely curtailing the benefits available to injured workers; however, a cursory examination of the record should reveal that such evidence is far from "anecdotal."

As for the argument that claimant lacks standing to assert a challenge which is personal to her lawyer, the E/C overlooks the above cited language in section 440.34(3) which places entitlement to attorney's fees in claimant. Moreover, applicable case law recognizes that while the fees awarded are not paid to claimant

directly, they are in effect a benefit.

The E/C's alternative argument that even if claimant possesses standing, the right to be rewarded for industry is not a fundamental right, thereby requiring the challenged statutes' validity be gauged by rational basis, rather than strict scrutiny, is not consistent with this court's precedent, recognizing that each of the personal liberties enumerated in the Declaration of Rights is a fundamental right, and legislation intruding on a fundamental right is presumptively invalid. As such, the two statutes at issue are subject to the standard of strict scrutiny, because they impinge on the fundamental right of claimant's attorney to be rewarded for industry.

REBUTTAL ARGUMENT

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?

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: In its defense of section 440.105(3)(c), which provides it is a first-degree misdemeanor for an attorney to receive a fee unless it is approved by the JCC, which, under the current law, could not be approved as it exceeds the

guideline fee schedule, the E/C argues that because Richardson's counsel was not criminally charged with the statute's violation, claimant is unable to show any harm, and it cites in support Tribune Co. v. Huffstetler, 489 So. 2d 722, 724 (Fla. 1986), requiring that one challenging the constitutionality of a criminal statute must show that he or she is charged under the statute or is in imminent threat of prosecution (AB 8).

It should be pointed out that in upholding the validity of the statute challenged, Huffstetler did not involve an issue asserting that the statute violated a party's fundamental right. The statute there, section 112.317(6), Florida Statutes (1981), prohibited the disclosure of one's intent to file an ethics complaint, or of the existence of a complaint already filed with the state ethics commission. In contrast, Jacobson v. Southeast Personnel Leasing, Inc., 113 So. 3d 1042 (Fla. 1st DCA 2013), held section 440.105(3)(c) unconstitutional in its application as a violation of claimant's fundamental right to freedom of association without requiring that a showing be made that claimant was criminally charged or imminently threatened with prosecution. Similar to Jacobson, the issue here is that section 440.105(3)(c) violates the fundamental right of claimant's attorney to be rewarded for industry.

The E/C argues that the holding of this court in Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), which struck down a statutory fee cap restricting the

amount to be paid an attorney of a defendant who was charged with a capital crime, has no relevance to the facts in the present case because the decision was based primarily on the defendant's Sixth Amendment right to counsel, and there is no constitutional right to an attorney in Florida's workers' compensation system (AB 8-11). Claimant has never argued that she has a constitutional right to an attorney to represent her on a workers' compensation claim. She does contend that because of the provisions set out in section 440.34(3), Florida Statutes (2009), affording her entitlement to an attorney's fee at the E/C's expense if she prevails on a claim for medical benefits, she inferentially has the statutory right to seek the assistance of counsel to handle such claim, a right that could become illusory by application of an inflexible guideline fee.

As for the E/C's reference to the staff analysis of House Bill 903, leading to the enactment of the 2009 version of section 440.34, commenting that "[g]enerally a workers' compensation is responsible for paying his or her own attorney's fees," that intent is also expressed in the final version of section 440.34(3), so stating, together with exceptions which make the E/C responsible for paying claimant's fees, as provided in subsection (3)(a)-(d). Whether the E/C can constitutionally abolish prevailing-party fees is not the issue now before this court. As of the date of claimant's accidental compensable injuries on 10/26/09, she had a substantive

right to the payment of her attorney's fees at the carrier's expense if she was successful, as she was, in her claim requesting medical benefits.

The rule is firmly 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). Although she prevailed on her claim, the statutory guideline schedule restricted her to a fee of no more than $1,750, despite evidence showing that her lawyer reasonably expended 90 hours on her behalf, equating to an hourly fee of $19.44, an amount which the evidence shows is confiscatory of his time and efforts.

Under the circumstances, the E/C's argument regarding legislation in other states requiring each party to pay his or her own fees would be relevant if Florida had no statute entitling a claimant to an award of attorney's fees. The Florida Legislature, however, has enacted a statute providing that claimants are entitled to the award of same under the conditions specified.

As for the E/C's argument that when claimant's attorney undertook his representation of claimant in 2012, he was aware of the fee amount allowed by the 2009 amended version of section 440.34(1); therefore his situation is similar to the attorney in Sheppard & White, P.A. v. City of Jacksonville, 827 So. 2d 925, 931 (Fla. 2002), who knew in advance that the hourly rate of compensation to represent

an indigent defendant in a direct appeal of a death sentence was $40, yet still agreed to serve as counsel. The attorney's prior knowledge of the fee amount was not, however, the primary reason for this court's decision, which approved an administrative order limiting him to that amount. Instead it was based almost entirely on evidence from attorneys in the community showing that the hourly rate did not negatively impact the right of the attorney's client to effective assistance of counsel. White, 827 So. 2d at 930-931. As previously explained in both this and the initial brief, the evidence presented at the fee hearing below clearly showed a substantial decline in both petitions filed and fees paid claimants' attorneys following the enactments of the 2003 amendments, which claimant's expert witness opined was the result of recent legislative enactments.

The E/C also cites at page 12 of its brief this court's opinion in Ingraham ex Rel. Ingraham v. Dade County School Bd., 450 So. 2d 847, 849 (Fla. 1984), stating that a statutory fee cap "does not amount to a legislative usurpation of the power of the judiciary to regulate the practice of law." The E/C fails to explain that Ingraham involved the question of the validity of section 768.28(8), Florida Statutes (1981), limiting awards of attorney's fees to 25 percent of the first $50,000 of the amount recovered against the state or its agencies. As this court pointed out in Ingraham, the statute "constitutes a limited waiver by legislative enactment of the state's

sovereign immunity." Id. at 848. Obviously the legislature has the right to waive the state's immunity as to any amount of fees, or to completely eliminate them in actions against the sovereign. As such, the statute challenged in Ingraham could not have the effect of usurping the court's power to regulate the practice of law.

In response to the E/C's argument at page 15 that there is "no statutory right to counsel in workers' compensation cases," claimant agrees; however, as previously explained, claimant has a statutory right to an award of attorney fees at the carrier's expense under the conditions provided in section 440.34(3). Such right becomes illusory if, as here, the evidence demonstrates a sizeable number of attorneys are, because of the application of an inflexible fee cap, forced to leave the practice of workers' compensation, with the result that an ever larger number of injured workers are required to prosecute their own claims in an increasingly complex field of law.

At page 15, the E/C takes issue with the claimant's argument that the judiciary's inherent judicial power to invalidate fee cap statutes "is not limited only to criminal cases inhering in the Sixth Amendment right to counsel." It contends that cases outside the criminal context where fee caps were invalidated involved fundamental rights, such as the constitutional interest in preserving the family unit; it contends, however,"No such right to counsel has been granted in workers'

compensation proceedings because there is no fundamental constitutional interest at stake" (AB 16).

In so saying, the E/C apparently overlooks or ignores the language of Article I, section 2 of the Florida Constitution which expressly lists as one of the basic rights, "the right to be rewarded for industry." While no case has been found which accords to a party the right to be represented by counsel in an action vindicating such right, as in a criminal case, section 440.34(3) provides entitlement to an award of fees to a prevailing claimant under specified circumstances. A reasonable corollary of the constitutional and statutory provisions is that once entitlement to a prevailing party-fee is provided, counsel should be rewarded for his or her efforts by an amount which is not confiscatory of the time expended.

At page 17 the E/C argues that because trials in workers' compensation cases are presided over by executive branch officers, the inherent judicial authority doctrine is inapplicable. It ignores the well-established rule that administrative officers are not empowered to determine a statute's constitutionality, which is a power instead reserved to Article V courts sitting in their appellate capacity. As such, this court exercises *de novo* review over such issues, and in so doing it clearly may exercise its inherent judicial authority to decide the validity of a fee cap.

At pages 19-20, the E/C attacks as lacking CSE support the statistical

evidence which claimant's expert witness David Mallen relied on in forming his opinion stating that, as a result of the legislative "reforms," beginning in 2003, an increasing number of claimants' attorneys were leaving the field of workers' compensation, making it far more difficult for injured workers to find attorneys willing to handle their claims. The E/C's arguments at the appellate level are those which should have been timely raised below. First, there was no objection to Mr. Mallen's qualifications as an expert witness. He was moreover accepted by the JCC as an expert. In fact, nearly all of his opinions were given without objection. The E/C's argument also overlooks the well-established rule that an expert's opinion need not be supported by admissible evidence. See section 90.704, Florida Statutes.

At page 21, the E/C contends that the repeated references made by claimant's expert witness to the "Keeto effect" (Davis v. Keeto, Inc., 463 So. 2d 368, 371 (Fla. 1st DCA 1985)) were "not evidence establishing a causal connection between an (unproven) unavailability of attorneys and the statutory fee cap." Nevertheless, the opinion expressed a common sense prediction of such connection based on the extensive statistical evidence showing a precipitous decline in claims since the enactment of the fee schedule.

At pages 21-22, the E/C argues there is no similarity between cases involving the fundamental constitutional "right of the criminally accused to effective

assistance of counsel" and the legislature's right to impose fee caps in proceedings "serving only a private purpose." If the E/C's position is correct, the legislature then has the unfettered right to impose any fee it wishes – in Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008), the fee awarded equated to $8.11 per hour.

In essence the E/C contends claimant's attorney has no fundamental right to earn a living resulting from successful litigation in the field of workers' compensation, because it relates to a contest between parties involving a private purpose. The inherent authority of the courts to guard against unwarranted intrusions by the remaining branches of government into powers appertaining to the judiciary is not so narrowly circumscribed, as argued by the E/C. This court in White v. Bd. of Cnty. Commiss'rs of Pinellas Cnty., 537 So. 2d 1376, 1378 (Fla. 1989), in holding a statutory maximum fee cap could be exceeded, approved Judge Lehan's dissent in White v. Bd. of Cnty. Commiss'rs of Pinellas Cnty., 524 So. 2d 428, 431 (Fla. 2d DCA 1988), which stated in part:

> 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.

At pages 22-24, the E/C argues that claimant lacks standing to challenge the statutes at issue; that such right is personal to her attorney. First, it should be noted that the E/C never raised such defense before the JCC, which it made for the first time at the appellate level. In Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 842 (Fla. 1993), this court ruled that a party had waived the right to assert the defense of lack of standing because such issue was raised, not at the trial level, for the first time in a petition before the supreme court.

Nevertheless, claimant has standing to bring the action. Because the legislature enacted a statute entitling claimant, not her attorney, to recover an attorney's fee at the E/C's expense, the rule stated in Department of Revenue v. Kuhnlein, 646 So. 2d 717, 720 (Fla. 1994), that Florida's courts "have authority over any matter not expressly denied them by the constitution or applicable statutes" also applies in the present case.

At page 25, the E/C makes the somewhat astounding argument that in order for a statute imposing a fee cap to deprive a person of the right to be rewarded for industry, the statute "must actually preclude that person from receiving any compensation." Interestingly, the E/C cites no authority in support of this novel

argument, and indeed there is none.

At pages 25-27 of its brief the E/C asserts that the challenged statutes are subject only to the rational basis standard – not strict scrutiny – because the right to be rewarded for industry is not a fundamental right. In support of its argument it relies at page 26 on language from this court's opinion in Dep't of Bus. Reg. v. Nat'l Mfd. Housing Fed'n, Inc., 370 So. 2d 1132, 1136 (Fla. 1979), *quoted with approval in* Fraternal Order of Police, Metro. Dade County, Lodge No. 6 v. Dep't of State, 392 So. 2d 1296, 1302 (Fla. 1980), stating that "the right to pursue a lawful business" can be constitutionally subjected to legislative limitations "if they rationally relate to a valid state objective."

What the E/C overlooks in its argument is that the quoted statements in both cases were dicta and unnecessary to the decisions reached. As such they have no value as precedential authority relevant to the issues raised in the present case. See Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002) (court receded from dicta in a former opinion and adhered to the precedent established in a holding in a different case). In Dep't of Bus. Reg., this court's comments were addressed to the issue of whether the statute unlawfully exceeded legislative authority, and in Fraternal Order of Police they were applied to the question of whether the statute violated due process.

It is moreover doubtful that the quoted statements are applicable to a statutory fee cap in a workers' compensation case. The case most analogous in its facts to those in the instant case is De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So.2d 204, 206 (Fla. 1989), which, in holding the challenged statute invalid by applying a strict scrutiny analysis, noted 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."

Finally, the E/C argues that under the rational basis standard the statutes are sustainable because they satisfy a legitimate state interest in "maximizing the limited availability of workers' compensation benefits and reducing the cost of workers' compensation insurance premiums" (AB 28). If the rational basis standard is applicable and such was the objective of the various legislative reforms beginning in 2003 through the 2009 amendments, it is difficult to understand how the goal of reducing the cost of insurance premiums was achieved by the repeal of the excess profits tax which refunded approximately $200 million to carriers, an undisputed fact placed in evidence before the JCC (R 853). As this court observed in N. Fla. Women's Health & Counseling Serv., Inc. v. State, 866 So.2d 612, 627 (Fla.2003) (*quoting* Moore v. Thompson, 126 So.2d 543, 549 (Fla.1960), legislative findings

of fact[1] "are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry.").

CONCLUSION

For the reasons stated, the court should hold sections 440.105(3)(c), and 440.34(1), Florida Statutes (2009), as applied to the facts, an invalid legislative intrusion into the inherent powers of the judiciary, and/or in violation of the basic rights provision of the Florida Constitution for the reason that they deprive claimant's counsel of the right to be rewarded for industry.

Respectfully submitted,

/s/ Richard W. Ervin, III

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[1]There were no express legislative findings in chapter 2009-94, section 1, Laws of Florida, resulting in the 2009 amended version of section 440.34.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to James Wyman, Esq., attorney for Appellees/Employer/Carrier, Dean, Hinshaw & Culbertson LLP, 2525 Ponce de Leon Blvd, 4th Floor, Coral Gables, FL 33134, 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, by e-mail service via the Florida Courts E-filing Portal on this 20th day of January 2015.

/s/ Richard W. Ervin, III
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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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