Filing # 26344593 E-Filed 04/21/2015 01:44:10 PM

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

Case No. : SC15-725

LT#: 1D14-3077

Daniel Stahl
Petitioner,

VS.

Hialeah Hospital and
Sedgwick Claims Management
Services,
Respondents(s).
_________________________________/

RECEIVED, 04/21/2015 01:48:41 PM, Clerk, Supreme Court

PETITIONER'S INITIAL BRIEF ON JURISDICTION

MARK L. ZIENTZ, ESQUIRE
Law Offices of Mark L. Zientz, P.A.
Two Datran, Suite 1619
9130 South Dadeland Boulevard
Miami, Florida 33156
(305) 670-6275
Fla. Bar No: 150168
mark.zientz@mzlaw.com
Counsel for Daniel Stahl.

TABLE OF CONTENTS

TABLE OF AUTHORITIES....................ii, iii, iv

INTRODUCTION....................1

STATEMENT OF THE CASE AND OF THE FACTS....................2

SUMMARY OF THE ARGUMENT....................4

POINT I OF PETITIONER....................6
DISCRETIONARY JURISDICTION SHOULD BE EXERCISED BY THIS COURT OVER A DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, WHICH EXPRESSLY DECLARES VALID AND CONSTITUTIONAL TWO SECTIONS OF A STATE STATUTE, TO WIT: *S.440.15(3)(C)FLA. STAT 2003* AND *S. 440.13 FLA. STAT. 1994*

POINT II OF PETITIONER....................9
THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *MARTINEZ V. SCANLAN*, 582 So. 2d 1167 (Fla. 1991)

CONCLUSION....................10

CERTIFICATE OF SERVICE....................11

CERTIFICATE OF FONT SIZE....................11

TABLE OF AUTHORITIES

Cases Page(s)

Avarena v. Miami-Dade County.................................... 10
928 So. 2d 1163 (Fla. 2006)

Castellanos v. Next Door Co.. 10
145 So. 3d 822 (Fla. 2014)

Estate of McCall v. U.S.. 9
134 So. 3d 894 (Fla. 2014)

Kluger v. White..7, 8, 10
281 So. 2d 1 (Fla. 1973)

Martinez v. Scanlan..5, 9, 10
582 So. 2d 1167, 1171 (Fla. 1991)

Mullarkey v. Florida Feed Mills, Inc............................... 7
268 So. 2d 363 (Fla. 1972)

New York Central Railroad v. White............................. 8
243 U.S. 188, 37 S.Ct. 247, 61 L. Ed. 667 (1917)

Stahl v. Hialeah Hospital.. 2
54 So. 3d 538 (Fla. 3 DCA 2011)

State v. Stacey... 10
482 So. 2d 1350, 1351 (Fla. 1985)

Sunspan Engineering & Const. Co. v. Spring-Lock Scaffolding,
Co., 310 So. 2d 4 (Fla. 1975)...7

Westphal v. City of St. Petersburg.................................. 10
143 So. 2d 924 (Fla. 2013)

STATUTES & RULES

Chapter 440..1, 3, 10

Ch. 99-240 s. 14 @ 2165... 8

Statute 440.02(13) Fla. Stat.. 8

Section 440.02 (22) Fla. Stat. 8

Section 440.09 (1) Fla. Stat. (1994)................................. 7

Section 440.11 (2003)... 2

Section 440.13... 1, 3

Section 440.13 Fla. Stat. (1994)....................................... 6

Section 440.13(14)(c) Fla. Stat.................................... 1, 6

Section 440.15 Fla. Stat... 1

Statute 440.15 (5) (b) Fla. Stat...................................... 1, 6

Section 440.15(3) (c) Fla. Stat. 2003................................ 6

Section 440.15 (3) (u) Fla. Stat.(1968)............................... 9

Section 440.15(6) Fla. Stat. (1994)................................... .. 4

OTHER AUTHORITIES

Florida Rules of Appellate Procedure, 9.030 (a)..................6

INTRODUCTION

In the 1994 session of the legislature the representatives, senators and the governor amended s.440.13 to add 440.13(14)(c) which, for the very first time since the original enactment of chapter 440 in 1935, made injured workers responsible for a portion of the medical expenses directly related to their industrial injury.

In 2003 the legislature went back to work and summarily repealed all portions of section 440.15 which could entitle an injured worker to compensation for permanent partial disability or entitle some injured workers with permanent impairments to be rehired by their employers. Full medical benefits were eroded further by provisions enacted to section 440.15(5) (b) allowing all compensation benefits and all medical benefits to be apportioned.

The Petitioner is Daniel Stahl, who was both a workers' compensation claimant before the administrative tribunal and the Appellant in the First District Court of Appeal (1DCA). He was also a Plaintiff in a tort action against Hialeah Hospital, his employer, filed in the Circuit Court for the 11th Judicial circuit and an Appellant in a case before the Third District Court of Appeal (3DCA) arising out of the tort suit.

The Respondents are the employer and the compensation carrier as well as the defendants in the circuit court action and the appellee in the 3 DCA case.

STATEMENT OF THE CASE AND OF THE FACTS

Daniel Stahl's journey through the maze known as the Florida Workers' Compensation scheme has been long, arduous and frustrating. Mr. Stahl was injured at his nursing job at Hialeah Hospital on December 8, 2003, 68 days after the amendments to chapter 440 in 2003 went into effect. Mr. Stahl prosecuted his claim for workers' compensation benefits but did not submit his claims to the trier of the facts. Instead he dismissed those claims and sought a recovery against his employer in the Circuit Court in and for Miami-Dade County, Florida on the legal basis that his employer was negligent in causing his injury. He also requested declaratory relief on the question of whether or not the Exclusive Remedy contained in s. 440.11(2003) was constitutional or was a deprivation of his rights to due process, trial by jury, access to courts and his right to be rewarded for industry. The Circuit court dismissed his complaint with prejudice. An appeal to the Third District Court of Appeal produced a decision which admonished Mr. Stahl for trying to get the relief he sought and directed him

back to the workers' compensation forum to get his constitutional claim heard, *Stahl v. Hialeah Hospital,* 54 So. 3d 538 (Fla. 3 DCA 2011).

Mr. Stahl re-filed his workers' compensation claim asserting that he was entitled to compensation for permanent partial disability (PPD), a category of benefits which had been repealed from chapter 440 effective October 1, 2003. Again, after a long process and numerous appeals to the 1DCA, his issues were resolved by an agreed order rendered by the Division of Administrative Hearings/Office of the Judges of Compensation Claims (DOAH/OJCC). In that order the Judge of Compensation Claims (JCC) ruled that the JCC could not decide constitutional issues. He denied compensation for partial loss of wage earning capacity (PPD) on the basis that said benefit was no longer available to injured workers.

Appeal was taken to the 1 DCA. The Attorney General (AG) was notified of the challenge to the constitutionality of portions of chapter 440. The AG did not seek to intervene. Ultimately, as is often the case, the 1 DCA rendered an order on February 3, 2015 per curiam affirming the order of the JCC. Stahl moved for a written opinion. The Respondents responded to the motion in opposition . The 1 DCA granted the motion for a written opinion on March 25, 2015 in which the 1 DCA held that the substantial rewrite of s. 440.13 and the elimination of PPD benefits were constitutional

and the statute itself remained an adequate replacement remedy for common law tort. The rational basis test was applied notwithstanding the fundamental rights impinged upon by the amendments to chapter 440 (Appendix A).

A motion for rehearing and clarification directed to the written opinion was filed with the 1 DCA. A response was filed in opposition . On April 14, 2015 the 1 DCA denied rehearing (Appendix A).

A notice to invoke the discretionary jurisdiction of the Supreme Court of Florida was filed in the 1 DCA on April 15, 2015.

SUMMARY OF THE ARGUMENTS

Two points are raised in support of petitioners request that the Supreme Court assume discretionary jurisdiction to review the ruling of the 1 DCA which found constitutional the shifting of part of the medical costs of an injury to the injured worker from the employer and the elimination of all indemnity for permanent partial disability (even to the extent of repealing the "Obligation to Rehire" 440.15(6) Fla. Stat. 1994, repealed 2003).

In Point I, Petitioner asserts that the use of the "Rational Basis" test for the constitutionality of amendments to provisions of chapter 440 is improper since fundamental rights are impinged upon. Those rights are the right to due process of law, the inviolate right of trial by jury, the right of access to courts and the right to be rewarded for industry. The "Strict

Scrutiny" test must be applied. Even if the rational basis test was the correct standard, it was misapplied. Remedial legislation, such as the workers' compensation law, is designed to remedy a perceived problem in society. That perceived problem was to place the burden of industrial injury on the industry served. It was not to make Florida business competitive with businesses in Mississippi, Alabama, Georgia, Texas or any other state or country. The rational basis for change in the statute must apply to the purpose for which the law was enacted, in this case using the police power of the state as its legal foundation. In addition, the Rational Basis asserted by the 1 DCA, that the amendments further the legitimate stated purpose of ensuring reasonable medical costs after the injured worker reached MMI and PPD benefits were supplanted by impairment income benefits, fail to take into consideration the fact that in the 12 years since the 2003 amendments, workers' compensation premiums have been reduced by approximately 60%. It is no longer necessary to keep benefit reductions in place to contain costs.

Point II suggests that the District Court's opinion expressly and directly conflicts with this court's opinion in *Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991) on the same point of law, ie: the constitutionality of chapter 440 under circumstances where the legislature has reduced or

eliminated benefits for injured workers below that level considered adequate by this court.

PETITIONERS POINT I

DISCRETIONARY JURISDICTION SHOULD BE EXERCISED BY THIS COURT OVER A DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, WHICH EXPRESSLY DECLARES VALID AND CONSTITUTIONAL TWO SECTIONS OF A STATE STATUTE, TO WIT: S.440.15(3)(C)FLA. STAT 2003 AND S. 440.13 FLA. STAT. 1994

Florida Rule of Appellate Procedure, 9.030 (a) (2) provides for discretionary jurisdiction in the Supreme Court when; (A) a decision of the District Court of Appeal; (i) expressly declares valid a state statute. The District Court of Appeal, First District, expressly found that s.440.13 Fla. Stat. 1994 and s. 440.15 (3)(c) Fla. Stat. 2003 were constitutional based on the court's application of the Rational Basis test (Appendix A). The amendments to s. 440.13 in 1994, for the first time since the workers' compensation law was enacted in 1935, made injured workers responsible for a medical co-payment for treatment by their authorized doctors after they reach maximum medical improvement (MMI), s.440.13 (14)(c) Fla. Stat. 1994. In 2003 the legislature amended s. 440.15(5) (b) to allow employers and carriers (E/C) to 'apportion' the cost of medical care between the injured employee and the E/C. The injured employee can be found

responsible for up to 49% of the cost of medical care related to the industrial injury. If more than 50% is apportionable to the injured worker, the E/C is not responsible for any of the cost under the definition of Major Contributing Cause, s.440.09 (1) Fla. Stat. 1994.

At the time of the adoption of the Constitution of 1968 full medical care for injuries on the job was a right guaranteed to injured workers as part of the Quid Pro Quo. Medical care had to be provided to the injured worker without apportionment or co-payment. That is what the citizens of Florida voted to accept as their basic law. The decision of the 1 DCA, using the Rational Basis Test, found that the elimination of full medical care for on the job injuries was valid "to ensure reasonable medical costs". This reasoning does not satisfy the test espoused in *Kluger v.* White, 281 So. 2d 1 (Fla. 1973). The cost of workers' compensation, like the cost of repairing or replacing industrial machinery, is a cost of doing business that is passed on to the consumer, *Mullarkey v. Florida Feed Mills, inc.* , 268 So. 2d 363 (Fla. 1972), *Sunspan Engineering & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975). Employers in every industry pay the same basic rate for compensation insurance based on employment/job classification. If workers' compensation costs rise for one employer, they rise for his competitors. Workers' compensation costs can be lowered by reducing the

incidence of injury or death. In Florida, the workers' compensation law, from its inception, required that there be safety rules and regulations to prevent injury. Safety was an integral part of the 'Grand Bargain", the "Quid Pro Quo", *New York Central Railroad v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L. Ed. 667 (1917). Florida repealed all its safety rules and enforcement in 1999, ch, 99-240, s 14, at 2165 which sunsetted the Occupational Safety and Health Act Eff. 7/1/2000. It was not resurrected. Florida's largest employer, the Government, and employees of employers with 10 or fewer employees are not covered by OSHA and enjoy no safety protections on their jobs. Eliminating safety without an overpowering public necessity violates *Kluger,* id. The same is true for the elimination of an entire category of benefit that existed in Florida's compensation law from inception until the ratification of the 1968 Constitution and thereafter up to October 1, 2003. The category is Permanent Partial Disability. The District Court of Appeal ruled that the elimination of this class of benefit was constitutionally valid because it was "supplanted by impairment income benefits" in 2003. It is well settled by definition in ch. 440 that impairment and disability are vastly different animals, s.440.02(13) "Disability" and s.440.02 (22) "Permanent Impairment". While "disability" benefits may supplement "impairment"

benefits, they may not supplant them as suggested by the 1 DCA, see s. 440.15 (3) (u) (1968):

" Other cases: In all other cases in this class of disability the compensation shall be 60% of the injured workers average weekly wage for such number of weeks as the injured employee's percentage of disability is of 350 weeks; provided , however, that **for the purpose of this paragraph "disability" means either physical impairment or diminution of wage earning capacity, whichever is greater".**

After October 1, 2003 premiums for workers' compensation coverage fell 57%. It has been twelve years since passage and there has been no legislative activity to replace the benefits lost by injured workers and no showing that such a drastic cut needs to continue (nor was there ever a showing that cutting benefits produced the result intended by the act, to place the burden of injury on the industry served and not on the taxpayers or the injured worker or his family), *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014).

POINT II OF PETITIONER

THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *MARTINEZ V. SCANLAN*, 582 So. 2d 1167 (Fla. 1991)

This court noted in *Martinez v. Scanlan,* id.@ ,1171,1172, that the act remained constitutional on a substantive basis because it still continued to provide *full medical care* and some compensation for *partial loss of wage*

earning capacity. The act after the 1994 amendments, no longer provides full medical care and after the 2003 amendments no longer provides any compensation for partial loss of wage earning capacity, nor required an employee to be rehired. In that regard, the opinion of the District Court of Appeal finding the act constitutional on these two bases is irreconcilable with *Martinez v. Scanlan,* id. One test of express and direct conflict is whether the decisions are irreconcilable, *Aravena v. Miami-Dade County*, 928 So. 2d 1163 (Fla. 2006). Express and direct conflict can also be based on a misapplication of a decision, *State v. Stacey*, 482 So. 2d 1350, 1351 (Fla. 1985). The District Court of Appeal clearly misapplied the Rational Basis Test, *McCall*, id. @ 901 and the teaching of *Kluger v. White*, id.

CONCLUSION

In light of pending challenges to the adequacy of the 104 week cap on temporary benefits, *Westphal v. City of St. Petersburg*, 143 So. 2d 924 (Fla. 2013) and the multiple challenges to the limitations on injured workers attorney fees, *Castellanos v. Next Door Co.* 145 So. 3d 822 (Fla. 2014), the Court is urged to accept jurisdiction of this case to evaluate the constitutionality of the medical and disability provisions of chapter 440 and to determine if the opinion of the District Court of Appeal is in express and direct conflict with *Martinez v. Scanlan.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E- Mail this 21 day of April, 2015 to: Hon. Pamela Jo Bondi, Attorney General, Alan Tanenbaum, Office of the Attorney General, State of Florida, The Capitol, Tallahassee, Fl. 32399-01050, and by E-Mail, atanenbaum@myfloridalegal.com, and to Russell Young, Esq. 3342 17th St.,Sarasota, Fl. 34239 and by E-mail to ryoung@eraclides.com; edie@eraclides.com

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the font requirements of Rule 9.210(a) Rules of Appellate Procedure have been complied with.

Mark L. Zientz, Esquire
LAW OFFICES OF MARK L. ZIENTZ, P.A.
9130 SOUTH DADELAND BOULEVARD
SUITE 1619
MIAMI, FLORIDA 33156
(305) 670 6275

By:
Mark L. Zientz
Florida Bar No.: 150168