IN THE SUPREME COURT
STATE OF FLORIDA

DANIEL STAHL,

Petitioner,

vs.

HIALEAH HOSPITAL and SEDGWICK CLAIMS MANAGEMENT SERVICES,

Respondents.

CASE NO.: SC15-725
Lower Tribunal: 1D14-3077
OJCC No.: 04-022489MAM

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

In this brief, Amicus Curiae, the National Employment Lawyers Association, Florida Chapter, will be referred to as Amicus and/or Florida NELA. Petitioner, Daniel Stahl, will be referred to as "Petitioner". Employer/carrier will be referred to as "E/C" and the Judge of Compensation Claims will be referred to as "JCC".

STATEMENT OF INTEREST

The National Employment Lawyers Association (NELA), is an organization of approximately 3,000 attorneys around the nation who represent employees in civil rights and employment-related litigation. The Florida Chapter was founded in 1993 and has approximately 200 participating attorneys around the state. Florida NELA seeks to address the issues in this case because the Florida Workers Compensation law no longer provides adequate, certain nor expeditious benefits for injured workers. Such a guarantee of adequate, certain and expeditious benefits is constitutionally required in order for the workers compensation law to serve as and remain the exclusive remedy for employees injured in work related accidents. The proper resolution of this constitutional challenge is a matter of substantial concern to Florida NELA, its members and their clients.

SUMMARY OF ARGUMENT

Workers Compensation is based upon a simple premise: injured workers, faced with the delay and difficulty of proving fault and

recovering damages, are provided moderate wage replacement and medical benefits in return for giving up their right to sue their employer and recover damages for negligence; in exchange, employers enjoy immunity from suit and enjoy limited and determinant liability. The constitutionality of the compensation "bargain" as an *exclusive* remedy, however, is dependent upon injured workers receiving benefits that are adequate, certain and expeditiously provided.

Amicus submits that as a result of cumulative legislative "reforms" in 1990, 1994 and 2003, Chapter 440 is facially unconstitutional as not providing "full medical care and wage-loss payments for .... partial disability" in conformance with *Martinez v. Scanlan*, 582 So.2d 1167, 1171, 1172 (Fla. 1991). But the constitutional problems run much deeper. The cumulative reforms have destroyed the requisite fundamental nature of compensation as remedial social legislation. Inadequate medical and wage replacement benefits are only part of the problem. Equally problematic is that benefits are no longer certain nor expeditiously provided due to the current laws' increased burdens of proving causation and allowance of apportionment of medical and wage replacement benefits. And under the "reforms", these critical decisions on causation are now made almost exclusively by physicians selected by the insurance company. The cumulative effect

of these reforms leaves injured workers trapped in a second class justice system with an uncertain, delayed and inadequate remedy.

ARGUMENT

I. CHAPTER 440.01 et seq., IS NO LONGER AN ADEQUATE EXCLUSIVE REPLACEMENT REMEDY IN PLACE OF COMMON LAW TORT AS REQUIRED BY BOTH THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

A. STANDARD OF REVIEW:

Because the issue presented involves a constitutional challenge, it is governed by the de novo review standard. *Bush v. Holmes*, 919 So2d 392 (Fla. 2006).

Amicus is aware of the three tiers of scrutiny and the concomitant presumptions and standards of proof that this Court utilizes in reviewing the validity of legislative enactments. *N. Fla. Women's Health & Counseling Servs. v. State,* 866 So. 2d 612, 625(Fla. 2003). Amicus submits that due to the fundamental rights implicated and the status of the Petitioner as a person with a "physical disability", this Court should utilize "strict" scrutiny, or, at a minimum, "mid-level" scrutiny in analyzing the statutes at issue. See, *T.M. v. State*, 784 So. 2d 442(Fla. 2001)(intermediate scrutiny applies where the governmental objective is important, and the means to obtain that objective are substantially related to the objective).

Strict scrutiny is applicable because fundamental rights are implicated by the challenged statutes including F.S.§440.11, which strip injured workers of their right to trial by jury and their right to pursue a common law action for negligence. Statutes are regarded as inherently "suspect" and subject to "heightened" judicial scrutiny if they impinge too greatly on fundamental constitutional rights. *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987). "A fundamental right is one which has its source in and is explicitly guaranteed by the federal or Florida Constitution". *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004). Art. I, § 22, Fla. Const. provides that the "right of trial by jury shall be secure to all and remain inviolate". "[T]he right to jury trial is an indispensable component of our system of justice" and "indisputably one of the most basic rights guaranteed by our constitution." *Blair v. State*, 698 So. 2d 1210, 1212, 1213(Fla. 1997). "Questions as to the right to a jury trial should be resolved.....in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions." *Hollywood, Inc. v. Hollywood*, 321 So. 2d 65, 71 (Fla. 1975). In civil cases, trial by jury is a " right so fundamental and sacred to the citizen...that "should be jealously guarded by the courts". *Jacob v. New York City*, 315 U.S. 752, 753 (1942).

Strict scrutiny is also applicable as the fundamental right "to be rewarded for industry" under Art. I, § 2, of the Florida Constitution is implicated by issues presented by Petitioner. As this Court held in *DeAyala v. Florida Farm Bureau Casualty Co.*, 543 So.2d 204 (Fla. 1989), injured workers have the fundamental right to be rewarded for their industry by not being deprived of *reasonable adequate and certain payment* for their workplace accidents. (emphasis supplied).

Strict scrutiny is further warranted as Petitioner is a member of a group that has "been the traditional targets of irrational, unfair and unlawful discrimination". *Palm Harbor Special Fire Control Dist.*, 516 So. 2d at 251. As a "basic right" Article I, §2 of the Florida Constitution (1998) provides: "No person shall be deprived of any right because of race, religion or *physical disability*". (emphasis supplied). "Physical disability" is not defined in the Constitution, nor was "physical handicap" defined by the Constitution as amended and approved by the electorate in November 1974. Although no legislative history has been discovered, presumptively the term "handicap" was borrowed from the Federal Rehabilitation Act of 1973, 29 U.S.C.§701, et. seq., enacted on September 26, 1973. In 1998, the Florida Constitution Revision Commission (CRC) replaced "handicap" with "disability" due to the pejorative label of "handicap" and "disability" being consistent with and used in laws including the Americans with Disabilities Act

of 1990, 42 U.S.C. §12101 et seq., ("ADA"). See, CRC minutes, January 12, 1998, pp.76-88.

"Disability" is defined by the ADA as, in pertinent part, "a physical....impairment that substantially limits one or more of the major life activities of such individual". 42 U.S.C. §12102(2). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"; a list meant to be illustrative, not exhaustive. 29 C.F.R. §1630.2(i); 28 C.F.R. §35.104; 28 C.F.R. §36.104; 28 C.F.R. §41.31(b)(2). The ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B), and the definition of "handicap" in the Fair Housing Amendments Act of 1988, 42 U.S.C.§ 3602(h)(1). See, *Bragdon v. Abbott*, 524 U.S. 624, 630,631 (1998).

As "physical handicap"/"physical disability" were inserted side by side with "race" and "religion" as Basic Rights, it can be reasonably presumed that the revisions were intended to include the physically disabled as "a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Palm Harbor,* 516 So 2d. at 251, *citing to Graham v. Richardson*, 403 U.S. 365, 372 (1971). While never deciding whether the physically disabled are a "suspect class", this Court in *Scavella v. School*

Board, 363 So. 2d 1095, 1097, 1098 (Fla. 1978) did hold that Florida's "specific constitutional provision" protecting those with a "physical handicap" imparts a "more stringent constitutional requirement" and provides protection in addition to the "right to be treated equally before the law."

Amicus submits it is because the physically disabled have been the traditional targets of "irrational, unfair and unlawful discrimination", that "physical disability' was included as a Basic Right within Article I, § 2 of the Constitution-- a clause which the *Scavella* Court recognized as granting greater protection to Florida citizens. Amicus' argument is further supported by the findings made by Congress in passing the ADA, which was enacted as a remedial response to pervasive prejudice and discrimination historically suffered by persons with physical and mental disabilities. 42 U.S.C. §12101(b)(1).

Congress concluded, after three years of hearings with thousands of hours of testimony coming from hundreds of sources, that persons with disabilities had been subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of such individuals ability to participate in, and contribute to society. "Findings and Purposes", 42 U.S.C. §12101(a)(2)to §12101(a)(9); See, Lowndes, *The*

Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons, 44 Fla. L. Rev. 417, 444 (1992).

Nor should the decision in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), which refused to adopt an intermediate standard of review, impede this Court's adoption of a stricter standard of review. *Cleburne* was grounded on assumptions directly contravened by the findings made by Congress in passing the ADA. Moreover, *Cleburne* does not take in account the specific protections guaranteed the physically disabled by the Florida Constitution.

As the statutes challenged herein affect medical and wage replacement benefits available to both the physically disabled who are involved in a work accident, as well as workers who become disabled due to a work accident, Amicus submits this Court should strictly scrutinize the statues at issue.

B. CHAPTER 440 NO LONGER PROVIDES ADEQUATE, CERTAIN NOR EXPEDITIOUSLY PROVIDED COMPENSATION OR MEDICAL BENEFITS

The cumulative legislative "reforms" in 1990, 1994 and 2003, have unquestionably reduced medical benefits and wage replacement benefits in both nature and substance, including: the elimination of benefits for permanent partial disability F.S. §440.15(3); the limitation of temporary disability benefits to 104 weeks, F.S. §440.15(2)and(4); the limitation of Permanent Total benefits ending

at age 75, F.S. §440.15(1); the elimination of full medical care with a required co-payment for medical treatment post MMI, F.S. § 440.13(2)(c); and, the apportionment of all indemnity benefits and all medical benefits, both before and after MMI. F.S.§ 440.15(5)(b). These reductions result in patently inadequate benefits and fall below the minimum threshold requiring "full medical care and wage-loss payments for .... partial disability" set forth in *Martinez v. Scanlan*, 582 So.2d 1167, 1171, 1172 (Fla. 1991).

But inadequacy of benefits is only part of the problem. Compensation as a constitutional, *exclusive* remedy is dependent upon injured workers receiving benefits that are certain and expeditiously provided. The so called "compensation bargain" constitutes "social legislation, the design, intent and purpose of which is to provide for injured workmen," *Florida Erection Services v. McDonald*, 395 So.2d 203, 209 (Fla. 1st DCA 1981) with an "amount [that] is fixed and definite, not contingent", *Port Everglades Terminal Co. v. Canty*, 120 So.2d 596, 601 (Fla. 1960), based upon the theory that "economic loss to the individual by injury in line of duty should be borne in part by the industry by which he is employed in order that his dependents may not want". *Duff Hotel Company v. Ficara*, 7 So.2d 790, 791 (Fla. 1942); See, *New York Central Railroad v. White* 243 U.S. 188, 201(1917); *McLean v. Mundy*, 81 So.2d 501 (Fla. 1955).

To assure the constitutionality of compensation as an injured workers exclusive remedy, the Florida Act was designed to be "self executing": a system where insurance carriers were charged with advising injured workers of their rights, monitoring injured workers' condition, and placing benefits in the hands of the injured worker without delay. By design, the Florida law favored workers arming them with lowered burdens of proof, presumptions and judicial doctrines to guarantee "sure...definite and easily ascertained compensation", *New York Central Railroad v. White*, 243 U.S. at 204, and to maintain the constitutional validity of the law. These procedural and substantive provisions were embedded in the law, were well known to employers and implemented to compel the delivery of benefits and avoid the "prove it" mind-set of the tort system.

Thus, employers knew that a worker need not prove a claim by the preponderance of evidence standard, but merely by "a state of facts from which it may be reasonably inferred" that the worker was injured during the course and scope of employment. *Johnson v. Dicks,* 76 So. 2d 657, 661 (Fla. 1955); *Johnson v. Koffee Kettle Restaurant*, 125 So.2d 207(Fla.1960); *Schafrath v. Marco Bay Resort, Ltd,* 608 So.2d 97(Fla.1st DCA 1992). In *Johnson*, 125 So. 2d at 299, this Court recognized that workers compensation, "a complete departure from the civil....code", mandated use of the "reasonably inferred" standard instead of the "markedly different"

preponderance of the evidence rule, as workers compensation is "a means devised to require industry to share with society the expense of injuries caused by it". To use "the preponderance of the evidence rule" in compensation cases would "cut off many who are entitled to workmen's compensation." *Johnson*, 125 So. 2d at 299.

Workers were also assisted in proving industrial causation of their injuries by the "Logical Cause Doctrine": Where the fact of a serious injury was conclusively shown and a logical cause for it proven, the employer who sought to defeat recovery for the injury incurred the burden of overcoming the established proof and showing that another cause of the injury was more logical and consonant with reason." *Crawford v. Benrus Market,* 40 So2d 889, 890 (Fla. 1949); *Bray v. Electronic Door Lift, Inc.*, 558 So2d 43 (Fla. 1st DCA 1989).

The Florida Act additionally provided presumptions including "....in the absence of substantial evidence to the contrary: 1) that every claim of an injured worker comes within the provisions of the law; and, 2) that sufficient notice of the claim has been given to the Employer." F.S.§ 440.26 (1979). Further, as remedial legislation, the Florida Act was "intended to be liberally construed" by both the compensation judge and the courts "in such a manner as to effectuate the purpose for which it was enacted." *Gillespie v. Anderson*, 123 So.2d 458, 463 (Fla. 1960). Both the Act itself and the facts presented were to be liberally construed

to establish the provision of benefits under the Act. Even in doubtful cases, such doubt should be resolved in favor of the claimant. *Great American Indemnity Company v. Williams* 85 So2d 619, 623(Fla.1956); *Alexander v. Peoples Ice Co.*, 85 So. 2d 846, 847 (Fla.1955)(doubts should always be resolved in favor of the working man to protect him and fulfill the purpose of the act). Liberal construction took into account "....the aspect of "certainty" of recovery which is said to contribute to the constitutional validity of the worker's compensation system." *Regency Inn v. Johnson* 422 So. 2d 870, 876 (Fla.1st DCA 1982).

Additional certainty for workers receiving timely benefits was provided by "operation of the universally accepted maxim that the employer takes the employee as he finds him." *Evans v. Florida Industrial Com.*, 196 So. 2d 748, 751 (Fla. 1967); *Alexander v. Peoples Ice Co.*, 85 So. 2d at 847. This maxim, part of "the basic philosophy of our workmen's compensation act" prevented employers from delaying or denying benefits to workers with pre-existing conditions. The law strictly limited apportionment to permanent disability benefits and limited apportionment to circumstances where the preexisting condition: 1. Was disabling at the time of the accident and continued to be so at the time permanent disability benefits became payable; or, 2. Was producing no disability at the time of the accident, but through its normal

progress was doing so at the time permanent benefits became payable. *Evans*, 196 So. 2d at 752.

It was this system of Workers Compensation which provided adequate, speedy and certain compensation for which the Court in *Kluger v. White,* 281 So. 2d 1, 9 (Fla. 1973) remarked:

> Workmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided *adequate, sufficient, and even preferable safeguards* for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury. (emphasis supplied).

But post *Kluger,* all of these "preferable safeguards" have been eliminated thus destroying the fundamental nature of workers compensation as "social remedial" legislation.

Effective January 1, 1994, the legislature outlawed Chapter 440 from being liberally construed in favor of the injured worker. F.S.§440.015("...the laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either employee or employer"). Liberal construction, however, was long held to be an aspect of "certainty" of recovery which is said to contribute to the constitutional validity of the worker's compensation system." *Regency Inn v. Johnson* 422 So. 2d 870, 876 (Fla.1rst DCA 1982).

Today, workers must prove their case by a preponderance of the evidence, *Branham v. TMG Staffing Services*, 994 So.2d 1172(Fla.1st DCA 2008), a standard which "cut[s] off many who are entitled to

workmen's compensation." *Johnson*, 125 So. 2d at 299. Injuries due to occupational disease, repetitive exposure, exposure to a toxic substance and/or mental or nervous injuries must now be proven by "clear and convincing evidence". F.S.§440.09(1)(2015); F.S. §440.093(2)(2015).

The presumptions, logical cause doctrine and cornerstone maxim that "an employer takes the employee as he finds him" have been eliminated and replaced, effective October 1, 2003, with a stringent "major contributing cause" standard. In order to receive medical or disability benefits, workers must now establish their accident is the major contributing cause of their injuries; which means the cause which is more than 50% responsible for the injury compared to all other causes combined for which treatment or benefits are sought. F.S. §440.09(1)(2015);*Gallagher Bassett Services v. Mathis*, 990 So.2d 1214(Fla.1st DCA 2008). Major contributing cause must be based on "objective relevant medical findings". F.S. §440.02(36)and §440.09(1)(2015). And workers with pre-existing conditions must continue to be able to prove that the accident is and ***remains*** more than 50% responsible for the injury as compared to all other causes combined, in order to continue to receive treatment or disability benefits. F.S. §440.09(1)(b)(2015), *Farnam v. US Sugar*, 9 So.3d 41(Fla.1st DCA 2009). Workers now saddled with proving "the" Major Contributing Cause for their injuries face a higher standard than "proximate cause" in the

civil system. It can be harder to prove a compensation case than a negligence case.

The uncertainty and delay for workers receiving timely, adequate benefits engendered by the major contributing cause standard can not be underestimated. While language in *Martinez v. Scanlan*, 582 So. 2d 1167, 1172, 1173 (Fla. 1991) suggests that a worker denied benefits due to changes in the compensation law may still have a viable tort remedy, such a proposal where benefits are denied due to problems establishing major contributing cause may not be workable. Many work accidents result in injuries to multiple body parts and/or physical and/or mental injuries. Some injuries may be found to be compensable under the major contributing cause standard and others may be denied. Requiring an injured worker to pursue both a compensation claim and tort suit in such circumstances is neither a workable or efficient solution designed to achieve justice.

Equally problematic, even if a worker can prove major contributing cause, benefits may yet be reduced due to the amended law on apportionment. F.S. §440.15(5)(b)(2). Today, *all* benefits, disability benefits (both before and after MMI) and medical care may be delayed and reduced through apportionment. Unquestionably, this not only results in uncertainty and delay of medical and disability benefits, but unfairly discriminates against those workers with preexisting conditions.

A recent case, *Frankel v. Loxahatchee Club, Inc.,* 2015 Fla. App. LEXIS 16688 (Fla. 1st DCA 2015) illustrates these concerns which would have never occurred under the rules strictly limiting apportionment set forth in *Evans v. Florida Industrial Com.*, 196 So. 2d 748, 751 (Fla. 1967). In *Frankel*, a 68 year old worker, who injured his shoulder and back in a work accident, had his recommended shoulder surgery delayed because of the E/C raising an apportionment defense as fifteen to twenty years earlier, the worker had hurt his right shoulder playing golf and required surgery for a torn rotator cuff. Even though the worker recovered and received no further treatment, the Court in *Frankel* was compelled by F.S. §440.15(5)(b) to rule that the E/C was responsible for only 75% of the cost of the recommended shoulder surgery (and not 55% of the cost as the JCC had apportioned out an additional 20% for age-appropriate degenerative changes found on an MRI) as the E/C's selected physician opined that 25% of the need for surgery was due to the pre-existing rotator cuff condition, exacerbated/aggravated by the compensable injury.

Is this "full medical care" as promised by *Scanlan*? Is this the "sure...definite and easily ascertained compensation", promised by *New York Central Railroad v. White* 243 U.S. at 204? And does the compensation law retain "the design, intent and purpose of which is to provide for injured workmen"? *Florida Erection*

Services v. McDonald, 395 So.2d 203, 209 (Fla. 1st DCA 1981). Amicus submits the answer is "No".

In *Staffmark v. Merrell*, 43 So. 3d 792, 798 (Fla. 1st DCA 2012), Judge Webster warned of the potential constitutional concerns relating to apportionment of medical:

> If, as I think will likely be the case, a significant number of injured workers receive significantly reduced benefits because of section 440.15(5)(b), the courts might well conclude that because the right to benefits has become largely illusory, Florida's Workers' Compensation Law is no longer a reasonable alternative to common-law remedies and that, accordingly, workers have been denied meaningful access to courts in violation of article I, section 21, of our constitution.

Any illusion that the Workers compensation law provides "full medical care" is also dispelled by the reality that the legislative "reforms" since 1990 now give the E/C the unfettered right to select all "authorized" physicians that treat an injured worker. F.S. §440.13(3). The physicians selected by the E/C are relative Gods who decide issues of major contributing cause, apportionment, ability to return to work, maximum medical improvement, existence of and percentage any permanent impairment, and work restrictions. An injured worker may obtain a one time change in authorized physicians, but the E/C has the right to select the replacement physician. F.S. §440.13(2)(f). Thus, unless the injured worker can afford the $1000 or so to obtain an Independent Medical Exam (IME), F.S. §440.13(5), the worker is stuck with the treatment and opinions from the E/C's physician. It is the reality for many

injured workers trapped in the current compensation system to receive inadequate care from E/C controlled physicians, who are more interested in keeping the E/C happy with favorable opinions on causation, apportionment and an early return to work, than providing full and adequate treatment. Tragically, it is not uncommon for many workers receiving such inadequate treatment to try to escape the compensation system by accepting a "coerced" settlement of their claim, just so they can select a qualified physician of their choice to receive a modicum of adequate care. A prime example of this can be seen the plight of the injured worker in *Pfeffer v Labor Ready, Southeast, Inc., no. SC14-1325, presently pending before this Court.*

CONCLUSION

Florida NELA respectfully submits that the Worker's Compensation law no longer provides adequate, certain nor expeditiously provided benefits and that, as an exclusive remedy, it should be declared unconstitutional under the 14th amendment to the United States Constitution and the Florida Constitution. Florida NELA submits that this Court should reverse the decision below and/or return Chapter 440 to the last law that passed constitutional muster, which is the 1990 law as approved by *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF FACE TYPE COMPLIANCE

The undersigned counsel for Appellant certifies that this brief was computer generated using Courier New 12 point font.

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