IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

DANIEL STAHL,

Petitioner,

v.

HIALEAH HOSPITAL and
SEDGWICK CMS,

Respondents.

CASE NO.: SC15-725

L.T. CASE NO.: 1D14-3077

ANSWER BRIEF OF RESPONDENTS

Gunster, Yoakley & Stewart, P.A. 215 S. Monroe Street, Suite 601 Tallahassee, FL 32301 (850)521-1708 Telephone KBell@gunster.com	Kelley Kronenberg, P.A. 201 S. Monroe Street, 5th Floor Tallahassee, FL 32301 (850)577-1301 Telephone KFernandes@kelleykronenberg.com
By: s/ Kenneth B. Bell, Esq. Fla. Bar No. 0347035	By: s/ Kimberly J. Fernandes, Esq. Fla. Bar No. 0094536

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STATEMENT OF THE CASE AND FACTS[1]

This Court has for discretionary review a First District Court of Appeal decision rejecting Petitioner's assertion that the massive Florida's Workers' Compensation Act ("the Act") is an inadequate exclusive replacement remedy for a tort action because of the addition of a $10 co-pay to section 440.13(13), Florida Statutes, in 1994 and the elimination of permanent partial disability benefits ("PPD") from section 440.15(3) in 2003. Respondents urge this Court to (1) affirm the decision because (a) Petitioner lacks standing; (b) the Act's facial constitutionality is not a question within an appellate court's scope of review of the OJCC proceeding; or (c) these amendments survive the rational basis test; or (2) find that jurisdiction was improvidently granted.

Petitioner's initial brief fails to accurately portray the unusual history of this case. As the Third District observed in *Stahl v. Tenet Health Systems, Inc.*, 54 So. 3d 538, 539 (Fla. 3d DCA 2011), Petitioner "has pursued a rather unconventional procedural course in this case." That descriptive is kind at best.

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1 The Petitioner, Daniel Stahl, shall be referred to herein as "Petitioner." The Respondents, Hialeah Hospital and Sedgwick CMS, shall be referred to herein as "Respondents." The Judge of Compensation Claims shall be referred to herein as the "JCC" and the Office of the Judges of Compensation Claims shall be referred to herein as the "OJCC." Citations to the record are referenced as (R. ___), with the number following the "R." referencing the page number in the record. Citations to the Appendix to this Brief are referenced as (App. ___), with the letter following the "App." referencing the corresponding tabulated document in the Appendix.

Petitioner injured his back in December 2003 while working as a nurse for Tenet Health Systems, Inc., d/b/a Hialeah Hospital. He filed a workers' compensation claim and, after reaching maximum medical improvement ("MMI") and being assigned a six percent permanent impairment rating, received all benefits he was entitled to under the Act. *Id.* at 538. Nonetheless, Petitioner petitioned the OJCC for permanent partial disability benefits to which he was not entitled under section 440.15(1), Florida Statutes (2003). "Without once contending the section was unconstitutional," he litigated that petition for more than three years. *Id.* at 539. On the day of the April 25, 2007, final hearing, Petitioner abandoned his OJCC proceedings and filed a declaratory judgment action in circuit court facially challenging "the constitutionality of the 2003 version of section 440.15(3), Fla. Stat. (2003)." *Id.* That action was dismissed with prejudice for lack of standing.

The Third District Court of Appeal affirmed the dismissal with prejudice in January 2011, holding that Petitioner lacked standing to challenge the statute because he could not "prove that he would be entitled to the wage-loss benefits he seeks but for the provision of section 440.15(3), as amended in 2003." *Id.* at 540. In other words, because "under all versions of section 440.15(3) between 1993 and 2003, [Petitioner] would not have met the twenty percent disability threshold required to obtain supplemental benefits," he could not establish standing.

Undeterred and still without any legal basis to claim entitlement to wage loss benefits, Petitioner returned to the OJCC to pursue the same facial challenge to the 2003 version of section 440.15(3). In February 2011, he filed a Petition for Benefits requesting "compensation for disability, partial in nature, from MMI to date" ("PPD") (App. B). Ignoring the Third District's decision on standing, Petitioner did not assert that he met the twenty percent threshold under the pre-2003 version of section 440.15(3). Instead, he asserted he "has a loss of wage earning capacity of greater than 6% and is entitled to partial disability compensation based upon 440.02(13) and 440.015 (2003)" (App. B). Petitioner later filed another Petition for Benefits requesting permanent total disability ("PTD") and other benefits (App. C).

In these latest OJCC proceedings, Petitioner never introduced any evidence or made any argument regarding the issue of constitutionality of the $10 co-pay added to section 440.13(1)(c) in 1994. The constitutionality or applicability of this co-pay provision was (1) not raised in his Petitions for Benefits (App. B, C); (2) not referenced in the parties' pretrial stipulation (App. D); (3) never asserted in his Motion for Summary Final Order (App. E), or discussed in Appellee's Cross Motion for Summary Final Order (App. F); and (4) not referenced in the amended order on those motions (App. G). Additionally, Petitioner failed to develop a record and

obtained no factual findings from the JCC relevant to any such challenge.

As for section 440.15(3), the JCC's June 2014 order on the parties' cross Motions for Summary Final Order did not find that Petitioner "would be entitled to the wage-loss benefit he [sought] but for the provision of section 440.15(3), as amended in 2003." *Id.* at 540. Instead, with "permanent partial disability" no longer an available benefit under the Act, the JCC simply acknowledged his lack of authority to award benefits "which are no longer provided for by statute" (App. G). The JCC's order then refers to Petitioner's constitutional challenge stating:

> The claimant's challenge to the unavailability of permanent partial disability indemnity benefits is rooted in constitutional grounds. The JCC has no authority to address constitutional challenges (citation omitted). This challenge must be left to another day to be heard, but only after a proper final hearing before the JCC at which time an evidentiary record will be established and findings of fact entered.

(App. G).

After the JCC entered that order, a status conference was held before another JCC. (R. 12, 16). At that status conference, Petitioner's counsel suggested that the JCC allow "the entry of a Final Merits Order which will grant one claim, deny another and indicate that the Judge has no jurisdiction to rule on the third" (R. 13). In his summary to the JCC on these outstanding issues, Petitioner's counsel stated "[t]he third claim . . . was a claim for wage loss benefits which, of course, don't exist

as of (inaudible). So wage loss benefits are going to be, of course, denied as there is no jurisdiction for the JCC in the statute" (R. 15). He again did not assert the $10 co-pay as an issue. In anticipation of the final hearing, Petitioner's counsel stated:

> My suggestion, Judge, was that the matter be set down for what could be ostensively [sic] a final hearing at which we will present to the Judge our proposed agreed Order and ask for the Order to be entered.

(R. 15). The JCC agreed with Petitioner's approach, which avoided a final hearing and the development of an evidentiary record, as referenced in the prior order on the motions for summary final order (App. G).

That ostensible final hearing was "held" on June 23, 2014. No evidence was presented or finding made that Petitioner "would be entitled to the wage-loss benefit he seeks but for the provisions of section 440.15(3), as amended in 2003." *Id.* at 540. Instead of a hearing, Petitioner prepared the Final Merits Order which was signed that day (App. H; R. 3-7). It was here that the $10 co-pay obligation was first acknowledged. As the first and only mention of this obligation in the OJCC proceedings, the order simply states that, "[p]ursuant to s. 440.13(14)(c), Fla. Stat. 2003 [sic], the Claimant will be obligated to pay a $10.00 co-pay per visit to Dr. Yates as 'overall' MMI is stipulated by the parties" (App. A; R. 5).

Petitioner appealed to the First District Court of Appeal.[2] His Notice of

2 This was his sixth appeal to the First District from these OJCC proceedings.

Appeal describes the nature of the order on appeal as "a denial of the claim for permanent partial disability benefits in [sic] the ground that the lack of said benefits in the law is a constitutional issue for which the JCC has no jurisdiction" (R. 10). In his initial brief to the First District, Petitioner only parenthetically mentions the $10 co-pay on page 26 and again on page 45 when referring to the order on appeal (Appendix I).

The First District initially affirmed the JCC's order without opinion. Petitioner moved for a written opinion (Appendix J). The First District issued its "Opinion on Motion for Written Opinion" without addressing (1) the Third District's earlier decision that Petitioner lacked standing to challenge the facial constitutionality of section 440.15(3), as amended in 2003[3]; and (2) the absence of any evidence in the twenty-page record on review that Petitioner would have been entitled to PPD benefits under any earlier version of that statute (Appendix K). Instead, applying the rational basis test, the court disagreed with Petitioner's assertion that "the 1994 addition of a $10 copay for medical visits after a claimant attains maximum medical improvement, and the 2003 elimination of permanent partial disability (PPD) benefits, make the Workers' Compensation Law an inadequate exclusive replacement remedy for a tort action" (Appendix K).

3 Respondents' answer brief filed with the First District asserted this lack of standing argument.

SUMMARY OF ARGUMENT

The facial constitutionality of Florida's Workers' Compensation Act is not a question this Court should decide in this appeal. That question exceeds the scope of review an appellate court has over the Final Merits Order in the OJCC proceeding. Moreover, Petitioner did not have standing to challenge section 440.15(3) (2003), the one provision of the Act he attempted to preserve for appeal in the underlying OJCC proceeding. As for the two amendments to the Act that the First District considered, both survive the rational basis test.

As in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991), when this Court last addressed the facial constitutionality of the Act, a declaratory relief action is a necessary predicate for an appellate court to answer such a significant question. A declaratory relief action (1) assures the participation of all necessary and interested parties to such a significant issue (e.g., workers, employers, the State, carriers or their servicing agents), (2) provides a reasoned circuit court decision on the mixed questions of law and fact, and (3) produces an adequate record that an appellate court can consider when exercising its power of review.

The OJCC proceeding on review lacked each of these elements. Necessary and interested parties could not participate. Significant questions of law and fact underlying Petitioner's question on appeal were never considered by the JCC, and

the scant twenty-page record is of no help on review. With no adversarial proceeding, no record, and no adjudication by the JCC on the mixed questions, deciding Petitioner's question for the first time on appeal would require the exercise of a judicial power that is limited to original proceedings. Applying that power in a review proceeding to declare the exclusive remedy or any other provision in the Act unconstitutional would cast a very dark shadow on the integrity of our judicial system.

In addition, Petitioner lacks standing to challenge section 440.15(3), the one provision he attempted to preserve in the OJCC proceeding for a constitutional challenge on appeal. As in his prior judicial proceeding, he did not establish before the JCC that but for the 2003 amendment he would have been entitled to its benefits. On the merits, no basis exists in the twenty-page record on review to overcome the statute's strong presumption of constitutionality. In other words, this Court cannot determine from its review of the record on appeal that there is no reasonably conceivable set of facts that provides a rational basis for this change in the law. And, as Respondents illustrate, the section's impairment benefit is an adequate replacement for wage loss benefits. Given the presumption of constitutionality, the rational basis standard of review, and the absence of any basis in the record on review to determine otherwise, the First District correctly upheld the facial

constitutionality of section 440.15(3) (2003).

As for section 440.13(13)(c), the facial constitutionality of the $10 post-MMI co-pay, added in 1994, was not a question preserved for appellate review; it is unclear why the First District culled this provision from Petitioner's briefs. With no finding below or any basis in the record to conclude that this $10 co-pay has resulted in less than full medical coverage for work-related injuries, the First District correctly concluded that the need to ensure reasonable medical costs to workers who have reached MMI was a reasonable basis for the Legislature to add a small co-payment.

The First District's decision should be affirmed and, if necessary, its opinion corrected because Petitioner lacked standing and the facial constitutionality of the Act was not within its proper scope of review. Alternatively, jurisdiction could be dismissed as having been improvidently granted.

ARGUMENT

I. PETITIONER'S CONSTITUTIONAL CHALLENGES ARE NOT PROPERLY BEFORE THIS COURT.

This Court last resolved a similar challenge to the constitutionality of the Act in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991). In *Scanlan*, a circuit judge rendered a decision in a declaratory judgment action brought by a petitioner with standing. All necessary parties were before the circuit court, an extensive record for review on appeal was well-developed, and the judge resolved the significant mixed questions of law and fact. That procedure put the question of the Act's constitutionality within an appellate court's scope of review.

In this case, long-time opponents of the Act have strategically avoided filing a declaratory action brought by a petitioner with standing. They were unsuccessful in a related strategy in *State of Florida v. Florida Workers' Advocate, et. al*., 167 So. 3d 500 (Fla. 3d DCA 2015), *rev. denied*, No. SC15-1255 (Fla. December 22, 2015). The same outcome is appropriate here.

This Court should not entertain and, thereby, endorse the opponent's strategy in this case for three reasons. First, Petitioner lacks standing to challenge the facial constitutionality of the 2003 version of section 440.15(3), which is the only challenge properly preserved on appeal to the First District. Second, Petitioner's facial challenges to the Act are far beyond any appellate court's proper scope of

review of the OJCC proceeding. Third, unlike *Scanlan*, the OJCC proceeding here did not (1) involve all necessary and interested parties, (2) allow for an encompassing view of the Act and the impact of any amendments, (3) produce a sufficiently developed record, or (4) result in a decision by a trial court of competent jurisdiction properly subject to appellate review.

A. Petitioner lacks standing to bring a facial constitutional challenge to the 2003 version of section 440.15(3).

As detailed in the Statement of Case and Facts, Petitioner challenged the facial constitutionality of the 2003 version of section 440.15(3) in *Stahl v. Tenet Health Systems, Inc. d/b/a Hialeah Hospital*, 54 So. 3d 538 (Fla. 3d DCA 2011). The Third District affirmed the circuit court's dismissal with prejudice for lack of standing. Petitioner lacked standing because he could not "prove that he would be entitled to the wage-loss benefits he seeks but for the provisions of section 440.15(3), as amended in 2003." *Stahl*, 54 So. 3d at 540.

As in *Stahl*, Petitioner herein lacks standing to challenge section 440.15(3) because "[u]nder all versions of section 440.15(3) between 1993 and 2003, [Petitioner] still would not have met the twenty percent disability threshold required for obtaining supplemental benefits." *Id.* at 540. In his latest OJCC proceeding and this appeal, Petitioner does not dispute that his 2003 workplace injury left him with a six percent permanent impairment rating, therefore, he still does not meet the

twenty percent disability threshold required under the prior versions of section 440.15(3). Thus, he still lacks standing to bring a facial constitutional challenge to section 440.15(3), as amended in 2003. *Id.*[4]

Petitioner may try to overcome his failure to satisfy the requisite twenty percent impairment threshold by urging the revival or application of a pre-1993 version of the wage loss statute which did not include that threshold. That argument has no merit because Petitioner failed to establish the satisfaction of other requirements of this section of the Act, such as a sufficient job search and an actual wage loss. *See* § 440.15(3), Fla. Stat. (2002). All versions of the wage loss statute, including pre-1993, contain those prerequisites. *See* § 440.15(3)(b), Fla. Stat. (1992). Case law is clear that a petitioner lacks standing to challenge the statute if he does not establish these other requirements. *See Acosta v. Kraco, Inc.*, 426 So. 2d 1120 (Fla. 1st DCA 1983) (without such findings, petitioner was unable to show that "but for the statute he would be eligible for wage loss benefits."); *Jack Eckerd Corp. v. Coker*, 411 So. 2d 1026, 1027 (Fla. 1st DCA 1982) (Petitioner "has not

4 The Third District held that Petitioner needed to prove standing through a finding made in an OJCC proceeding, or a showing of evidence in the circuit court. *Stahl*, 54 So. 3d at 540. The order on the motions for summary final order in the subsequent OJCC proceeding on appeal here also states that "a proper final hearing" needed to be held "at which time an evidentiary record will be established and findings of fact entered" (App. F). That hearing was never held, no evidentiary record was developed, and the Final Merits Order does not reflect the findings necessary for standing.

shown that she is adversely affected by the statute by proof that she meets all other requirements for that class of benefits.").

Without proof of a twenty percent or higher impairment rating, Petitioner was not entitled to PPD benefits under the 1993-2002 versions of section 440.15(3) and lacks standing to challenge the constitutionality of the 2003 amendment. Without proof of actual wage loss and a sufficient job search, he also fails to establish standing to challenge *any* version of the statute, pre- or post-1993.

Given Petitioner's lack of standing, the First District's decision should be affirmed.

B. The scope of review on appeal does not include Petitioner's facial challenges to Florida's Workers' Compensation Act.

Should the Court find Petitioner has standing, his challenges to the Act are still insufficient to support the remedy sought as they are not within an appellate court's scope of review.

The nature of the OJCC proceeding, the JCC's decisions adverse to Petitioner, and the record available for review determine an appellate court's proper scope of review:

> The phrase "scope of review" refers to the judicial decisions that are properly before the appellate court for consideration. . . The scope of review in a given case depends on a number of factors, primarily the nature of the appellate proceeding and the record submitted to the

appellate court.

Philip J. Padavano, *Florida Appellate Practice*, § 19:1 (2015 ed.). In other words, "scope of review" limits the breadth of an appellate court's review function to the decisions (actions or omissions) made below. J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, Law and Contemp. Probs., Spring 1984.

Obviously, the breadth of appellate review of the JCC's adverse decisions in this case is far narrower than opponents of the Act would like.

1. The nature of the appellate proceeding: an appellate review of a JCC Final Merits Order.

Petitioner appealed a JCC Final Merits Order that adjudicated the compensation to which he was actually entitled under the Act. That order did not adjudicate the merits of his PPD claim. Indeed, as reflected in the Statement of Case and Facts, Petitioner conceded when he filed his latest Petition for Benefits that the JCC had no jurisdiction to consider his claim for benefits unavailable under the 2003 version of section 440.15(3). He simply made that claim in hopes of having the First District consider issues the Third District could not, due to his lack of standing.

As stated in the JCC order that Petitioner wrote:

[T]his category of benefit is no longer available as a

> workers' compensation benefit and any argument for said classification of indemnity raises a constitutional issue which is outside the jurisdiction of the OJCC.

(R. 5).

The JCC's jurisdictional conclusion was never challenged. A JCC is not a court of general jurisdiction. It is a quasi-judicial, administrative position that can only effect the remedies for which Chapter 440 provides. *Bend v. Shamrock Servs.*, 59 So. 3d 153, 156 (Fla. 1st DCA 2011). The JCC is without jurisdiction to consider claims of facial constitutionality. *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 208 (Fla. 1st DCA 1983). Therefore, the JCC could not award Petitioner benefits that no longer exist under the Act and had no jurisdiction to rule on the constitutionality of section 440.15(3).

Though he would never dispute the JCC's jurisdictional decision, Petitioner noticed this jurisdictional issue for appeal because the First District is able to review such questions. Fla. R. App. P. 1.980(b)(1)(A). Once the First District opened the door to his appeal, Petitioner launched his attack on the Act's facial constitutionality, an issue neither triable nor tried below.

2. The insufficient record from the JCC proceeding does not allow for proper review on appeal of the mixed questions of law and fact.

The twenty-page record reviewable in this appeal does not cure the "scope of

review" problem because that record contains no evidence, argument or factual findings in support of Petitioner's facial challenge. In fact, it is so barren of facts related to the new issues asserted on appeal, neither the initial brief nor the amici briefs in support rely on it. Instead, those briefs rely on nonrecord publications, articles, speeches, letters, and reports, some of which would not have been admissible had an adjudicatory hearing been held.[5]

When reviewing constitutional issues, Florida appellate courts have long recognized that they cannot review mixed questions of law and fact without an adequate record. This is especially true when the constitutionality of legislation is challenged and questions of fact are unresolved. For example, in *McNeil v. Council for Secular Humanism, Inc.*, this Court declined to hear a case certified as one of great public importance because of the inadequacy of the record on appeal. 41 So. 3d 215, 216 (Fla. 2010) (Polston, J., concurring). In support of that decision, Justice Polston's concurrence cites the First District's reasoning in *Glendale Federal Savings & Loan Ass'n v. State*, 485 So. 2d 1321, 1325 (Fla. 1st DCA 1986)("The wisdom of [allowing the plaintiff to adduce evidence] is particularly

5 E.g., the Appendix to Petitioner's Initial Brief includes: (1) a letter from members of Congress to the Secretary of the United States Department of Labor; (2) a speech given by former Justice Ervin to a meeting of the Workers' Compensation Deputy Commissioners; (3) a printout of a report from the National Economic and Social Rights Initiative; (4) an interim report from the Florida Senate Interim Project Report; and (5) a Report of the Office of the Judges of Compensation Claims (Petitioner's App. C-G).

evident in this case where we have been asked to rule for the first time on constitutional questions of considerable magnitude, without the benefit of any record except the various complaints and motions directed to the complaints . . . .");
see also, Cox v. Fla. Dep't of Health & Rehab. Svcs., 656 So. 2d 902, 903 (Fla. 1995).

In the administrative law context, the Third District declined to review a constitutional challenge in *Great House of Wine, Inc. v. Florida Department of Business & Professional Regulation, Div. of Alcoholic Beverages & Tobacco*, when the petitioner "appeal[ed] from a Declaratory Statement issued on stipulated facts at its request by the . . . Division of Alcoholic Beverages & Tobacco," arguing that the statutes upon which the statement was based were unconstitutional. 752 So. 2d 728, 729 (Fla. 3d DCA 2000). Because the administrative agency could not rule on the constitutionality of the statutes, the record consisted only of written pleadings, stipulated facts, transmittal letters and the order based on the stipulated facts. *Id.* "No evidentiary hearing was involved in this procedure." *Id.* The Third District expressed doubt about the constitutionality of the statute and even noted that the briefs raised some "questions about the rationality and/or arbitrariness of the statutory requirements." *Id.* at 730 nn. 2, 3. However, because the constitutional issue involved a mixed question of law and fact, the "hard evidence (in the record

made before the Department)" was not sufficient to make a ruling on appeal. *Id.* at 730 n.2. The Third District affirmed without prejudice to the Petitioner "bringing a declaratory judgment action in" circuit court "in order to develop a complete record for review of the constitutional issues raised in this appeal." *Id.*

Similarly, in *Shamp v. Board. of Orthotists & Prosthetists*, the First District affirmed a State of Florida Board of Orthotists and Prosthetists ruling and declined to address Petitioner's argument that the statute upon which the Board relied was unconstitutional. 781 So. 2d 1124, 1124 (Fla. 1st DCA 2001). At oral argument, the Board argued that the proper method for the Petitioner to challenge the constitutionality of the statute was a declaratory action in circuit court. *Id.* at 1124-25. Based on the "paucity of the record," the First District agreed and affirmed the Board's determination "without prejudice to Petitioner's right to seek any appropriate relief in the circuit court on the constitutional issues raised in this appeal." *Id.* at 1125; *see also State Employees Attorneys Guild v. State*, 653 So. 2d 487 (Fla. 1st DCA 1995)(affirming an order of the Florida Public Employees Relations Commission when the petitioner challenged the constitutionality of the statute upon which the Commission relied without prejudice to the petitioners' rights to file a declaratory judgment action in circuit court to develop a record for the constitutional challenge); *Butler v. State Dep't of Ins.*, 680 So. 2d 1103, 1106 (Fla.

1st DCA 1996).

In the proceedings below, the JCC referenced Petitioner's offer of a proposed order without the need for an evidentiary proceeding by stating to Respondents' counsel, "be aware of Greeks bearing gifts, wouldn't you say, Ms. Lipsky . . . ?" (R. 17). The JCC was prescient of Petitioner's Trojan horse strategy. Petitioner filed for benefits to which he knew he was not entitled, failed to develop a record for review, and crafted an order with no findings on the relevant mixed questions of law and fact solely to gain access to the First District. Once this access was granted, he improperly launched an attack on the entire Act. According to the case law, this unconventional, flawed procedure fails to provide any appellate court with a sufficient record upon which to decide the mixed questions of law and fact necessary to resolve Petitioner's constitutional challenges.

3. The case law allowing limited constitutional challenges from workers' compensation cases is inapplicable.

Before the First District, Petitioner relied on cases that have allowed constitutional challenges to be decided on appeal in workers' compensation cases. Most of those cases involve as-applied challenges. When the constitutional issue was not independent of the JCC's determinations and the record submitted was sufficiently developed, the First District did allow a limited facial constitutional challenge in *Sasso*, 431 So. 2d 204. The First District did so because it believed it

was, "effectively, the most suitable court to which a claim of statutory constitutionality can be made." *Id*. at 208. But *Sasso* is inapposite. Unlike *Sasso*, the constitutional issues Petitioner raises herein are (1) independent of the JCC's determinations; (2) unpreserved (except for the PPD claim for which standing is an issue); and (3) the insufficient record negates the possibility of appellate review. *Id*. at 208.

The most relevant workers' compensation cases on this question are *Carr v. Central Florida Aluminum Products, Inc.*, 402 So. 2d 565 (Fla. 1st DCA 1981), and *Ortega v. Owens-Corning Fiberglass Corp.*, 409 So. 2d 530 (Fla. 1st DCA 1982). Judge Wentworth's special concurrence in *Carr* provides a poignant analysis of the "scope of review" question. The parties and the deputy commissioner (now known as a JCC) in *Carr* knew the degree of impairment was not disputed. Instead, as in this case, the claim for permanent impairment benefits was based "solely on the alleged facial unconstitutionality of the current statute" and, therefore, "presented no issue which the deputy had authority to decide." *Id.* at 569. Under those circumstances, Judge Wentworth could not fathom how the First District would adjudicate the constitutional issue. As she wrote:

> I am unable to see how such a procedure can logically or legally be used to obtain initial adjudication of the constitutional issues here. . . I would therefore deny relief, even assuming that there is merit in his

constitutional attack on the provision . . . .

Id. at 569. The same is true in this appeal. Petitioner's PPD claim in his OJCC proceeding was based solely on the alleged facial unconstitutionality of the current statute and, therefore, presented no issue upon which the JCC had authority to decide. The constitutionality of the $10 co-pay was never an issue before the JCC. Thus, Petitioner's broad facial constitutionality claims not raised or considered below are not subject to "initial adjudication" on appellate review.

In *Ortega*, the First District decided that the claimant's constitutional challenges should be decided in the circuit court, not in a workers' compensation proceeding. Included within its reasoning was that "latent constitutional questions on workers' compensation appeals from orders of the deputy commissioners" do not come to the appellate court with sufficient fact-finding and other resources. *Id.* at 533. The same is true in this appeal.

Clearly, as it did in *Great House of Wine, Inc.*, and *Shamp*, and as Judge Wentworth suggested in *Carr*, the First District should have affirmed the JCC's order herein without determining any of the constitutional issues raised. The First District's scope of review under Florida Rule of Appellate Procedure 9.180 included the JCC's jurisdictional decision on the PPD claim, but it did not include the merits of that claim, much less initially adjudicating the broad facial challenges to the Act

raised for the first time on appeal. Although its short opinion does ignore much of Petitioner's broad attack, the First District should not have addressed the constitutionality of the two amended statutes it did decide. In relation thereto, this Court has the discretionary jurisdiction to review the First District's decision, but that review should not extend to deciding the issues Petitioner has first raised on appeal. Those significant questions never adjudicated below and, with no support in the record, are not ripe and far exceed the proper scope of review of the JCC's decision.

C. When significant questions of law and facts are involved, the proper method for challenging the constitutionality of a statute is a declaratory judgment action in circuit court.

"Ordinarily, the constitutionality of a legislative act should be challenged by filing an action for declaratory judgment in circuit court." *Abdool v. Bondi*, 141 So. 3d 529, 537 (Fla. 2014); *Moreau v. Lewis*, 648 So. 2d 124, 126 (Fla. 1995) ("We have previously recognized that under ordinary circumstances the constitutionality of a statute should be challenged by filing a suit for declaratory judgment in circuit court."); *Div. of Bond Fin. v. Smathers*, 337 So. 2d 805, 807 (Fla. 1976); *Dickinson v. Stone*, 251 So. 2d 268, 271 (Fla. 1971). And, as argued above, a declaratory judgment action in circuit court is necessary herein because the significant constitutionality questions raised by Petitioner involve mixed questions of law and

fact never addressed in the JCC proceeding below.

Petitioner may argue that he tried to pursue a declaratory judgment action, and he did. But that action was dismissed for his lack of standing, a defect Petitioner failed to cure in this appeal. In *Stahl*, the Third District affirmed that Petitioner had no standing to bring a facial challenge to the 2003 version of section 440.15(3) because that court "was not presented with an OJCC finding that but for the 2003 statute he would be entitled to wage loss benefits" and the record did not otherwise establish such entitlement. *Stahl*, 54 So. 3d at 540. Rather than appealing the Third District's decision to this Court, Petitioner chose another path to gain appellate review of the same issue (and much more). However, the route was fundamentally flawed as it did not include the truly necessary and interested parties, create an evidentiary record, or result in an initial adjudication of the constitutional question. Instead, it involved stipulations and agreements to streamline a JCC denial of benefits so an appeal could be pursued before a different court of appeal.

As noted earlier, Petitioner and opponents of the Act try to overcome the insufficient record by including appendices with material never subjected to admissibility challenges or cross-examination. Those appendices are inadequate substitutes for the expert testimony and other evidence presented by both sides at

trial and available to this Court in cases such as *Scanlan*.[6] As in *Scanlan*, the proper forum for consideration of relevant evidence is a circuit court in a declaratory judgment action, not by merely attaching extra-record materials to appendices on appeal.

As much, if not more so, than in *McNeil v. Council for Secular Humanism, Inc.*, 41 So. 3d 215, wherein this Court recently declined to hear a case certified as one of great public importance because of the inadequacy of the record on appeal, the issues Petitioner raises for "initial adjudication" on appeal are of great public importance. Given that importance, this Court should not adjudicate in a vacuum on the impact of two self-selected changes to the Act. Instead, this Court should affirm the decision or find that jurisdiction was improvidently granted so that a complete record may be created through a proper declaratory judgment action in circuit court. *See id.; Great House of Wine, Inc.*; *Shamp*; *State Employees Attorneys Guild; Carr*.

Until a complete record is available from a circuit court proceeding, this Court cannot reasonably apply the rational basis standard of review necessary to reach an informed judgment on the constitutionality of the Act. As discussed next, such an action in a circuit court will also provide the State and other interested parties the

6 A review of this Court's record in *Scanlan* reveals the vast difference between these two proceedings.

opportunity to defend the constitutionality of the statute. Only then will any appellate court have the record necessary for a proper review.

D. The Attorney General was not served and the State and others have not had an opportunity to present their interests.

Petitioner asserts that he "has put the Office of the Attorney General on notice that a Constitutional issue is being raised" (Initial Brief, p. 8). He does not specify how he "put the Office of the Attorney General on notice," and no notice of constitutional question has been filed with this Court. Florida Rule of Civil Procedure 1.071 requires both the filing of a notice and service. Fla. R. Civ. P. 1.071. Failure to properly serve the Attorney General can be grounds for dismissal. *Hudder v. City of Plant City*, 2014 WL 7005904, at *1 (M.D. Fla. Dec. 10, 2014) (dismissing a complaint for failure to serve the attorney general).

This Court recently denied review in *State v. Florida Workers' Advocates*, 167 So. 3d 500 (Fla. 3d DCA 2015), *rev. denied*, No. SC15-1255 (Fla. December 22, 2015), where the Third District noted the problems associated with failing to serve the Attorney General:

> Apparently the trial court accepted the argument that a notice of a constitutional challenge mailed to the Attorney General is sufficient to align and implead the State of Florida as a defendant. In reality, however, the State had not been joined or named as a defendant, had not been properly served with original process, had never filed any responsive pleading, and was under no procedural or

statutory compulsion to do so.

Id. at 504 n.3.

Had Petitioner filed a declaratory judgment action facially challenging the Act, he would have had to serve the complaint on the Attorney General. § 86.091, Fla. Stat. (2014).[7] The purpose of the service/notice statute is "to provide an avenue for the interests of the State to be represented." *Watson v. Claughton*, 160 Fla. 217, 223 (1948). Obviously, doing so would have been contrary to the Trojan horse strategy adopted herein and by similar opponents to the Act in *Florida Workers' Advocates*. That strategy is to deprive the State of a fair opportunity to defend the Act and to avoid development of a complete factual record. It also deprives other interested parties of an opportunity to participate. This Court should neither entertain nor endorse such strategies.

E. The only preserved constitutional challenge is to section 440.15(3). Petitioner has not otherwise alleged fundamental error.

Finally, Petitioner only preserved for appellate review his challenge to section 440.15(3) as amended in 2003. His numerous other challenges, including the $10 co-pay provision, were neither raised nor otherwise preserved in the OJCC

7 This section provides that when declaratory relief is sought on a constitutional issue, "the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard."

proceeding; furthermore, he has not asserted that the JCC made any error. Therefore, the only challenge to the Act's facial constitutionality that may be considered on appeal is section 440.15(3) as amended in 2003. *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993) ("A facial challenge to a statute's constitutional validity may be raised for the first time on appeal only if the error is fundamental."); *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982). "Moreover, 'for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process.'" *D'Oleo-Valdez v. State*, 531 So. 2d 1347, 1348 (Fla. 1988) (quoting *Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981)).

For the above reasons, Petitioner lacks standing to challenge the 2003 version of section 440.15(3), as he failed to adequately preserve his other challenges for review, including his challenge to section 440.13(13)(c). Moreover, his other facial challenges to the Act are not within any appellate court's scope of review. The merits of these significant constitutional questions should not be initially adjudicated in this appeal. Instead, as in *Scanlan*, the mixed questions of law and fact raised should first be decided by a circuit court in a declaratory judgment action and then reviewed on appeal.

II. THE APPROPRIATE STANDARD OF REVIEW IS RATIONAL BASIS WITH A STRONG PRESUMPTION OF CONSTITUTIONALITY, NOT STRICT SCRUTINY.

This Court reviews "a district court's decision regarding the constitutionality of a statute de novo." *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912, 916 (Fla. 2013). In a facial constitutional challenge, the Court determines "only whether there is any set of circumstances under which the challenged enactment might be upheld[,]" and if "any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends." *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010) (citation and internal quotation marks omitted).

Courts addressing the constitutionality of the workers' compensation statute apply the rational basis test. *Winn Dixie v. Resnikoff*, 659 So. 2d 1297, 1299 (Fla. 1st DCA 1995) ("Furthermore, the rational basis test is traditionally applied to social legislation such as workers' compensation."). The rational basis test "'employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one.'" *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 645 (Fla. 2003) (Pariente, J. specially concurring) (quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)). "If there is 'any reasonably conceivable state of facts that would provide a rational basis for the classification,' the courts must defer to the Legislature." *Id.* (Pariente, J., specially concurring) (quoting *Heller v. Doe*, 509 U.S. 312 (1993)).

Finally, "statutes carry a presumption of constitutionality and must be construed whenever possible to achieve a constitutional outcome." *Joseph B. Doerr Trust v. Cent. Fla. Expressway Auth.*, No. SC14-1007, 2015 WL 6748858, at *5 (Fla. Nov. 5, 2015). "[T]here is a strong presumption that a state statute is constitutionally valid, and 'an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt.'" *Medina v. Gulf Coast Linen Servs.*, 825 So. 2d 1018, 1020 (Fla. 1st DCA 2002) (quoting *Todd v. State*, 643 So. 2d 625 (Fla. 1st DCA 1994)) (addressing the constitutionality of section 440.15 of the Act). Moreover, "[t]he judiciary will not nullify legislative acts merely on grounds of the policy and wisdom of such act, no matter how unwise or unpolitic they might be, so long as there is no plain violation of the Constitution." *Holley v. Adams*, 238 So. 2d 401, 405 (Fla. 1970).

Striving for strict scrutiny, Petitioner argues that (1) his access to courts has been denied or restricted by the Act, and (2) he is part of a protected class.[8] Both arguments fail.

A. A rational basis test applies to determine whether a reasonable alternative to court is adequate.

The rational basis standard applies to determine whether section 440.11,

8 Petitioner makes a generalized claim that the Act violates his "right to be rewarded for industry," but fails to explain how this right is affected by the Act in any way. *See* Initial Brief, pp. 10, 12, 13.

Florida Statutes, provides a reasonable alternative to the civil courts. *Berman v. Dillard's*, 91 So. 3d 875, 877 (Fla. 1st DCA 2012) (rejecting the strict scrutiny standard and applying the rational basis standard when evaluating the right to access courts under the Act). Only if the reasonable alternative fails the rational basis test does the Court then apply heightened scrutiny to determine if the statute impermissibly denies access to courts.

In *Kluger v. White*, this Court established this framework to evaluate a claim that access to courts had been denied. 281 So. 2d 1 (Fla. 1973). This Court held that when "a right of access to the courts for redress of a particular injury" predates the adoption of the Florida Constitution,

> the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[9]

Id. at 4. Thus, the heightened requirement that the state show an overpowering public interest becomes relevant only if no reasonable alternative is provided. This Court has never required that the reasonable alternative meet strict scrutiny. *See id.* (noting that workers' compensation, rather than meeting the requirement for a

9 This Court has since stated that the "overpowering public necessity" test is no different than strict scrutiny. *Mitchell v. Moore*, 786 So. 2d 521, 528 (Fla. 2001).

statute to infringe on a fundamental right, is an exception "to the rule against abolition of the right to redress for an injury").

B. Workers' Compensation Claimants Are Not a Suspect Class.

Workers' compensation claimants are not a suspect class. *Acton v. Fort Lauderdale Hosp.*, 440 So. 2d 1282, 1284 (Fla. 1983); *Winn Dixie v. Resnikoff*, 659 So. 2d 1297, 1299 (Fla. 1st DCA 1995) (rejecting claimant's argument that the passage of the Americans with Disabilities Act created a new suspect class of disabled persons).

As for equal protection and due process claims, "the statute need only bear a reasonable relationship to a legitimate state interest." *Id.*; *Bradley v. Hurricane Rest.*, 670 So. 2d 162, 165 (Fla. 1st DCA 1996) (explaining, in a workers' compensation case challenging the constitutionality of section 440.15, "[t]he rational basis test is the proper standard by which to review the claimant's equal protection and due process challenges."). And, Petitioner "bears the burden of demonstrating that the statutory distinction at issue in this case has no rational relationship to a legitimate state purpose." *Lucas v. Englewood Cmty. Hosp.*, 963 So. 2d 894, 895 (Fla. 1st DCA 2007).

III. AMENDED SECTIONS 440.15(3) AND 440.13(13)(c) ARE CONSTITUTIONALLY SOUND.

Instead of addressing the First District's opinion as written, Petitioner's initial

brief mirrors his brief to the First District. His general assertion is that the Act is facially unconstitutional because it denies substantive due process, access to courts, and the right to trial by jury. He then attempts to support that assertion by arguing (1) the benefits are now inadequate, (2) two causes of action have been eliminated, (3) the Division of Safety was eliminated and safety rules were repealed, and (4) the 2003 amendments are no longer valid because the cost of coverage has decreased.

The First District's written opinion ignores that general assertion and most of Petitioner's supporting arguments. It rewrites that general assertion to be: "Claimant asserts that the 1994 addition of a $10 co-pay . . . and the 2003 elimination of [PPD] benefits, make the [Act] an inadequate exclusive remedy for a tort action" (Appendix J). The First District then disagrees with that revised assertion "because both amendments withstand rational basis review in that the $10 co-pay provision furthers the legitimate state purpose of ensuring reasonable medical costs" after MMI is reached and "PPD benefits were supplanted by impairment income benefits" (App. K). The First District's opinion should be affirmed (assuming Petitioner has standing, the issues were preserved, and answering the revised assertion was within that court's scope of review).

Petitioner does briefly address the First District's two penultimate conclusions. He argues that the 2003 repeal of the wage loss statute (§ 440.15(3),

Fla. Stat. (2002)) leaves claimants with no adequate remedy for permanent partial disabilities and that the creation of the $10 co-pay for post-MMI medical appointments (§ 440.13(13)(c), Fla. Stat. (2003)) unfairly burdens claimants with a portion of the cost of their medical care (Initial Brief, pp. 23-4).[10] These arguments are made without evidentiary support for Petitioner's entitlement to wage loss benefits or evidence of Petitioner's denial of medical treatment due to non-payment of the $10 co-pay.

If the merit of these two issues is considered and the rational basis standard of review applied, the impairment benefits available to compensate permanent partial disabilities provide an adequate remedy and the $10 co-pay associated with post-MMI medical care is a de minimus burden.

A. The benefits available under the Act are an adequate exclusive remedy for workers' compensation claimants.

Even if this Court determines Petitioner has standing, his argument still fails because the amended statute fairly compensates the injured worker with impairment benefits, a reasonable alternative to the wage loss benefits eliminated in 2003. *See Sasso v. Ram Props. Mgmt.*, 452 So. 2d 932, 934 (Fla. 1984)(finding that a partial

10 The Petitioner's Initial Brief includes numerous arguments pertaining to several other provisions in chapter 440, but this Court is obligated to address only the provisions ruled upon by the lower court. *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1178 n.4 (Fla. 2013); *Ampuero-Martinez v. Cedars Healthcare Group*, 139 So. 3d 271 n.1 (Fla. 2014).

remedy does not constitute an abolition of rights without reasonable alternative); *Martinez v. Scanlan*, 582 So. 2d 1167, 1171-72 (Fla. 1991)(holding that the statutory amendment at issue did reduce benefits to claimants, nonetheless, it was deemed a constitutional replacement remedy and a reasonable alternative to tort litigation); *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n.*, 114 So.3d 912, 920-21 (Fla. 2013)(applying the reasoning in *Martinez v. Scanlan* to another substitutional remedy, finding that the remedy is a reasonable alternative to a tort remedy, even though it "severely truncates the amount that parents could receive from a jury in noneconomic damages"). His argument also fails because full medical benefits are still afforded to claimants, regardless of the $10 co-pay provision.

1. Section 440.15(3) as amended in 2003

Section 440.15(3), as amended in 2003, provides claimants impairment benefits to compensate for the permanent impairment suffered in a work-related injury, calculated according to a scale which provides more compensation for more serious injuries and less compensation for less serious injuries. The crux of Petitioner's argument lies in the pre-2003 availability of wage loss benefits payable after impairment benefits. *See* § 440.15(3), Fla. Stat. (2002). Under that prior version of the statute, an impairment rating greater than twenty percent provided

entitlement to wage loss benefits for up to 401 weeks when combined with other indemnity benefits paid, as long as the claimant met certain prerequisites. *Id.*

Petitioner may argue the former wage loss benefits and the current impairment benefits were not intended to address the same detriment, asserting that impairment benefits compensate claimants for the permanency of work injuries, while wage loss benefits compensate claimants for a loss of wage-earning capacity associated with work injuries. However, that argument was raised to and rejected by the First District in *Bradley v. The Hurricane Restaurant*, 670 So. 2d at 165.[11] As noted in *Bradley*, the prerequisite for entitlement to both types of benefits was a permanent impairment rating. *Id.* ("Physical impairment is one accepted criterion for measuring benefits, and it was within the legislature's discretion to utilize this standard"). Additionally, the 2003 amendments consolidated these two post-MMI benefits, thus increasing the efficiency of the system, consistent with the Legislature's intent. *See* § 440.015, Fla. Stat. (2003)("It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden.").

Under the 2002 statute, impairment benefits were paid for three weeks per

11 While the burden of proof in the statutes that created these two benefits differs, both statutes served a similar purpose of compensating claimants after they reach MMI.

percentage point of the impairment rating. *See* § 440.15(3), Fla. Stat. (2002). Once those payments were exhausted, if the rating exceeded twenty percent, only then would the claimant be eligible for wage loss benefits. *Id.* If the rating did not exceed twenty percent, the claimant (such as Petitioner) was never eligible for wage loss benefits. *Id.*

In 2003, the wage loss portion of section 440.15 was repealed, leaving impairment benefits as the sole monetary benefit premised upon an impairment rating. *See* § 440.15(3), Fla. Stat. (2003). The statutory amendments also increased the pay rate on a longer schedule for higher impairment ratings.

To illustrate this change in the statute, consider a claimant with a $200 weekly compensation rate and a twelve percent permanent impairment rating. Under the 2002 statute, no wage loss entitlement existed because the rating was under the twenty percent threshold. Instead, this claimant was entitled to thirty-six weeks of impairment benefits calculated at a weekly amount of $100, totaling $3,600. *See* § 440.15(3), Fla. Stat. (2002). Under the 2003 statute, the claimant was entitled to twenty-six weeks of impairment benefits calculated at a weekly amount of $150, totaling $3,900. *See* § 440.15(3), Fla. Stat. (2003). In other words, the claimant would receive more money under the 2003 statute than under the 2002 statute. Incidentally, using Petitioner's six percent impairment rating, both versions of the

statute would entitle him to the same amount of impairment benefits, $1,800.

The 2003 amendments increased the impairment benefits payable for a rating of twenty percent or higher. To illustrate, assume a claimant has a $200 weekly compensation rate and a twenty-five percent impairment rating. Under the 2003 statute, this claimant would be entitled to $12,750 in impairment benefits. Under the 2002 statute, this claimant would be entitled to $7,500 in impairment benefits, followed by weekly wage loss benefits of $192 (paid monthly) for as long as he or she is unable to earn income at his or her pre-injury wage level, capped at 401 weeks for all temporary indemnity and impairment benefits.

Even before the repeal of the wage loss statute, it was even challenged by claimants as unconstitutional. *Sasso v. Ram Prop. Mgmt.*, 452 So. 2d 932 (Fla. 1984)(challenging the limitation on wage loss benefits to claimants under the age of sixty-five). This Court noted in *Sasso* that the adequacy of all other benefits available as an alternative to wage loss or tort remedies kept the statute constitutional. This is still true today under the current version of the Act. "The workers' compensation law remains a reasonable alternative to tort litigation. It provides injured workers with full medical care and benefits for disability and permanent impairment regardless of fault, without the delay and uncertainty of tort litigation." *Bradley*, 670 So. 2d at 164-65. The current version of section

440.15(3) is clearly facially constitutional.

2. Section 440.13(13)(c)

Petitioner also argues that adding the $10 co-pay to the Act in 1994 for post-MMI medical appointments requires claimants to shoulder a portion of their medical expenses, thus improperly reducing the amount of medical benefits available to claimants (Initial Brief, p. 24).

If this Court finds the co-pay statute is properly considered in this appeal, it should also find that the Act still provides claimants with full medical care, regardless of the co-payment. In fact, contrary to Petitioner's contention that the Act has been "decimated and eviscerated" over the years, it actually provides claimants with medical benefits not provided to other injured persons under any other remedial system, (Initial Brief, p. 18).

Requiring a claimant to make a $10 co-pay for medical appointments after MMI does not run afoul of the legislative intent of requiring industry to shoulder the financial burden of work injuries. The co-pay does not reduce the amount of medical care available to claimants. And, no evidence exists in the record to show that medical treatment has been denied a claimant due to a failure to make the $10 co-pay. Furthermore, an inability to make this co-pay could be resolved by affording a claimant an advance payment on benefits pursuant to section 440.20,

another remedy exclusively available to workers' compensation claimants. *See* § 440.20(12)(c), Fla. Stat. (2003).

The $10 co-pay after MMI is a de minimus burden for claimants when considering the other medical benefits afforded under the Act. For example, regardless of whether a claimant has reached MMI, the Act provides for attendant care, medical equipment, housing and transportation accommodations, and even treatment for non-compensable conditions, if certain other requirements are met.

Subsections 440.13(2)(a) and (b) require employer/carriers to provide attendant care to injured employees for as long as their doctors deem it reasonable and medically necessary. Such attendant care can be provided by a health care service, or it can be provided by a family member for direct payment to that family member. § 440.13(2)(b), Fla. Stat. (2003). In fact, if a family member leaves his or her employment to provide such attendant care, he or she can be compensated at the rate of pay forfeited from the former employment. § 440.13(2)(b)(2), Fla. Stat. (2003).

Section 440.13(2)(a) is a broadly interpreted provision which has required employer/carriers to provide home modifications, vehicle modifications, or even entire homes or vehicles, to claimants. *See Peace River Elec. Corp. v. Choate,* 417 So. 2d 831 (Fla.1st DCA 1982)(awarding an entirely new home); *Ramada Inn S.*

Airport v. Lamoureux, 565 So. 2d 376 (Fla. 1st DCA 1990)(awarding home modifications); *Temps & Co. Servs. v. Cremeens*, 597 So. 2d 394 (Fla. 1st DCA 1992)(awarding vehicle modifications); *Applegate Drywall Co. v. Patrick*, 559 So. 2d 736 (Fla. 1st DCA 1990)(awarding a vehicle). Florida courts have even awarded payment of certain utility bills and insurance for claimants. *Desir v. Nouveau Assocs.*, 969 So. 2d 1089 (Fla. 1st DCA 2007).

Another broad interpretation of section 440.13(2)(a) has created the "hindrance to recovery" doctrine, which requires employer/carriers to provide medical treatment to claimants for indisputably non-compensable medical conditions when those personal conditions serve as a hindrance to a claimant's recovery from the compensable condition. *See Jordan v. Fla. Indus. Comm'n*, 183 So. 2d 529 (Fla. 1966)("[T]he existence of a non-disabling pre-existing condition retarded and prevented recovery from the compensable injury," warranting an award of correction of the pre-existing condition to allow a cure for the work injury pursuant to section 440.13(1), which was the 1966 codification of the current section 440.13(2)(a)).

The Act has also been amended to include short deadlines for the provision of certain medical benefits, giving claimants more control over medical care when employer/carriers do not meet these deadlines. For example, section 440.13(3)(d)

provides a "3-day rule," deeming a doctor's referral to be medically necessary if the employer/carrier fails to authorize the referral within three days of receiving it. § 440.13(3)(d), Fla. Stat. (2003). Section 440.13(3)(i) provides a "10-day rule," deeming a medical procedure costing more than $1,000 to be automatically reimbursable without prior authorization if the employer/carrier fails to authorize the procedure within ten days of receiving a doctor's recommendation for the procedure. § 440.13(3)(i), Fla. Stat. (2003). Finally, section 440.13(2)(f) provides a "5-day rule," giving the claimant the ability to select a doctor for authorization as his or her one-time change in physician if the employer/carrier fails to name an alternate doctor within five days of receiving the claimant's request to change doctors. § 440.13(2)(f), Fla. Stat. (2003). No other remedial system provides such aggressive deadlines for medical care.

In sum, these medical benefits (which are not an exhaustive representation of benefits available under the Act), illustrate that claimants remain entitled to full medical care for work-related injuries. No contrary evidence exists in the record on review. Consequently, section 440.13(13)(c) is facially constitutional.

As restated by the First District, Petitioner asserted that the amendments to these two provisions made the Act an inadequate exclusive remedy to tort litigation. The First District rightly disagreed and the record on review does not establish

otherwise. The benefits available under chapter 440 still provide an adequate replacement remedy to the civil tort system.

B. The repeal of the "opt out" provision and the 1989 amendment of section 440.11(4) did not deny claimants access to courts in violation of the constitution.

Petitioner's argument that the repeal of the "opt out" provision and the removal of a bad faith cause of action denies claimants access to courts (Initial Brief, pp. 28-9) is not preserved, is not addressed in the First District's opinion, and lacks record support. This argument is also meritless because the Act remains an adequate exclusive replacement remedy to tort actions, and bad faith claims are still being asserted, and awarded, in today's workers' compensation realm. *See Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 95 (Fla. 2005)("We have clearly concluded that the workers' compensation system does not immunize an insurance carrier's intentional fraudulent actions while processing a claim. . . ."). Section 440.11 thus remains constitutional.

C. The elimination of the Division of Safety and the repeal of safety rules in chapter 440 did not dispense with other safety measures implemented in the workplace.

Petitioner's argument that the repeal of Chapter 442 eliminated safety regulations (Initial Brief, pp. 40-1) is not preserved, is not addressed in the First District's opinion, and lacks record support. It is also meritless because workplace

safety is subject to federal OSHA regulations (and other means to promote safety) which allowed the redundant state regulations to be abandoned. No evidence exists in the twenty-page record on review establishing that the elimination of the safety provisions cited by Petitioner has increased jobsite accidents or injuries.

D. The 2003 amendments to the Act addressed several concerns, only one of which was the high cost of workers' compensation coverage.

Petitioner's final argument that the amendments should be repealed because the crisis that prompted them is now over (Initial Brief, pp. 42-3) is also not preserved, was not addressed by the First District, and lacks record support. It is also meritless because the cost of insurance has decreased and, as a direct result, more insurance is being purchased, providing better protection for more Florida workers. A reversion to pre-2003 law would only cause the "crisis" to arise again, thereby increasing the costs of insurance, directly impacting the affordability of coverage for Florida employers, and reducing the guaranteed protection of workers for work-related injuries.

CONCLUSION

This Court should affirm the First District's decision but clarify that the facial constitutionality of the Act was not within that court's scope of review. Instead, such a challenge must be decided in a declaratory judgment action. Alternatively, this Court could conclude that jurisdiction was improvident lay granted and dismiss this appeal.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true copy of this brief has been e-mailed to the parties listed below this 30th day of December, 2015.

Mark Zientz, Esq.
Law Offices of Mark L. Zientz, PA
9130 S. Dadeland Blvd., Ste. 1619
Miami, FL 33156
Mark.zientz@mzlaw.com
Counsel for Petitioner

Katherine Giddings, Esq.
Diane DeWolf, Esq.
Akerman LLP
106 E. College Ave., Ste. 1200
Tallahassee, FL 32301
Katherine.giddings@akerman.com
Dian.dewolf@akerman.com
Elisa.miller@akerman.com
Michele.rowe@akerman.com
Counsel for The Florida
Chamber of Commerce and
Florida Justice Reform
Institute

Roy Carroll Young, Esq.
Young van Assenderp, PA
216 S. Monroe St.
Tallahassee, FL 32301
ryoung@yvlaw.com
Counsel for The Florida
Chamber of Commerce

William W. Large, Esq.
Florida Justice Reform Institute
210 S. Monroe St.
Tallahassee, FL 32301-1824
william@fljustice.org
Counsel for Florida Justice Reform Institute

Rayford Taylor, Esq.
Gilson Athans P.C.
980 Hammond Dr., Ste. 800
Atlanta, GA 30328
rtaylor@caseygilson.com
Counsel for Florida Insurance Council, American Ins. Assn., National Assn. of Mutual Ins. Companies, and Property Casualty Insurers Assn. of America

William H. Rogner, Esq.
Hurley, Rogner, Miller, Cox, Waranch and Westcott, PA
1560 Orange Ave., Ste. 500
Winter Park, FL 32789
wrogner@hrmcw.com
Counsel for Florida Assn. Of Insurance Agents and American Assn. of Independent Claims Professionals

James N. McConnaughhay, Esq.
McConnaughhay, Coonrod, Pope, Weaver, Stern and Thomas, PA
1709 Hermitage Blvd., Ste. 200
Tallahassee, FL 32308
jnmcconnaughhay@mcconnaughhay.com
Counsel for Associated Industries of

Florida, Florida Roofing, Sheet Metal and Air Conditioning Contractors Assn., The Florida Retail Federation, The National Federation of Independent Business, The Florida United Business Assn., Inc., and the Florida League of Cities

David McCranie, Esq.
McConnaughhay, Coonrod, Pope, Weaver, Stern and Thomas, PA
165 Wells Rd., Ste. 302
Orange Park, FL 32073
dmccranie@mcconnaughhay.com
Counsel for Associated Industries of Florida, Florida Roofing, Sheet Metal and Air Conditioning Contractors Assn., The Florida Retail Federation, The National Federation of Independent Business, The Florida United Business Assn., Inc., and the Florida League of Cities

Kimberly A. Hill, Esq.
Kimberly A. Hill, PL
821 S.E. 7th St.
Fort Lauderdale, FL 33301
Kimberlyhillappellatelaw@gmail.com
Counsel for VOICES, Inc.

William J. McCabe, Esq.
1250 S. Hwy 17/92, Ste. 210
Longwood, FL 32750
billjmccabe@earthlink.net
Counsel for Florida Workers Advocates

Richard Sicking, Esq.
Mark Touby, Esq.
Touby, Chait & Sicking, PL
2030 S. Douglas Rd., Ste. 217
Coral Gables, FL 33134
ejcc@fortheworkers.com
ejcc3@fortheworkers.com
Counsel for Florida Professional Firefighters, Inc.

Michael J. Winer, Esq.
110 N.11th St., 2nd Floor
Tampa, FL 33602-4202
mike@mikewinerlaw.com
Counsel for Florida Justice Assn.

Louis Pfeffer, Esq.
250 S. Central Blvd., Ste. 205
Jupiter, FL 33458
lpfeffer@pfefferlaw.com
Counsel for National Employment Lawyers Assn., Florida Chapter

Gerald Rosenthal, Esq.
Rosenthal, Levy, Simon & Ryles
1401 Forum Way, 6th Floor
West Palm Beach, FL 33401
grosenthal@rosenthallevy.com
Counsel for Workers' Injury Law & Advocacy Group

Geoffrey Bichler, Esq.
Bichler, Kelley, Oliver & Longo, PLLC
541 S. Orlando Ave., Ste. 310
Maitland, FL 32751
geoff@bichlerlaw.com

sheila@bichlerlaw.com
Counsel for Police Benevolent Assn., Fraternal Order of Police, International Union of Police Assns., AFL-CIO and Florida Association of State Troopers

By: _____s/_____
Kimberly J. Fernandes, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Gunster, P.A. 215 S. Monroe Street, Suite 601 Tallahassee, FL 32301 (850)521-1708 Telephone KBell@gunster.com	Kelley Kronenberg, P.A. 201 S. Monroe Street, 5th Floor Tallahassee, FL 32301 (850)577-1301 Telephone KFernandes@kelleykronenberg.com
By: _____s/_____ Kenneth B. Bell, Esq. Fla. Bar No. 0347035	By: _____s/_____ Kimberly J. Fernandes, Esq. Fla. Bar No. 0094536