IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CASE #: SC15-725
LT Claim No: 1D14-3077

Daniel Stahl

Petitioner,

v.

Hialeah Hospital and
Sedgwick Claims Management
Services

Respondents

PETITIONERS REPLY BRIEF

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OVERVIEW

> **"Workers' compensation is a very important field of the law, if not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of businesses, and the pocketbooks of consumers are affected daily by it", *Singletary v. Mangham Const. Co.*** 418 So. 2d 1138 (Fla. 1 DCA 1982) (Judge Mills in a separate opinion).

Respondents raise the question of Petitioner's 'standing' as their first response to the facial invalidity argument made by Petitioner. This is really a non-issue for a number of reasons, not the least of which is that the Petitioner is "able to demonstrate an injury which is both real and immediate, not conjectural or hypothetical", *Montgomery v. Dep't of Health and Rehab Services*, 468 So. 2d 1014, 1016 (Fla. 1 DCA 1985). Even though the 'intent' of the law is to compensate for 'disability' s. 440.015 (1994), it fails to compensate for permanent partial disability. Disability is defined as: "...incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury" s. 440.02 (13) (2003). Stahl has a disability and was denied compensation for it. He does not lack standing to complain. Stahl asked the circuit court in and for the 11th Judicial Circuit to allow him to sue his employer because the workers' compensation 'exclusive remedy' was

constitutionally inadequate to replace a tort system which compensates for loss of future wage earning capacity. He also asked for declaratory relief for the same reason. After dismissal of the complaint with prejudice, Stahl appealed to the Third DCA. In a written opinion the Third DCA affirmed the dismissal and found that Stahl lacked standing to complain about the lack of any benefit for his permanent partial disability **because he could not show that he would have been able to obtain permanent partial disability benefits under the compensation law in effect just before October 1, 2003** (the law that eliminated all compensation for Permanent Partial Disability).

In a motion for rehearing directed to that opinion, Stahl pointed out that the court may have overlooked that the right to Permanent Partial Disability was available to all permanently disabled employees at the time of the adoption of the constitution of 1968 and was eliminated in a series of amendments, the so called 'death by a thousand cuts', culminating in the complete elimination of any benefit for permanent partial disability effective October 1, 2003 (Appendix A- Motion for Rehearing in *Stahl v. Hialeah Hospital*, case # 3D09-3146). In that same motion for rehearing Stahl also explained to the court why he had standing to complain about the constitutionally of an inadequate benefit structure because he was being

denied an opportunity to prove he had a wage loss greater than his 6% 'impairment' which would have entitled him to compensation for partial loss of wage earning capacity in 1968. The Third DCA denied the motion for rehearing and denied the request for a certified question or certification of conflict with *Martinez v. Scanlan,* 582 So.2d 1176 (Fla. 1991) (the *Martinez* court initially recognized that none of the parties had an actual, pending controversy, the court nevertheless exercised its jurisdiction because of 'the importance of this case", and the perception that "the rights and obligations of some of the parties and many others would be affected if the act in its entirety is invalid", id. at 1171).

Whether or not a statute passes the test for facial invalidity is not a test to determine if Stahl was eligible for wage loss benefits pre October 1, 2003. That would be an as applied (to Stahl) challenge. The test is whether wage loss benefits were continuously available to any disabled injured worker from 1968 to October 1, 2003.After that date that entire class of benefits was eliminated with no replacement as required by *Kluger v. White, 281 So. 2d 1 (Fla. 1973).*

The Third DCA's mistake was not going back before 1993, back to 1968. Even the 1993 statute, s.440.15(3)(b) would have allowed Petitioner the right to claim wage loss benefits. It was the 1994 statute, effective

January 1, 1994, that set the 20% impairment threshold, s.440.15(3)(b) 1 (a) (1994).

Florida's compensation statute had wage loss benefits in 1968, a class of benefits that was totally eliminated in 2003, in violation of *Kluger,* id. None of the 'takeaways' after 1968 was ever replaced with an equivalent benefit. Respondents also complain that Petitioner never introduced any evidence of, or made any argument regarding the $10.00 co- pay issue (P. 3 Ans Brief). The court is reminded that this case was 'tried' based upon a stipulated set of facts. No proof was required. Respondents at the trial level acquiesced to the language in the agreed order which mentioned that since Petitioner had reached overall MMI he would be required to pay the $10.00 co-payment (Appendix A to Ans. Brief).

Respondent points out that the 'standing' argument was raised in Respondent's Answer Brief filed with the First DCA. For arguments sake we accept that the affirmative defense of 'standing' was raised. Lack of standing is an affirmative defense that must be raised by the defendant and the failure to raise it generally results in a waiver, *Phadael v. Deutsche Bank Trust Co.*83 So. 3d 893 (4th DCA 2012). In this case the Respondents raised the standing issue in the First DCA. They did not request rehearing after the written opinion was rendered. They did not 'cross-appeal'. The

First DCA's ruling on the substantive issues means that the standing issue was not a barrier to their substantive decision. The law of this case is that Petitioner has standing.

Respondents seem to think there were missing parties and no adversary at trial. Hialeah Hospital was the adversary and the facts were agreed upon. The JCC could not decide the constitutional issues. The Attorney General was put on notice as required by statute (Appendix B) and chose not to participate until after the Answer Brief was filed in this case and then only as *amicus*. In addition, the Division of Workers' Compensation is allowed to intervene as a party. The clerk of the Supreme Court is directed to provide a copy of the pertinent documents to the division. The Division is not a party until the notice of intervention is filed, Rule 9.180(e) Rules of Appellate Procedure. The Division did not intervene. Any argument about necessary parties not being able to participate is not well taken.

I- PETITIONER'S CONSTITUTIONAL CHALLENGES ARE PROPERLY BEFORE THE COURT

Once the court assumes jurisdiction, the court may entertain any issue related to the underlying controversy. In accepting jurisdiction over a certified question, for example, the court is not limited to a decision on just the question certified, *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594

(Fla. 1961).

There are no questions of fact involved. If that were true this would be an 'as applied' challenge. As a facial challenge, only the language of the statute is in question. Does the statute provide a constitutionally adequate remedy in place of the tort remedy it replaced? Petitioners provided the court with various guidelines for adequacy, Respondents have not.

The argument of Respondents presents a "Catch 22". If constitutional review cannot be obtained in the courts of general jurisdiction by declaratory judgment, requiring the matter to be presented to the OJCC, and then if presented to the OJCC cannot be asserted on appeal because the JCC has no power to decide the issue (P. 20, 21 Ans. Brief). How can a facial invalidity challenge ever be mounted? Respondent even asserts that the First DCA should not have decided the constitutional issues presented to them. That reasoning flies in the face of *B & B Steel Erectors v. Burnsed*, 591 So. 2d 644 (Fla. 1 DCA 1991) which, citing *Sasso v Ram Properties,* 452 So. 2d 932 (Fla1984), concluded that constitutional issues arising out of decisions by a JCC can be raised for the first time on appeal even if not preserved below, id. 647.

II- RATIONAL BASIS V. STRICT SCRUTINY

While it is true that there is only one decision holding a portion of

chapter 440 to be unconstitutional based in part using strict scrutiny, *DeAyala v. Florida Farm Bureau*, 543 So. 2d 204 (Fla. 1996) (note: there was no participation by the State in this case), like *Burnsed*, id. *DeAyala* is another significant case missing from Respondents answer brief. *DeAyala, id.,* stands for the proposition that a statute will be regarded as inherently "suspect" and subject to "heightened" judicial scrutiny if it impinges too greatly on fundamental constitutional rights flowing either from the federal or Florida Constitutions, **or** if it primarily burdens certain groups that have been the traditional targets of irrational, unfair, and unlawful discrimination (emphasis in original). The classification implicated in s.440.15(3) is **the physically disabled**, a class that is now constitutionally protected, Art.I, Sec. 2, Fla. Const. Even if not a protected class, injured workers have been the subject of discrimination by the majoritarian political powers in favor of business interests. Workers' compensation laws have become subsidies for business.

III- AMENDED SECTIONS ARE NOT CONSTITUTIONALLY SOUND

For 42 years, since October 1, 1974, virtually every amendment to chapter 440 has been enacted with the intent to reduce benefits to injured workers and create procedures that make processing a claim impossible for the injured worker without the assistance of counsel. The one exception was

the increase in the amount of the death benefit to $150,000.00 where it has remained since October 1, 2003.

In *DeAyala*, id. the court quotes form *Dennis v. Brown*, 93 so. 2d 584, 588 (Fla. 1957) that:

> "Workmen's (sic workers') compensation acts were designed to remove from the workman himself the burden of his own injury and **disability** and place it on the industry which he served. Such acts should be liberally construed with the interest of the working man foremost".

OSHA reported in 2015 that injured workers nationally are responsible for 50% of the cost of their own injuries, the Federal government 11%, private health insurance 13% and State and local government 5%. Workers' compensation pays only 21% of the total cost of injury on the job, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the* Job, page 6, (Appendix C). Florida in all likelihood would be worse than the average

Enactment of laws that make the injured worker responsible for part of the medical costs associated with the injury and responsible for all of his or her permanent partial wage loss shifts the burden of injury away from industry and onto the injured worker and his family. Such a situation clearly conflicts with every pronouncement from this court on the issue. See, for example, *Mobile Elevator v. White*, 39 So. 2d 799 (Fla. 1990):

> "If we bear in mind the purpose of the compensation act it seems to us there is small importance in the circumstance that only two employees were at the time actually serving in this state. **The industry served, instead of society, was intended by the lawmakers to bear the burden resulting from injury to persons employed in industry.** If we use this criterion in this controversy, it seems inescapable that the fundamental fact is that appellee's injury constituted a loss, or a burden, to be paid or borne by the industry he was serving at the time.
> If he was hurt while installing an elevator, then **the employer who benefits or profits from that activity must relieve society of the consequences of a broken body, a diminished income, an outlay for medical and other care.** If this be the exalted reason for the workmen's compensation plan, and undoubtedly it is, the matter of the performance by appellant of one job south of the Alabama-Florida line by only two workmen, while admittedly many more employees belonged to the organization on the north side of that line, presumably engaged in the same general business, seems inconsequential". (Emphasis added), id.

Petitioners submit that it is not a legitimate state interest to guarantee increased profits for business by shifting the responsibility for on the job injury to entities other than the employer. Especially since one of those entities is the injured employee. The 1994 and 2003 amendments were only enacted to lower employer premiums. A cost they could pass on to customers, while the employee had to pay his own costs.

The language used by the First DCA in the opinion finding no constitutional infirmity in the two sections they reviewed is the result of flawed reasoning. For instance, the court said: "because both amendments withstand the rational basis review in that the $10.00 co-pay provision

furthers the legitimate state purpose of ensuring reasonable medical costs". (Appendix J to Ans. Brief). The court might as well have said that there is a legitimate state purpose to transferring $10.00 of the cost of medical care from the employer to the injured worker. Medical costs as a whole did not decrease one cent. The employer just paid less.

Respondents then make the argument that impairment benefits fairly compensate for future loss of wage earning capacity (P. 33 Ans. Brief). This is notwithstanding that impairment and disability are defined differently in the law. One is for functional loss s. 440.02 (22) Fla Stat. 2003), the other for the inability to earn the same wages earned at the time of the injury, s. 440.02 ((13) Fla. Stat. 2003). It is ludicrous to assert that regardless of what Petitioner received for his impairment, that it was adequate. Any statute that fails to compensate all disabled employees for future loss of wage earning capacity is inadequate on its face. Respondents cite no authority for their claim that the law after the 2003 amendments is adequate as a replacement for tort liability.

As for the $10.00 co-pay, if allowed to remain the law, what is to stop the legislature from increasing the co-pay amount? What is to stop the legislature from instituting a yearly deductible ? It is not the amount of the co-pay that is the problem, it is the existence of the co-pay that is troubling.

Respondents state that if the injured worker is unable to pay the co-pay he can ask for an advance (P.38, 39 Ans. Brief). That argument may be made out of ignorance or to mislead the court. Either way, the argument is not valid. After MMI, and after the payment of impairment benefits, the injured worker is not entitled to any further compensation. Advances are loans against future compensation. No future indemnity, nothing to tap into re-pay the loan. If the co-pay is *de minimus* as asserted (P.39 Ans. Brief) why is it needed at all? Respondents are correct that the law provides a myriad of medical benefits. What respondents fail to advise is that if the benefits are 'apportioned' pursuant to s.440.15 (5) (2003), the injured worker has to be prepared to pay between 1% and 49% of the cost of all his medical care using reduced, apportioned indemnity. If the injured employee has no money, he gets no medical benefit at all.

As for Respondents position that Florida Safety rules are 'redundant' (P.43 Ans. Brief) because of OSHA, this too is an argument made out of ignorance of the law. OSHA does not cover government (government is Florida's largest employer) or employers of fewer than ten employees. The rest of the workforce is allegedly protected by OSHA. In Florida it would take OSHA inspectors **230 years** to inspect each **covered** workplace one time, *U.S. Dept. of Labor, Bureau of Labor Statistics, F.Y.2011.*

RESPONSE TO AMICI:

STATE OF FLORIDA

If Respondents and their Amici are correct, the only way to challenge the facial invalidity of a statute is for the Petitioner to be aggrieved by each and every deficient provision in the law. This challenge is to the adequacy of the law, not an as applied challenge applicable only to Petitioner. The limited replacement remedy will at some point after repeated cuts, be insignificant and unlawful. This scenario was described by this court in *Marinez v. Scanlan*, id. When the statute gets to a point after amendment where it no longer provides full medical care and some compensation for permanent partial disability, it becomes inadequate and unconstitutional.

The question for the court is whether the legislature has provided a reasonable and adequate remedy in place of the tort remedy now governed in Florida by comparative negligence standards since 1973, *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). Just because the court has upheld the workers' compensation scheme's framework in the past by looking at statutes that merely reduced but did not eliminate an entire class of benefits, is not controlling. We now have the taking of the inviolate right to trial by jury without adequate remuneration. No court has ruled on the subject of whether those injured workers who sustain a physical disability, like Mr.

Stahl, are members of a suspect class. They are and they should enjoy the protection of strict scrutiny review pursuant to Art. I, sec 2 of the Florida Constitution.

FLORIDA CHAMBER OF COMMERCE ET. AL.

The law is no longer self- executing. Section 440.02(1) (2003) says:

> "An injury caused by exposure...**is not an injury by accident arising out of the employment** unless there is clear and convincing evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed, can cause the injury or disease sustained by the employee".

Section 440. 02 (36) (2003) says:

> "Arising out of" pertains to occupational causation. An accidental injury or death arises out of the employment if work performed in the course and scope of employment is the **major contributing cause** of the injury or death".

The injured worker now must prove his accident is the major contributing cause of his injury, *A.Duda & Sons v. Kelley*, 900 So. 2d 664 (Fla. 1 DCA 2005). It is an impossible burden of the injured worker to prove any exposure compensable, *Altman Contractors v. Gibson,* 63 So. 3d 802 (Fla. 1 DCA 2011) (Wolf. J. Dissenting) (Under the Workers' Compensation Law, Claimant had the obligation of proving her exposure to mold by clear and convincing evidence). The injured worker who has been called a 'turtle on its back', *Davis v. Keeto*, 463 So. 2d 368 (Fla. 1 DCA

1985), is expected to prove compensability by clear and convincing evidence without an attorney! Self- executing?

THE INSURANCE AGENTS, ET. AL.

The insurance agents want to protect their commissions. That is understandable but not an overwhelming public need. They argue the right to opt out repealed in 1970 broadened coverage. Unlikely, but possible. No statistics are cited. But it also repealed the last vestige of the inviolate right to trial by jury enjoyed by employees who opted out pre September 1, 1970. The right to opt out figured as a key reason why the non- dependent parents of a child killed on the job had no cause of action for wrongful death. The child had the right to opt out but didn't, *Mullarkey v. Florida Feed Mills*, 208 So. 2d 363 (Fla. 1972).

One wonders why the insurance agents are on the side of the respondents. If their commissions are a percentage of the premiums, they, like the disabled workers have also taken a hit since 2003 with **premiums down 60.3%,** *2015 Workers' Compensation Annual Report, Florida Office of Insurance Regulation,*(Appendix D, page 30). Any suggestion that the alleged 'crisis' in 2003 still exists is a fantasy, *Estate of McCall v. U.S.*, 134 So. 2d 894 (Fla. 2014) (A past crisis does not forever render a law valid).

CONCLUSION

Appellant urges the court to reverse the District Court of Appeal, First District and grant whatever relief is just and proper. Appellant suggests that Judge Cueto, like the boy who recognized the Emperor had no clothes, may have had the right solution. Leave the workers compensation law just as it is, except invalidate the exclusive remedy contained in § 440.11, and/or alternatively go back to the last law that passed constitutional muster , the 1991 law, *Martinez v. Scanlan* , id.

It is unconscionable, unreasonable and unconstitutional to shift the cost of industrial injury away from industry while upholding the exclusive remedy.

CERTIFICATE OF SERVICE

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