IN THE SUPREME COURT OF FLORIDA

EMMA MURRAY,

Appellant,

v.

Supreme Court Case No. SC07-244
Lower Tribunal Case No. 1D06-475

MARINER HEALTH/ACE USA,

Appellee.

BRIEF OF *AMICI CURIAE*
FLORIDA JUSTICE REFORM INSTITUTE;
FLORIDA A.G.C. COUNCIL, INC.;
ASSOCIATED BUILDERS AND CONTRACTORS OF FLORIDA, INC.;
THE FLORIDA RETAIL FEDERATION;
THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION;
FLORIDA TRANSPORTATION BUILDERS ASSOCIATION, INC.;
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; AND
THE FLORIDA CHAMBER OF COMMERCE
IN SUPPORT OF APPELLEE, MARINER HEALTH/ACE USA

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PRELIMINARY STATEMENT

On appeal, Appellant, Emma Murray, will be referred to as "Petitioner." The Office of the Judges of Compensation Claims will be referred to as the "OJCC." All emphases are supplied unless otherwise indicated.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Florida Justice Reform Institute is dedicated to the restoration of fairness, equality, and predictability in the civil justice system. Florida A.G.C. Council, Inc. comprises the three Florida chapters of the Associated General Contractors of America. Associated Builders and Contractors of Florida, Inc. is a trade association of commercial, merit-shop contractors dedicated to free enterprise, reasonable government regulation, and lower taxes. The Florida Retail Federation is a statewide trade association that represents Florida's retailers before state legislative and regulatory bodies. The National Federation of Independent Business Legal Foundation is a nonprofit, public-interest law firm established to protect the rights of America's small business owners. Florida Transportation Builders Association, Inc. is a trade group representing the road and bridge-building industry in Florida. The Chamber of Commerce of the United States of America is the nation's largest federation of businesses, representing a membership of more than three million businesses and professional organizations of every size, economic sector, and geographic region in the country. The Florida Chamber of Commerce is Florida's largest federation of businesses, local chambers, and associations, representing more than 139,000 grassroots businesses working together to make the State of Florida a better place to live and work for all Floridians.

SUMMARY OF ARGUMENT

In 2003, Florida's workers' compensation system was in crisis. Premiums ranked among the highest in the country, fueled by an attorney's fee provision that not only assured all claimants' attorneys a reasonable fee, but tempted them with the prospect of a windfall. To restore the system's efficiency and protect the state's economy, the Legislature repealed the discretionary factors that permitted deviations from the percentage formula, limiting both overall attorney compensation and the recovery of prevailing-party attorney's fees.

Petitioner's claims must fail. **First**, both the text and legislative history of current law establish the Legislature's intent to repeal the discretionary factors. **Second**, the adjudication of Petitioner's constitutional attack is improper because Petitioner lacks standing and the factual record is wholly inadequate. **Third**, because the Legislature has permissibly limited the extent to which fees may be shifted to an employer-carrier, the limit on overall attorney compensation preserves a claimant's benefits and does not violate equal protection. **Fourth**, the statutory limit has also controlled costs and reduced premiums and thus satisfies substantive due process. **Fifth**, it does not implicate the right of access to courts, and, if it does, it easily meets the constitutional test. **Sixth**, this Court's own rules and decisions recognize the Legislature's authority to regulate attorney compensation.

ARGUMENT

I. THE 2003 REFORMS ABOLISHED THE LEE FACTORS.

Section 440.34, Florida Statutes, limits a claimant's attorney's compensation to a "reasonable" fee, *see* § 440.34(3), Fla. Stat., and defines "reasonable" by reference to a percentage formula, *see id*. § 440.34(1). "When a statute contains a definition of a word or phrase, that meaning must be ascribed to the word or phrase whenever repeated in the same statute unless a contrary intent *clearly* appears." *European Marble Co. v. Robinson*, 885 So. 2d 502, 506 (Fla. 1st DCA 2004) (quoting *Vocelle v. Knight Bros. Paper Co.*, 118 So. 2d 664, 667 (Fla. 1st DCA 1960)) (emphasis in original). By its plain terms, the statute limits a claimant's attorney's fee award to a definite percentage of benefits secured.

Nevertheless, Petitioner asks the Court to rewrite Section 440.34 to permit deviations from the percentage formula according to the factors in *Lee Engineering and Construction v. Fellows*, 209 So. 2d 454 (Fla. 1968), and subsequently codified by the Florida Legislature. In doing so, Petitioner seemingly ignores the Legislature's recent repeal of the *Lee* factors. *See* Ch. 2003-412, § 26, Laws of Fla. "[T]here is a strong presumption that, when the legislature amends a statute, it intends to alter the meaning of the statute." *Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 497 So. 2d 630, 633 (Fla. 1986). When it repealed

the *Lee* factors, the Legislature abrogated them.[1]

The context of the 2003 reforms confirms this conclusion. Before 2003, Florida law prescribed the percentage formula but directed the Judge of Compensation Claims to consider the *Lee* factors and to "increase or decrease" the fee if "the circumstances of the particular case warrant such action." § 440.34(1), Fla. Stat. (2002). This provision gave rise to an abusive practice under which attorneys claimed—and routinely received—fee awards under the approach yielding the larger fee. *See* 2004-05 OJCC Annual Report, at 9-13.

In *Davis v. Keeto*, 463 So. 2d 368 (Fla. 1st DCA), *review den'd*, 475 So. 2d 695 (Fla. 1985), the Court held that an upward adjustment in a fee award was appropriate where, under the percentage formula, the award would yield less than a reasonable hourly rate. Conversely, in *Alderman v. Fla. Plastering*, 805 So. 2d 1097 (Fla. 1st DCA 2002), the Court held that a downward adjustment in a fee award was *not* appropriate where, under the percentage formula, the award would yield more than a reasonable hourly rate. Thus, in practice, "the statutory percentage was applied only when it resulted in a windfall for the attorney; when

[1] Petitioner suggests that the Legislature's repeal of the *Lee* factors simply reinstates *Lee*. *Lee*, however, was decided before the Legislature enacted the percentage-fee structure. The current statute is therefore materially different from that construed in *Lee*. In addition, the Legislature's adoption of *both* the percentage formula and the *Lee* factors, and its subsequent repeal of *only* the *Lee* factors, manifests its intent to rely exclusively on the percentage formula.

the statutory formula resulted in a low hourly rate the attorney could switch to an hourly methodology." *See* 2004-05 OJCC Annual Report, at 12.[2]

The *Davis-Alderman* rule contributed to fuel workers' compensation litigation to an "unsustainable level." *See* 2003-04 OJCC Annual Report, at 1. While "workers compensation attorneys became among the highest paid in the state," *see* 2004-05 OJCC Annual Report, at 11, the public interest suffered:

> [I]t became commonplace for litigation to be commenced over very small stakes, with lawyers on both sides devoting hours of legal work out of proportion to the value of the benefits in controversy, often resulting in a concession by the carrier having little or no value to the claimant, but resulting in a fee predicated on an hourly rate of $200 to $300 for the attorney.

Id. at 10. The number of Petitions for Benefits increased 30.7 percent in Fiscal Year 2002-03 and 18.8 percent in Fiscal Year 2003-04. *See* 2002-03 OJCC Annual Report, at 1. These data were "seen as evidence the system was in crisis," and the OJCC agreed that "the urgency of reform was not overstated." *Id.*

The Florida House of Representatives responded by establishing the Select Committee on Workers' Compensation to "identify measures to improve the availability and affordability of workers' compensation." *See* Fla. H.R. Comm. on Insurance, HB 25A (2003) Staff Analysis 2 (May 12, 2003). The Committee met

[2] In *Alderman*, the Court upheld a fee award under the percentage formula that equated to $847 per hour. In *What an Idea, Inc. v. Sitko*, 505 So. 2d 497, 498 (Fla. 1st DCA 1987), the Court upheld a fee award that equated to $2,700 per hour.

seven times and, besides numerous written presentations, received testimony from nearly 50 witnesses. *Id.* The Legislature concluded that workers' compensation premiums—which ranked *second* in a 45-state comparison—were "hurting Florida's ability to attract businesses [and] limiting economic growth." *Id*. at 2-3.

The Legislature found that attorney involvement was "significant" and served as a major "cost driver." *Id*. at 3. It also found the *Lee* factors problematic:

> The Select Committee heard testimony that hourly attorneys' fees in workers' compensation litigation are a significant cost driver and should be prohibited. The testimony supported the view that claims disputes are often unnecessarily extended and continued in order to increase the amount of attorneys' fees awarded, and that elimination of the hourly fee provision would encourage the furtherance of meritorious cases to the exclusion of those lacking justification.

Id. at 4; *accord* 2004-05 OJCC Annual Report, at 10 ("Attorneys' fees are widely and correctly seen as a key driver of workers' compensation costs . . . ."). The 2003 reforms accordingly "eliminate[d the] factors that [a] judge may consider in going above the statutory [percentage] fees." Fla. H.R. Comm. on Insurance, HB 25A (2003) Staff Analysis 4 (May 12, 2003).

The Legislature's intent to alter the landscape of workers' compensation litigation is evident in the text of current law and the context of the 2003 reforms. *See* 2004-05 OJCC Annual Report, at 16 ("It would be disingenuous in the extreme to pretend to believe that the legislature, spending all that time and effort changing the language of the attorney fee statute, intended to leave the *Davis-Alderman* rule

untouched."). The suggestion that the Legislature did not abrogate the *Lee* factors, when it repealed the words that codified them, does not wash.

II. THERE IS NO CONSTITUTIONAL RIGHT TO UNLIMITED PREVAILING-PARTY ATTORNEY'S FEES.

Petitioner improperly conflates two issues. Section 440.34 limits *both* the overall compensation of a claimant's attorney *and* the amount of attorney's fees a successful claimant may shift to the employer-carrier. In urging the Court to invalidate the *first* limit, Petitioner assumes that the Court will invalidate the *second* as well. This assumption is unfounded. Regardless of the constitutionality of a limit on overall attorney compensation, there is no constitutional right to unlimited prevailing-party attorney's fees.

If the Court holds that the Legislature may not limit the overall attorney compensation, it must nevertheless uphold the statutory limit on fee-shifting. The Legislature clearly intended that employer-carriers would be liable for a claimant's attorney's fees to the extent of the percentage formula—but not further. And when it authorizes fee-shifting, the Legislature is free to impose limits. *See, e.g.*, *L. Ross, Inc. v. R. W. Roberts Const. Co., Inc.*, 481 So. 2d 484 (Fla. 1986) (applying a statute that limited the recovery of attorney's fees to 12.5 percent of the judgment).

A "court may only award attorney's fees when such fees are expressly provided for by statute, rule, or contract." *Bane v. Bane*, 775 So. 2d 938, 940-41 (Fla. 2000); *accord State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067,

1077 (Fla. 2006) ("[A]n award of attorneys fees . . . is a matter of substantive law properly within the aegis of the legislature, in accordance with the long-standing American Rule adopted by this Court."). Fee-shifting provisions, moreover, must be strictly construed because they are "in derogation of common law." *Pepper's Steel & Alloys, Inc. v. United States*, 850 So. 2d 462, 464 (Fla. 2003).

This position is implicit in *Samaha v. State*, 389 So. 2d 639, 640 (Fla. 1980), where this Court upheld the overall compensation limitation in former Section 440.34 on the ground that it secured to claimants the benefits recovered. Likewise, in *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506, 510 (Fla. 1st DCA 2006), the Court found that the statute issue here "protect[s] the claimant's interest in retaining a substantial portion of the benefits secured." *Accord Khoury v. Carvel Homes South, Inc.*, 403 So. 2d 1043 (Fla. 1st DCA 1981). These cases do *not* hold that the unconstitutionality of the overall compensation limit would shift the entire burden of claimants' fees to employer-carriers.

Petitioner cites no case holding one party constitutionally obligated to pay another party's attorneys. She certainly cites no case holding that a party statutorily obligated to pay another party's attorneys to a limited extent is constitutionally bound to pay more than the statutory amount. Indeed, there is no precedent for transforming a *limited* statutory entitlement into an *unlimited* constitutional entitlement to fees. The Court should decline to create an

unprecedented constitutional right to receive—and obligation to pay—attorney's fees beyond the amount expressly authorized by the Legislature.

III. PETITIONER LACKS STANDING TO RAISE HER CONSTITUTIONAL CLAIMS.

"It is a fundamental principle of constitutional law that a party cannot challenge the constitutionality of a statute unless it can be demonstrated that he has been, or definitely will be, adversely affected by its terms." *M.Z. v. State*, 747 So. 2d 978, 980 (Fla. 1st DCA 1999). To establish standing, a party must show a "distinct and palpable" injury in fact which "is likely to be redressed" by the relief sought. *Peregood v. Cosmides*, 663 So. 2d 665, 668 (Fla. 5th DCA 1995).

The record contains no evidence of a redressable injury. Petitioner engaged the assistance of competent counsel and recovered the claimed benefits. The challenged law in no way impaired the vindication of her rights. The record merely hypothesizes that *other* claimants might be adversely affected. Petitioner has no right redress the injuries of others. *See Sieniarecki v. State*, 724 So. 2d 626, 628 (Fla. 4th DCA 1998). And, because there is no allegation that Petitioner would, if she could, pay her attorney more than the limit, there is no evidence that a favorable decision would redress any injury she might have sustained.

IV. THE RECORD IS INSUFFICIENT TO SUPPORT AN ADJUDICATION OF THE CONSTITUTIONAL CLAIMS.

Because a Judge of Compensation Claims has no jurisdiction to rule on the

constitutionality of a statute, *see Bradley v. Hurricane Restaurant*, 670 So. 2d 162, 164 (Fla. 1st DCA 1996), the record is insufficient for a proper adjudication of constitutional claims. This Court has frequently recognized the necessity of an adequate record. *See, e.g.*, *North Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003) ("To assist appellate courts in evaluating a trial court's ruling concerning the constitutionality of a statute, it oftentimes is preferable to have a record developed in the lower court before a finder of fact."); *Cox v. Fla. Dep't of Health & Rehab. Servs.*, 656 So. 2d 902 (Fla. 1995).

In *State Employees Attorneys Guild v. State*, 653 So. 2d 487 (Fla. 1st DCA 1995), the Court declined to entertain a constitutional challenge on appeal from an agency order. "When the constitutionality of a statute is a mixed question of law and fact, involving the existence of valid reasons for the legislation, it is preferable to have a record developed in a lower court before a finder of fact." *Id*. at 489. Similarly, in *Shamp v. Board of Orthotists and Prosthetists*, 781 So. 2d 1124 (Fla. 1st DCA 2001), the Court refused, on appeal from an agency order denying licensure, to consider a constitutional challenge to licensing statute. "Given the paucity of the record, we affirm, without prejudice to Appellant's right to seek any appropriate relief in the circuit court on the constitutional issues . . . ." *Id*. at 1125; *accord Great House of Wine, Inc. v. Fla. Dep't of Bus. and Prof. Reg., Div. of Alcoholic Beverages and Tobacco*, 752 So. 2d 728 (Fla. 3d DCA 2000).

The record here is equally barren. While the JCC made limited findings with respect to Petitioner's counsel and heard testimony vaguely predicting harm, the record is wholly inadequate for a constitutional determination. It contains none of the mountain of facts presented to the Legislature supporting the challenged law, or of the actual effects of the law. The posture of this case, moreover, prevented interested parties from intervening to adduce relevant facts,[3] and it deprived the Attorney General of Florida of the opportunity to defend the constitutionality of a statute of grave public importance. *See* § 86.091, Fla. Stat. (2007). This notice requirement was designed "to provide an avenue for the interests of the State to be represented." *Watson v. Claughton*, 160 Fla. 217, 223 (1948). The Legislature never intended that it should be defeated—and the Attorney General muzzled from defending the rights of the people—by a procedural artifice.

V. SECTION 440.34, FLORIDA STATUTES, IS CONSTITUTIONAL.

A. The Challenged Law Does Not Violate Equal Protection.

The Legislature has broad discretion in creating statutory classifications, and

[3] The Court below had no need to consider the sufficiency of the record because it followed precedent and rejected the constitutional claims out of hand. *See Murray v. MarinersHealth/ACE USA*, 946 So. 2d 38, 39 (Fla. 1st DCA 2006). Given an opportunity, however, these *amici* would prove that there is no dearth of attorneys ready to assist claimants—as shown, for example, by the number of large yellow-page ads around the state—and that the 2003 reforms have permitted employer-carriers to avoid using their own counsel to defend claims, at a great savings to the people of Florida. The short-circuited fact-finding process in this case has deprived the Court of the benefit of such highly probative facts.

they are presumed valid. *Grant v. State*, 770 So. 2d 655, 660 (Fla. 2000). In an equal protection challenge not involving a fundamental right or a suspect class, the test is whether the statute bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive.[4] *Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330, 333 (Fla. 1991).

Section 440.34 easily meets this standard. By limiting attorney compensation, it preserves to the claimant a principal part of a recovery and promotes the benevolent purposes of Florida's Workers' Compensation Law:

> Since a workmen's compensation claimant's benefits are limited, allowing an attorney or other person to obtain a portion thereof from a claimant, particularly when it is a substantial sum, would thwart the public policy of affording the claimant necessary minimum living funds and cast the burden of support for that person on society generally. Thus the state has a legitimate interest in regulating attorney fees in workmen's compensation cases.

Samaha v. State, 389 So. 2d at 640; *accord Yeiser v. Dysart*, 267 U.S. 540, 541 (1925) ("[A] large proportion of those who come under the statute have to look to it in case of injury, and need to be protected against improvident contracts in the interest not only of themselves and their families, but of the public").

Courts in other states agree. In *Crosby v. State Workers' Compensation Bd.*, 442 N.E.2d 1191, 1195 (N.Y. 1982), a claimant alleged that a state law subjecting

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[4] The First DCA applied rational-basis review in a substantially identical constitutional challenge to former Section 440.34 in *Khoury v. Carvel Homes South, Inc.*, 403 So. 2d 1043, 1045 (Fla. 1st DCA 1981).

claimant's attorney's fees—but not those of an employer—to approval by a workers' compensation board violated equal protection. The Court disagreed:

> The purpose of the restrictions being to protect the claimant from entering into an improvident fee agreement which might substantially reduce the eventual monetary benefits awarded, the statute clearly promotes the over-all objective of ensuring adequate economic relief to the employee or his family. We believe that the Legislature could properly determine that employers and compensation carriers, not laboring under the same economic difficulties as the claimant, are not in need of similar protection.

Id. The Virginia Supreme Court did the same. It found a "rational basis . . . for the difference in treatment of counsel for employees versus . . . employers":

> The Act is designed to benefit and protect employees. Authorizing the Commission to control fees recoverable by claimants' counsel protects claimants from entering into an improvident fee agreement which might substantially reduce the eventual monetary benefits awarded. Moreover, the control exercised by the Commission promotes the objective of ensuring adequate relief to the claimant and his family. No similar concern exists with regard to employers and the fees they pay for legal services . . . .

Hudock v. Virginia State Bar, 355 S.E.2d 601, 604 (Va. 1987); *accord Ayotte v. United Services, Inc.*, 567 A.2d 430, 434 (Me. 1989); *Superintendent of Ins. v. Mountain State Mut. Cas. Co.*, 725 P.2d 581, 583 (N.M. Ct. App. 1986).

Petitioner contends that the challenged law does not preserve a claimant's benefits "because it is a payment made over and above the benefits to which the Claimant is entitled." (Br. at 37). This assumes—wrongly—that the statutory limit on fee-shifting is unconstitutional, and that an employer-carrier is bound to

pay *all* of a claimant's attorney's fees. *See* Section II, *supra*. Petitioner advances no argument establishing a constitutional entitlement to *unlimited* fee-shifting. If the Court invalidates the overall limit on attorney compensation, it must keep in place the existing, legislatively crafted limit on the extent to which those fees may be shifted. Any fees beyond this point would be borne by the claimant.

The present case illustrates the necessity of the overall fee limitation. The JCC approved—and directed the employer-carrier to pay—attorney's fees in the amount of $648.84. The JCC also determined that, if the challenged law could be disregarded, a "reasonable" fee would have been $16,000. Without a limit on attorney compensation, Petitioner would have been liable for $15,351.16—the amount by which the "reasonable" fee exceeded the amount shifted to the employer-carrier. Not only would all of Petitioner's benefits ($3,244.21) have been consumed, she would have been left with a significant debt ($12,106.95). The limit on overall attorney compensation undoubtedly serves a rational purpose.

B. The Challenged Law Does Not Violate Substantive Due Process.

Where fundamental rights are not implicated, the "test for determining whether a statute . . . violates substantive due process is whether it bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive." *Ilkanic v. City of Fort Lauderdale*, 705 So. 2d 1371, 1372 (Fla. 1998). The challenging party bears the "very heavy

burden" of demonstrating that the statute is "arbitrary and unreasonable," and the law must be upheld if any state of facts "can reasonably be conceived to exist" in its favor. *State v. Sobieck*, 701 So. 2d 96, 103-04 (Fla. 5th DCA 1997).

The challenged law satisfies due process because it preserves a claimant's benefits. It also enhances the availability and affordability of workers' compensation insurance. Since the enactment of the 2003 reforms, workers' compensation premiums have decreased statewide by an average of 58 percent, to the lowest rates since 1984. *See* Press Release, *Florida Insurance Commissioner McCarty Orders Further Decrease in Workers' Compensation Insurance Rates* (October 27, 2007), *available at* http://tinyurl.com/2agg6y. The latest reduction of 18.4 percent—in the fifth consecutive year of decreases—marks the largest recorded one-year decrease in Florida history and is expected to reduce Florida's premiums to the national median. *Id*. Measured by premium rates per $100 of payroll, Florida now boasts the nation's 45th *lowest* rate. Florida Office of Insur. Reg'n, *2007 Workers' Compensation Annual Report*, at 3 (January 1, 2008).

In 2005, the OJCC reported that the "amount and cost of litigation . . . remain very large but their growth has been arrested by the 2003 amendments." *See* 2004-05 OJCC Annual Report, at 9. Today, Florida's workers' compensation market is "robust," presenting a "large number of independent insurers," none of which has "sufficient market share to exercise any meaningful control" over price.

Florida Office of Insur. Reg'n, *2007 Workers' Compensation Annual Report*, at 3 (January 1, 2008). The Office of Insurance Regulation concluded that the "[r]ecently enacted legislative changes . . . have addressed affordability [and] are having beneficial results." *Id*. at 3-4. The fee limit is rational and must be upheld.

C. The Challenged Law Does Not Violate the Right of Access.

The cap on attorney compensation does not violate claimants' right of access. The right of access does not guarantee each litigant an attorney, *see Lingle v. Dion*, 776 So. 2d 1073, 1078 (Fla. 4th DCA 2001) ("All litigants, whether represented by an attorney or proceeding pro se, are afforded equal access to the courts."), or subject every disincentive to attorney participation to constitutional scrutiny. This Court has long recognized that "in many types of legal actions it is neither financially nor economically feasible for litigants to hire attorneys." *The Florida Bar*, 450 So. 2d 810, 811 (Fla. 1983).

"Workers' compensation is a branch of law which is entirely statutory in origin." *Shaw v. Cambridge Integrated Services Group, Inc.*, 888 So. 2d 58, 61 (Fla. 4th DCA 2004). Its creation "involved a legislative balancing of competing interests, creating a system of shared benefits and burdens for its participants." *Sun Bank/South Fla., N.A. v. Baker*, 632 So. 2d 669, 672 (Fla. 4th DCA 1994). It establishes "a system of exchange between employees and employers . . . designed to promote efficiency and fairness," under which "the employee relinquishes

certain common-law rights . . . in exchange for strict liability and the rapid recovery of benefits." *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 90 (Fla. 2005).

To promote the rapid and efficient availability of benefits, the workers' compensation system is not designed to depend on the participation of counsel:

> [T]he workmen's compensation law was intended to provide a direct, informal and inexpensive method of relieving society of the burden of caring for injured workmen . . . . While we do not intend to minimize the value of an attorney's services in compensation cases . . . , it is noteworthy that, in actual practice, a simple letter to the commission advising of claimant's belief that he is entitled to compensation is treated as a claim and activates the processing of the matter as such. In order to recover an award for his attorney's fee, it is incumbent upon the claimant to show that it was necessary, and not merely expedient, to employ an attorney . . . .

Port Everglades Terminal Co. v. Canty, 120 So. 2d 596 (Fla.1960) (citation and internal marks omitted). The First DCA has flatly held that a claimant "has no constitutional right to counsel" in a workers' compensation proceeding. *McDermott v. Miami-Dade County*, 753 So. 2d 729, 732 (Fla. 1st DCA 2000).

Florida, moreover, provides claimants assistance in the presentation of claims. To "effect the self-executing features" of workers' compensation, Florida has established the Employee Assistance and Ombudsman Office (the "Office"). § 440.191(1)(a-b), Fla. Stat. (2007). The Office is "a resource available to all employees who participate in the workers' compensation system" and is required to "take all steps necessary to educate and disseminate information to employees." *Id*. § 440.191(1)(c). As in *Demps v. State*, 696 So. 2d 1296, 1297 (Fla. 3d DCA

1997), where the provision of libraries and lay assistance sufficiently answered the right of access of prison inmates, the provision of assistance through the Office appropriately balances a claimant's interests in the effective presentation of claims and the public interest in a prompt and efficient system of compensation.

Even if the challenged law implicates the right of access, it is valid. A statute that limits the right of access is constitutional if (i) it provides a reasonable alternative, or (ii) there is an overpowering public necessity and no alternative method of meeting that necessity can be shown. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). Here, the Office provides a reasonable alternative to any limited effect the challenged law may have on the availability of counsel. And, as discussed in Section I, *supra*, exorbitant attorney's fees contributed in 2003 to drive the workers' compensation system to a state of crisis that the Legislature determined threatened the economic welfare of the state. This overpowering public necessity required the abolition of the discretionary *Lee* factors, and, as discussed in Section V.B, *supra*, the effects have been dramatically beneficial.

Petitioner advances no evidence that the challenged law has restricted claimants' access to counsel. There is no evidence (i) that the number or availability of workers' compensation attorneys has decreased since 2003; (ii) that a different percentage formula would materially increase the number or availability of such attorneys; (iii) that unrepresented claimants have been unable to secure the

benefits to which they are entitled; (iv) that the Office is unable to provide claimants adequate assistance; or (v) that claimants would be able to pay hourly rates beyond the amount which the law specifically shifts to employer-carriers.

Indeed, the only available data suggest that the challenged law has *not* impaired claimants' ability to retain counsel. According to the OJCC, the percentage of claimants proceeding *pro se* has *decreased* from 8.26 percent in Fiscal Year 2002-03 to 6.30 percent in Fiscal Year 2006-07—the opposite of what Petitioner's reasoning suggests. *See* 2006-07 OJCC Annual Report, at 13.[5] This record simply cannot overcome the "strong presumption" of validity that attends a statutory enactment. *Gonzalez v. State*, 948 So. 2d 892, 893 (Fla. 5th DCA 2007).

D. The Challenged Law Does Not Violate the Separation of Powers.

Finally, there is no support in this state for the position that the Legislature is powerless to limit attorney compensation. In fact, this Court's own rules recognize the right of the Legislature to do precisely that. Rule 4-1.5(a) of the Florida Rules of Professional Conduct provides that an attorney may not ethically charge or collect "an *illegal*, prohibited, or clearly excessive fee." Similarly, Rule 4-1.5(f)(1) permits attorneys to accept contingent fees, "except in a matter in which a contingent fee is prohibited by subdivision (f)(3) *or by law*." These provisions

[5] These data were computed by dividing the number of Petitions for Benefits filed during the fiscal year into the number of those Petitions which, at year's end, were unassociated with legal counsel. *See* 2006-07 OJCC Annual Report, at 13.

expressly acknowledge the Legislature's authority to regulate attorney's fees.

Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), does not support Petitioner's argument. In *Makemson*, the Court upheld the facial constitutionality of a statute limiting the compensation of attorneys representing indigent criminal defendants. It noted that in "extraordinary circumstances" the statute might interfere with the Sixth Amendment right to counsel and the Court's duty to provide representation to the criminally accused. *Id*. at 1112. Neither interest is at issue here. Thus, in *Ingraham v. Dade County School Board*, 450 So. 2d 847, 849 (Fla. 1984), this Court found "no merit" in the contention that a statutory limit on attorney compensation equal to 25 percent of any recovery pursuant to Section 768.28, Florida Statutes, usurped a judicial function. It should do the same here.

CONCLUSION

The Court should affirm the First DCA's conclusion that Section 440.34 limits overall attorney compensation and prevailing-party attorney's fees to the percentage formula prescribed by the Legislature, without deviation according to discretionary *Lee* factors, and that the challenged law is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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