IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BRADLEY WESTPHAL,

Appellant,

v.

CITY OF ST. PETERSBURG/ CITY OF ST. PETERSBURG RISK MANAGEMENT, and STATE OF FLORIDA,

Appellees.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-3563

Opinion filed September 23, 2013.

An appeal from an order of the Judge of Compensation Claims.
Stephen L. Rosen, Judge.

Date of Accident: December 11, 2009.

Jason L. Fox of the Law Offices of Carlson & Meissner, Clearwater; and Richard A. Sicking, Coral Gables, for Appellant.

Richard W. Ervin, III of Fox & Loquasto, P.A., Tallahassee, for Amicus Curiae Florida Workers Advocates, in support of Appellant.

Andre M. Mura of Center for Constitutional Litigation, P.C., Washington, D.C., for Amicus Curiae American Association for Justice, in support of Appellant.

Bill McCabe of Longwood, for Amicus Curiae Florida Justice Association, in support of Appellant.

Geoffrey Bichler of Bichler, Kelley, Oliver & Longo, PLLC, Maitland, for Amicus Curiae Police Benevolent Association, in support of Appellant.

John C. Wolfe, City Attorney, and Kimberly D. Proano, Assistant City Attorney, St. Petersburg, for Appellees City of St. Petersburg/City of St. Petersburg Risk Management; Pamela Jo Bondi, Attorney General, Allen Winsor, Chief Deputy Solicitor General, and Rachel E. Nordby, Deputy Solicitor General, Tallahassee, for Appellee State of Florida.

William H. Rogner, Winter Park, for Amicus Curiae Associated Industries of Florida; Associated Builders and Contractors of Florida; The Florida Chamber of Commerce; The Property Casualty Insurers Association of America; The Florida Justice Reform Institute; Publix Super Markets; United Parcel Service; The Florida Roofing, Sheet Metal and Air Conditioning Contractors Association; The Florida Retail Federation; The American Insurance Association; The National Federation of Independent Business; The Florida United Businesses Association, Inc.; and The Florida Association of Self Insured's, in support of Appellees.

George T. Levesque, General Counsel, Florida Senate, Tallahassee; and Daniel E. Nordby, General Counsel, Florida House of Representatives, Tallahassee, for Amicus Curiae The Florida Senate and The Florida House of Representatives, in support of Appellees.

EN BANC

PADOVANO, J.,

This case is before the full court on motions by the State of Florida and the City of St. Petersburg for rehearing en banc. For the reasons that follow, we grant the motions, withdraw the panel opinion in Westphal v. City of St. Petersburg/ City of St. Petersburg Risk Management and State of Florida, 2013 WL 718653 (Fla. 1st DCA Feb. 28, 2013), and recede from our previous en banc opinion in Matrix Employee Leasing, Inc. v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011).

We hold that a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent and total disability benefits. This conclusion is supported by the text of the Workers' Compensation Law, as we shall explain, and it eliminates the possibility that disabled workers, like the claimant in this case, will fall into an indefinite gap in which they would not be entitled to apply for disability benefits. In light of our decision in this case, we find it unnecessary to consider the claimant's argument that the statute, as we previously construed it in Hadley, is unconstitutional as a denial of the right of access to the courts.

A brief statement of the history of the issue is needed to properly explain our decision. This court first addressed the potential problems created by the 104-week time limit on temporary disability benefits in City of Pensacola Firefighters v. Oswald, 710 So. 2d 95, 98 (Fla. 1st DCA 1998). The claimant in that case was nearing the end of his eligibility for temporary benefits but he had not reached maximum medical improvement. We held that "an employee whose temporary benefits have run out - or are expected to do so imminently - must be able to show not only total disability upon the cessation of temporary benefits but also that total disability will 'be existing after the date of maximum medical improvement.'"

Oswald, 710 So. 2d at 98. (quoting § 440.02(19), Fla. Stat. (Supp.1994)). The underlying principle was described in the opinion as a "narrow but necessary exception" to the longstanding rule that permanent total disability benefits are not awardable before the claimant has reached maximum medical improvement. Oswald, 710 So. 2d at 96-98. Because the claimant in Oswald was not able to show that he would be totally disabled after he reached maximum medical improvement, we held that he was not yet entitled to assert his claim.

The court adhered to the rule in Oswald in a number of panel decisions and in the en banc decision in Matrix Leasing, Inc. v. Hadley. The court in Hadley acknowledged that the applicable statutes may create a gap in disability benefits for those injured workers who are totally disabled on the expiration of temporary disability benefits but fail to prove prospectively that total disability will exist after the date of maximum medical improvement. Nevertheless, the court concluded that it could not interpret the statute to avoid the gap. Mr. Hadley had exhausted his 104 weeks of temporary total disability benefits but he needed to undergo several additional surgical procedures and he was not yet at maximum medical improvement. Applying the rule in Oswald, the court concluded that he was not entitled to apply for permanent total disability benefits until such time as he could offer medical proof that he was at maximum medical improvement or that he would be totally disabled once he reached maximum medical improvement.

Based on the rule in Hadley, the judge of compensation claims in this case denied a claim for permanent and total disability benefits. Mr. Westphal, a firefighter, felt a sharp pain in his back as he was moving heavy furniture while fighting a fire. By the time he returned to the fire station, he reported extreme pain and a loss of feeling in his left leg from the knee down. The city accepted the compensability of his low back and left knee injuries and provided both indemnity and medical benefits.

Mr. Westphal sought and obtained temporary total disability benefits for a period of 104 weeks but he was still totally disabled at the time those benefits expired. He filed a petition seeking compensation in the form of permanent and total disability benefits, and the judge of compensation claims considered the petition in a hearing and denied it.

The judge rejected the testimony of an independent medical examiner, Dr. Victor Hayes, M.D., to the effect that Mr. Westphal would be totally disabled at the time he reached maximum medical improvement and relied instead on the testimony of Mr. Westphal's treating physician, Dr. David McKalip, M.D. As a part of his treatment, Dr. McKalip performed two surgical procedures on Mr. Westphal's back. He testified that Mr. Westphal was still recovering from the second surgery and that it was too soon to render an opinion as to the nature and

extent of any permanent work restrictions he might impose once Mr. Westphal reached maximum medical improvement from the surgery.

The final order denying the petition explains why the judge accepted the testimony of Mr. Westphal's treating physician over the contrary testimony offered by the independent medical examiner. The judge stated in the order, "While claimant urges reliance on the opinion of his independent medical examiner, Dr. Hayes, I choose to rely on the testimony of Dr. McKalip, the orthopedic surgeon who recently performed surgery on April 11, 2012, as being in the best position to determine whether or not the claimant has reached physical maximum medical improvement."

The judge also rejected Mr. Westphal's argument that he would still be totally disabled after eventually attaining maximum medical improvement. On this point, the judge made the following finding: "Based on Dr. McKalip's testimony, and the en banc decision from the First District Court of Appeal in Matrix Employee Leasing v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011), I find that the claimant has not reached [MMI] from a physical standpoint and it is too speculative to determine whether he will remain totally disabled after the date of [MMI] has been reached from a physical standpoint." (emphasis added.) Because Mr. Westphal had not proven that he would be totally disabled when he reached

maximum medical improvement, the judge denied the claim for permanent and total disability benefits.

Mr. Westphal then appealed to this court. He argues that the 104-week limit on temporary total disability benefits results in a denial of the constitutional right of access to courts for those workers who remain totally disabled but are still improving when their temporary benefits expire. This is the issue that ultimately prompted the court to hear the case en banc. However, we need not address the constitutional validity of the statutory limitation on temporary disability benefits, because the controversy is one that can be resolved on another ground.

We now conclude that we interpreted the Workers' Compensation Law incorrectly in Hadley and that we should recede from the rule we adopted in that case. Nothing in the text of the applicable statutory provisions suggests that the Legislature intended to create a gap in which some totally disabled workers will be ineligible to apply for disability benefits. Moreover, the notion that there can be a period of time during which a disabled worker is not entitled to be compensated for his or her workplace injury is contrary to the basic purpose of the Workers' Compensation Law.

Section 440.15(2)(a) of the Workers' Compensation Law provides that a disabled worker is eligible for temporary total disability benefits for a maximum of 104 weeks but it does not suggest that a disabled worker who has reached that limit

is no longer entitled to any further disability benefits. Nor does the statute state or imply that a disabled but still improving worker must prove that the disability will continue to exist at some unspecified point in the future when a doctor is willing to say that the worker will have reached maximum medical improvement.

In construing a statute, we must first consider the plain meaning of the text. See Holly v. Auld, 450 So. 2d 217 (Fla. 1984); Fla. Dep't of Envt'l Protection v. ContractPoint Florida Parks, LLC, 986 So. 2d 1260 (Fla. 2008); Fast Tract Framing, Inc. v. Caraballo, 994 So. 2d 355 (Fla. 1st DCA 2008). If the statute conveys a "clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007) (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)).

By the plain language of section 440.15(2)(a), an injured worker who is still totally disabled at the end of his or her eligibility for temporary disability benefits is deemed to be at maximum medical improvement as a matter of law, even if the worker may get well enough someday to return to work. In these circumstances, the claimant need not present medical proof that he or she has reached maximum medical improvement. The worker may immediately assert a claim for permanent total disability benefits, and the judge may award those benefits if the worker has proven that he or she is in fact totally disabled.

Section 440.15(2)(a) of the Workers' Compensation Law provides that an injured worker who is totally disabled is eligible for temporary total disability benefits for a period of time not to exceed 104 weeks. The disabled worker must be evaluated by a doctor six weeks before the expiration of the 104-week period of eligibility, and the doctor must assign an impairment rating. The evaluation is required by section 440.15(3)(d), which states:

> After the employee has been certified by a doctor as having reached maximum medical improvement or 6 weeks before the expiration of temporary benefits, whichever occurs earlier, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating, using the impairment schedule referred to in paragraph (b).

§ 440.15(3)(d), Fla. Stat. (2009) (emphasis added). The use of the word "shall" in this subsection makes mandatory both the duty to evaluate the worker and the duty to assign an impairment rating. If the injured worker is receiving temporary total disability benefits but has not yet reached maximum medical improvement, the evaluation must be completed and the impairment rating must be assigned.

Section 440.15(3)(d) employs the term "impairment rating," but this is merely a shorthand reference to a "permanent impairment rating." This paragraph is contained within section 440.15(3), which deals exclusively with compensation for permanent impairments. Moreover, when this statute is read in conjunction with other statutes to which it relates, the term "impairment rating" can only mean a "permanent impairment rating." Section 440.15(2)(a), the subsection that sets

the 104-week limit on eligibility for temporary total disability benefits, states in material part:

> Once the employee reaches the maximum number of weeks allowed, or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined.

§ 440.15(2)(a), Fla. Stat. (emphasis added).

The use of the term "permanent impairment" signifies that the disabled worker has attained maximum medical improvement. Section 440.02(22), Florida Statutes (2009), defines "permanent impairment" as "any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, existing after the date of maximum medical improvement, which results from the injury" (emphasis added). It follows that the permanent impairment rating required by section 440.15(3)(d) is the legal equivalent of a medical finding that the disabled worker has reached maximum medical improvement.

This conclusion is supported by two more detailed provisions, subsections 440.15(3)(d)1. and 2., pertaining to the nature and content of the report the doctor is required to make six weeks before the expiration of temporary disability benefits. These paragraphs provide:

> 1. The certifying doctor shall issue a written report to the employee and the carrier certifying that maximum medical improvement has been reached, stating the impairment rating to the body as a whole, and providing any other information required by the department by rule. The carrier shall establish an overall maximum

> medical improvement date and permanent impairment rating, based upon all such reports.
>
> 2. Within 14 days after the carrier's knowledge of each maximum medical improvement date and impairment rating to the body as a whole upon which the carrier is paying benefits, the carrier shall report such maximum medical improvement date and, when determined, the overall maximum medical improvement date and associated impairment rating to the department in a format as set forth in department rule. If the employee has not been certified as having reached maximum medical improvement before the expiration of 98 weeks after the date temporary disability benefits begin to accrue, the carrier shall notify the treating doctor of the requirements of this section.

§ 440.15(3)(d), Fla. Stat. (2009). In these two paragraphs of the statute, the Legislature is plainly equating a medical finding of maximum medical improvement with the status that exists by law if the employee has not reached maximum medical improvement six weeks before the expiration of temporary benefits.

When all of these statutes are read together, as they should be, it is clear that an injured worker who is still totally disabled at the end of the period of eligibility for temporary total disability benefits is deemed to be at maximum medical improvement, regardless of any potential for improvement. The doctor is required by section 440.15(3)(d) to assess and certify the injured worker's "permanent impairment," a term that can have but one meaning under section 440.02(22): a condition existing "after the date of maximum medical improvement." It follows that the permanent impairment rating that must be given at that time is the legal

equivalent of a medical finding that the worker has reached maximum medical improvement.

This interpretation of the Workers' Compensation Law does not extend temporary benefits beyond the statutory limit; it merely enables a disabled worker to assert a claim for permanent disability benefits without an artificial and unnecessary delay in the process. While it is true that the Legislature placed a fixed time limit on the right to recover temporary disability benefits, the purpose of this time limit was not to create a gap in which a totally disabled but still improving worker will be uncompensated. To the contrary, it is clear from the overall statutory scheme that the time limit was designed as a deadline on the issue of maximum medical improvement.[1]

The conclusion that disability benefits are available throughout the course of a worker's disability is not only supported by the text of the applicable statutes, it is also consistent with the intent of the Legislature as expressed in the Workers' Compensation Law. Section 440.015, Florida Statutes (2009), states, "It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured

[1] The two-year limit on temporary disability benefits was enacted as a part of the Workers' Compensation Law in 1993. See § 440.15(2)(a), Fla. Stat. (Supp. 1994). Before that, the time limit on temporary disability benefits was five years. See § 440.15(2)(a), Fla. Stat. (1993). We acknowledge the decision by the Florida Supreme Court in Thompson v. Florida Industrial Relations Commission, 224 So. 2d 286 (Fla. 1969), but we conclude that it is not controlling here. The 1961 statute the court was interpreting in Thompson had no provision for the assignment of a permanent impairment rating prior to the expiration of temporary benefits.

worker." We can infer from this statement that the Legislature meant to require the continuous payment of disability benefits for an injured worker who continues to be disabled and that the 104-week limit on temporary disability benefits does not effectively terminate the injured worker's right to just compensation.

It is unreasonable to assume that the Legislature meant to create a gap in benefits, during which a disabled worker is not compensated for a disability, even though there is no dispute that the worker is totally disabled. If that were the case, a disabled worker who has exhausted the 104 weeks of temporary benefits, but who has still not fully recovered from the workplace injury, might have to wait months - or perhaps years - before disability benefits would resume, even though the employee remains totally disabled all the while.

The existence of a gap in benefits would also promote a disparity in the way that disabled workers are treated. A disabled worker who reaches maximum medical improvement relatively quickly is fully compensated. But a disabled worker who is told that he or she may be well enough to return to work someday may have no compensation at all beyond the initial 104-week period. We do not believe that the Legislature intended to create such a disparity. It is reasonable to conclude that the Legislature meant to ensure the "prompt delivery of benefits" to all workers who are injured on the job, not just some of them. See, e.g., Gauthier v. Fla. Int'l Univ., 38 So. 3d 221, 224 (Fla. 1st DCA 2010).

Our conclusion that a disabled worker is entitled to receive disability benefits continuously throughout the course of his or her disability is also consistent with the overall statutory scheme. Section 440.15(1)(d) authorizes an employer to discontinue the payment of disability benefits to a worker who has regained earning capacity through rehabilitation. Thus, the status of maximum medical improvement is not truly permanent. When an employee is deemed to be at maximum medical improvement by operation of law, the employer is not stuck with that determination forever. The worker's status and eligibility for benefits can change with the circumstances.

On the other hand, an interpretation that would create a potential gap in disability benefits could result in an uncorrectable error. If the claim is denied because the disabled worker may still improve and it turns out later that he or she does not improve, the logical inference would be that the worker had, in fact, reached maximum medical improvement earlier. Yet there is nothing in the law that would enable the worker to recover the disability benefits he or she should have been receiving in the meantime. It is reasonable to conclude that, if the Legislature had intended to create a gap in the payment of disability benefits, it would have at least provided a remedy for the recovery of lost benefits if it could be shown later that the claimant was actually at maximum medical improvement all along and should have been receiving those benefits.

We acknowledge that Mr. Westphal has not asked us to recede from our opinion in Hadley, but that is not necessary under the circumstances. The argument made in the initial brief was that the statute violates the constitutional right of access to courts. This argument necessarily refers to the validity of the statute as we interpreted it in Hadley.

We also acknowledge that a court should be very reluctant to recede from one of its own decisions. See Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (stating that a Court should not depart from precedent in the absence of a special justification). The doctrine of stare decisis is of vital importance in the work of an appellate court. Fidelity to precedent is said to be the preferred course of action because it "promotes the evenhanded, predictable, and consistent development of legal principles" and because it "contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 828 (1991).

However, the doctrine of stare decisis should not be applied reflexively as a method of protecting a precedent, if the result would be to perpetuate an injustice. Although fidelity to precedent is the first choice, an appellate court must be willing to consider the correctness of its prior work and, above all, willing to admit that it has made a mistake. As Chief Justice Roberts observed, the doctrine of stare decisis is neither an "inexorable command," nor a "mechanical formula of

adherence to the latest decision." Citizens United v. Federal Election Com'n, 558 U.S. 310, 377 (2010) (quotations omitted).

In the present case, there are two compelling reasons to reconsider the precedent we set in Hadley. The first of these reasons is that we have never before been confronted with a constitutional challenge to the statutes in question. Such a question was not presented in Hadley or in any other previous case presented to the court. It is safe to say that the prospect of declaring the statute unconstitutional put the issue in an entirely new light.

The second reason is that the principle established in Oswald has not worked out the way we thought it would. It is clear to us now that the exception the court was attempting to create to ensure the continuous flow of disability benefits for those who are truly disabled is very rarely applied. Instead, the rule in Oswald is now used almost exclusively as authority to deny benefits. [2] The Workers'

[2] See, e.g., McDevitt Street Bovis v. Rogers, 770 So. 2d 180 (Fla. 1st DCA 2000) (denying a disabled worker disability benefits after the expiration of the 104-week period because she failed to prove that she would still be totally disabled at the time she reached maximum medical improvement); Chan's Surfside Saloon v. Provost, 764 So. 2d 700 (Fla. 1st DCA 2000) (denying a disabled worker disability benefits because she failed to prove that she would still be disabled at the time she reached maximum medical improvement); Metropolitan Title & Guar. Co. v. Muniz, 806 So. 2d 637 (Fla. 1st DCA 2002) (concluding that a disabled worker would be entitled to apply for disability benefits after the 104-week period only if he could prove that he would still be disabled at the "future date" of his maximum medical improvement); Rivendell of Ft. Walton v. Petway, 833 So. 2d 292 (Fla. 1st DCA 2002) (denying a disabled worker disability benefits because she was still improving and not yet at maximum medical improvement at the end of the 104-

Compensation Law was designed to provide injured workers just compensation for their injuries at reasonable cost to their employers. See § 440.015, Fla. Stat. Yet, by this court's interpretation of the law in Oswald and Hadley, it has become an impediment to the recovery of just compensation for a distinct class of severely injured workers. As Judge Van Nortwick observed in his dissent in Hadley, the "patch" created in Oswald "leaves many disabled claimants stuck in [the] gap." Hadley 78 So. 3d at 634 (Van Nortwick J., dissenting).

For these reasons, we hold that Mr. Westphal's claim for permanent and total disability benefits is not premature. If he can prove that he is totally disabled, he is entitled to receive his benefits now and he need not wait until such time in the future as he can offer medical proof that he has reached the point of maximum medical improvement. We certify this case for review by the Supreme Court under Article V, section 3(b)(4) of the Florida Constitution on the ground that our decision passes on the following question of great public importance:

> Is a worker who is totally disabled as a result of a workplace accident, but still improving from a medical standpoint at the time temporary total disability benefits expire, deemed to be at maximum medical improvement by operation of law and therefore eligible to assert a claim for permanent and total disability benefits?

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week period); Crum v. Richmond, 46 So. 3d 633 (Fla. 1st DCA 2010) (denying disability benefits one day after the expiration of temporary benefits because the disabled worker was still improving and had not yet reached maximum medical improvement).

The order of the judge of compensation claims is reversed and the case is remanded for consideration of the claim for permanent and total disability benefits.

Reversed.

LEWIS, C.J., and WOLF, VAN NORTWICK, CLARK, MARSTILLER, SWANSON, and MAKAR, JJ., concur.

WOLF, J., concurs in an opinion in which LEWIS, C.J., joins.

BENTON, J., concurs in result in an opinion in which RAY, J., joins.

THOMAS, J., concurs in result only and dissents in part.

WETHERELL, J., dissents in an opinion in which ROBERTS and ROWE, JJ., join.

OSTERHAUS, J., recused.

WOLF, J., concurring.

I concur in the decision to revisit the prior opinion of this court in Matrix Employee Leasing, Inc. v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011), and to adopt the interpretation of the statute in Judge Padavano's opinion. I also concur to award the contested benefits to the claimant.

I do not vote to revisit Hadley because of the argument that our prior interpretation of the statute would render it unconstitutional. For many reasons, on which it is unnecessary to expound in this opinion, I believe our prior interpretation met constitutional scrutiny. I also do not vote to revisit Hadley because the interpretation adopted today is clearly more persuasive or correct than the previous interpretation by this court of this ambiguous statutory scheme. I believe there are two reasonable statutory interpretations.

I vote to rethink and to revisit Hadley because: 1) a majority of this court has determined that the claimant in the instant case is entitled to PTD benefits at 104 weeks, a conclusion with which I do not disagree; 2) the interpretation adopted by the court today provides the most workable and clear guidance for the Judges of Compensation Claims and the workers' compensation bar on how to deal with a claimant who is disabled and not at physical MMI at 104 weeks; 3) we are revisiting a position that I now believe put doctors in an untenable position of looking into a crystal ball and speculating on the future; and 4) we are adopting a

position that, within this ambiguous statutory scheme, is most likely to allow a claimant with a legitimate permanent disability to receive needed benefits.

If we are incorrect in our interpretation, the Legislature may address it.

BENTON, J., concurring in result.

Only months after the compensation order under review was entered, the City conceded (during the pendency of the appeal) that it owed permanent total disability benefits. On the same mistaken premise that it urged below (and misled the judge of compensation claims to adopt)—namely, that permanent total disability benefits are not owed until the claimant actually reaches "physical MMI," even though all temporary benefits have been paid—the City has not agreed to pay permanent total disability benefits for the period after it stopped paying temporary benefits and before it conceded Mr. Westphal's permanent, total disability. Now at issue in the present case as a result is Mr. Westphal's entitlement to some nine months of permanent total disability benefits. No other disability benefits are at issue. As both members of the original panel still on the court seem to agree, the case should be remanded with directions that the claimant be awarded all the permanent total disability benefits he sought.

In any event, decision of this question does not require an en banc court. "En banc hearings and rehearing shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity in the court's decisions." Fla. R. App. P. 9.331(a). While undoubtedly important to Mr. Westphal, these few months' compensation benefits are not "of exceptional importance" within the meaning of the rule. Nor is the en banc court sitting "to

maintain uniformity in the court's decisions." Id. Quite the opposite. The court has voted not to dissolve en banc proceedings precisely in order not to maintain uniformity in the court's decisions. Today's majority opinion espouses precisely the same view stated in dissent and explicitly rejected the last time the court sat en banc on this question. See Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 634-35 (Fla. 1st DCA 2011) (Padovano, J., dissenting). Rule 9.331 does not authorize en banc proceedings for purposes of a rematch.

For the reasons Judge Thomas sets out in his opinion, the claimant carried his burden to show both that he was unable to do anything more strenuous than sedentary work—which was not available to him within a radius of fifty miles—at the end of 104 weeks of temporary benefits, and that he would not be able to perform such work on account of disability existing after the date of maximum medical improvement as defined by section 440.02(10), Florida Statutes (2009).[3] Under the rule recently reaffirmed in Hadley, therefore, he was entitled to permanent total disability benefits upon the cessation of temporary benefits. See East v. CVS Pharmacy, Inc., 51 So. 3d 516, 517 (Fla. 1st DCA 2010) ("A claimant seeking PTD benefits before she reaches overall MMI must prove she has a present

[3] "Date of maximum medical improvement" means "the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability."

total disability and that said disability will exist after the date of MMI."); Crum v. Richmond, 46 So. 3d 633, 636 (Fla. 1st DCA 2010); Fla. Trans. 1982, Inc. v. Quintana, 1 So. 3d 388, 390 (Fla. 1st DCA 2009).

Quite apart from the majority opinion's unjustified disregard of an unbroken fifteen-year line of precedent—and the unprecedented use of the en banc rule in this case—the new substantive rule of decision the majority opinion lays down is wholly unnecessary to accomplish its stated purpose. If the new rule is that a claimant who "remains totally disabled" when

> eligibility for temporary total disability benefits [ends] is deemed to be at maximum medical improvement . . . [and] eligible . . . for permanent and total disability benefits,

Majority Opinion, at 3, the Oswald-Hadley line of cases has already made this clear whenever it can be proven that the claimant will remain totally disabled upon reaching maximum medical improvement. The real effect of this new rule will be felt in cases in which no gap in benefits can be proven. Consider the case where the claimant is totally disabled at the end of 104 weeks because of surgery necessitated by an industrial accident but sure to be right as rain after six weeks' convalescence. In such a case, the new rule is an end run around the two-year limit

on temporary benefits. See §§ 440.15(2)(a), 4(e), Fla. Stat. (2009);[4] Okeechobee Health Care v. Collins, 726 So. 2d 775, 776 (Fla. 1st DCA 1998) (holding temporary benefits cannot be paid for more than 104 weeks). This is brazen defiance of a clear statutory directive.

The majority opinion sometimes speaks of a putative gap, not in disability benefits, but in the period during which claimants may apply for them. Arguably introducing a fundamental ambiguity, it shifts back and forth between a "gap in benefits" and "an indefinite gap in which [claimants] would not be entitled to apply" for benefits. Maj. Op. at 3, 4. But the latter notion makes absolutely no sense under a statutory scheme that unequivocally cuts off the right to apply for permanent total disability benefits two years after the industrial accident. See § 440.19(1), Fla. Stat. (2009).[5] Like the statutory limit on temporary disability

[4] Section 440.15(2)(a), Florida Statutes (2009), provides that "in case of disability total in character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed 104 weeks[.]" Section 440.15(4)(e), Florida Statutes (2009), provides that temporary partial disability benefits "shall be paid during the continuance of such disability, not to exceed a period of 104 weeks, as provided by this subsection and subsection (2)."

[5] "Except to the extent provided elsewhere in this section, all employee petitions for benefits under this chapter shall be barred unless the employee, or the employee's estate if the employee is deceased, has advised the employer of the injury or death pursuant to s. 440.185(1) and the petition is filed within 2 years after the date on which the employee knew or should have known that the injury or death arose out of work performed in the course and scope of employment." § 440.19(1), Fla. Stat. (2009).

benefits, the statute of limitations must be given effect. Not a single judge now maintains that either is unconstitutional.

Accordingly, I concur in the judgment insofar as it requires that Mr. Westphal be awarded approximately nine months' worth of permanent total disability benefits on remand. I fully concur in Judge Thomas's rejection of what amounts to a judicial rewrite of the statute for the reasons he states, and I join the portion of Judge Wetherell's opinion under the heading of Roman numeral I.

THOMAS, J., concurring in result only, and dissenting in part.

I concur in the result only, as Mr. Westphal established through unrefuted expert testimony that he was totally disabled at the expiration of temporary disability benefits and would remain totally disabled after he reached maximum medical improvement (MMI). Thus he was entitled to permanent total disability (PTD) benefits as a matter of law, under our rule announced fifteen years ago in City of Pensacola Firefighters v. Oswald, 710 So. 2d 95, 98 (Fla. 1st DCA 1998), and reaffirmed in Matrix Employee Leasing, Inc. v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011). Furthermore, in addition to our prior authority, reversal is mandated under the Florida Supreme Court's decision in Wald v. Grainger, 64 So. 3d 1201 (Fla. 2011). Therefore, the Judge of Compensation Claims (JCC) erred as a matter of law in denying Mr. Westphal relief.

I vigorously dissent, however, from the majority's opinion, which in my view violates Florida's "strict" separation of powers provision in article II, section three of the Florida Constitution. Fla. House of Representatives v. Expedia, Inc., 85 So. 3d 517 (Fla. 1st DCA 2012). The majority opinion enacts new substantive law that creates a legal entitlement to **permanent** total disability benefits at the expiration of temporary total disability benefits, **regardless** of whether the claimant will remain totally disabled when reaching maximum medical improvement.

Article II, section three of our state constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." As we recently stated in Expedia, "The importance of this provision cannot be overstated. Our supreme court described the separation of powers as the 'cornerstone of American democracy' . . . [and] stated that Florida has traditionally applied a '**strict** separation of powers doctrine.'" 85 So. 3d 524 (quoting Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004) (emphasis added)); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (holding that "courts of this state are 'without power to construe an unambiguous statute in a way which would **extend**, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'") (quoting Am. Bankers Life Assurance Co. of Fla. v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968) (emphasis added)); State v. Egan, 287 So. 2d 1, 7 (1973) (recognizing that "[u]nder our constitutional system of government, however, courts cannot legislate."). By enacting substantive law, the majority opinion has unconstitutionally encroached on the legislative branch's power, in violation of Florida's strict separation of powers.

I. The Majority Opinion Enacts Substantive Law In Violation of article II, section three of the Florida Constitution, and Unnecessarily Departs From the Judicial Policy of *Stare Decisis*

Our supreme court decided more than forty years ago that only the legislature, not the judiciary, has the authority to write the law imposing limits on temporary total disability indemnity benefits. Thompson v. Fla. Indus. Comm'n, 224 So. 2d 286, 287 (Fla. 1969) (stating: "The Florida Workmen's Compensation Act is inadequate in failing to provide for a situation such as this. However, the remedy lies with the Legislature and not with the Florida Industrial Commission or the Court."). The majority opinion, in my view, abrogates legislative power by transforming a statutory limitation of **temporary** disability benefits, which was enacted to reduce costs, into an entitlement to **permanent** disability benefits. The majority opinion thus disregards express legislative intent to reduce costs imposed on Florida's employers from inappropriate awards of permanent total disability benefits.[6]

[6] In the 1993 Workers' Compensation Reform Act, which eliminated all temporary total indemnity benefits after 104 weeks, in addition to eliminating wage-loss benefits, the Legislature expressed its intent and findings in unambiguous terms: "WHEREAS, permanent total disability benefits are awarded in Florida at levels **more than five times the national average**, and . . . WHEREAS, the Legislature finds that the wage loss formula is partly to blame for an increase in eligibility for permanent partial disability benefits and for an increase in total payments for permanent partial disabilities[,]" and concluded that "the reforms contained in this act **are the only alternative available** that will meet the public necessity of maintaining a workers' compensation system that provides adequate coverage to

The majority's attempt to distinguish Thompson in footnote 1 of its opinion is completely unavailing, as the majority's rationale for its entire decision is fundamentally flawed. It erroneously equates **impairment** with **disability**, and then proceeds to build a house of cards on this flawed concept. See Texas Workers' Compensation Comm'n v. Garcia, 893 S.W. 2d 504, 516 (Tex. 1995) (discussing fundamental difference between impairment and disability, using example of similar injuries to concert pianist and bank president, stating: "Impairment benefits compensate for **non-economic** aspects of an injury . . . while disability benefits compensate for direct economic harm." (emphasis added); see also Bradley v. Hurricane Restaurant, 670 So. 2d 162, 165 (Fla. 1st DCA 1996) (noting that "impairment is one accepted criterion for measuring benefits" and rejecting argument that statute is unconstitutional because it bases impairment benefits on permanent impairment rating "and has no relation to the claimant's **actual disability** or actual wage loss.") (emphasis added). Thus, the majority's attempt to distinguish the binding precedent of Thompson must fail as a matter of law and logic, as the addition of impairment provisions to the statute are irrelevant to the holding in Thompson.

The majority opinion also disregards the Legislature's **explicit approval** of our two previous decisions in Oswald and Hadley, in its *amicus curiae* brief filed

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injured workers at a cost **that is affordable to employers . . . .**" Ch. 93-415, Laws of Fla. (emphasis added).

here. In addition, the majority opinion disregards the fact that the legislature has not acted to amend the relevant statutes we have interpreted for fifteen years.

Although courts have the constitutional authority to find statutes unconstitutional if the general law violates the superior organic law, the majority opinion specifically eschews any claim that the current law is in fact unconstitutional. The majority opinion states only that the constitutional issue previously addressed here casts the statute in a "new light," and Judge Wolf, writing for two of the eight members of the court joining the majority opinion, disclaims any view that our previous holdings in Oswald and Hadley render the relevant statutes unconstitutional.

In contrast with the majority opinion, our prior decision in Oswald, which we recently reaffirmed in Hadley, maintains the limitation of temporary total disability benefits, consistent with the original legislative intent. In the House of Representative's Final Bill Analysis of Chapter 93-415, Laws of Florida, the staff analysis noted that the newly limited section 440.15, Florida Statutes, "[a]mends provisions regarding the length of temporary benefits not to exceed 104 weeks, rather than the 260 weeks in current law." See "House of Representatives, As Further Revised By the Committee on Commerce, Final Bill Analysis & Economic Impact Statement," § 20, pg. 11 (Nov. 30, 1993). Similarly, the Senate Staff Analysis states that the new 104-week limitation means that "Temporary total

disability benefits are limited to 104 weeks, rather than the current duration of 260 weeks. Once the employee reaches the maximum number of weeks, temporary disability benefits **will cease** and a determination is required to be made of the injured worker's permanent impairment." See "Senate Staff Analysis and Economic Impact Statement," Senate Bill 12-C, October 29, 1993 (emphasis added). Nowhere does either the House or Senate staff analysis even imply that the changes to the workers' compensation act limiting temporary total disability benefits to 104 weeks somehow creates an entitlement for a disabled claimant to immediately receive permanent disability indemnity benefits, regardless of whether the injured worker has reached maximum medical improvement.

The majority opinion thus constitutes judicial legislation in violation of article II, section three of the Florida Constitution, because the opinion amends the statutory definition of maximum medical improvement to allow a claim for permanent disability indemnity benefits, regardless of whether the claimant will be totally disabled when reaching maximum medical improvement. The majority opinion also amends the definition of impairment rating by conflating it with the definition of disability and merging the two concepts, as discussed above. Finally, the majority opinion amends the statutory definition of permanent total disability benefits, as such benefits will now be available to persons who will in fact not be totally disabled when they reach maximum medical improvement. All of these

changes are implemented not by the legislature, the proper constitutional branch, but by the majority opinion's new version of the statute, which has no basis in text, prior case law, or legislative intent.

This new version of the statute thus enacts substantive law that will likely have serious and unexpected consequences.[7] This is precisely why Florida's

[7] The consequences of the majority opinion's new version of the statute may be adverse to both employers and employees. As to employers and carriers, the Florida Office of Insurance Regulation recently received an application by the National Council on Compensation Insurance to increase workers' compensation insurance rates. If approved, rates will have increased for the fourth consecutive year. See "Office Statement on Annual National Council on Compensation Insurance Workers' Compensation Rate Filing, Friday, August 16th, 2013, http://www.floir.com/PressReleases/viewmediarelease.aspx?id=2018. While this Office Statement notes that the rates are almost 55.9% lower than a decade ago, the majority opinion's new version of the statute, which dramatically increases eligibility for permanent total disability benefits, could lead to an increase in future rates. And in 1993, when the limitation of temporary disability indemnity benefits was changed from 260 weeks to 104 weeks, one Florida Senate analysis estimated that the change would save one percent of "system costs," or "$32,742,583" in 1993 dollars. See Senate Staff Analysis and Economic Impact Statement, Senate Bill 12-C, October 29, 1993, Section 18, pg. 37. By granting an even greater entitlement to **permanent** disability indemnity benefits, the majority opinion could impose far greater costs in 2013 dollars.

By contrast, regarding employees, the opinion may provide an economic incentive to employers to more vigorously litigate entitlement to **temporary** disability indemnity benefits. This is because once temporary disability benefits are conceded, when such benefits expire, today's opinion "deems" that the totally disabled claimant has reached maximum medical improvement, and the employer will be required to pay **permanent** disability benefits for the indefinite future, **as a matter of law**. Although the majority opinion notes that current law allows employers and carriers to revisit these permanent benefits, that remedy imposes costs itself. Of course, it is the Legislature which is the most appropriate branch to study and consider these potential consequences, which is why the organic law

organic law assigns the legislative power only to the Legislature, which is the body better suited to enact substantive law, as it utilizes a lengthy process of committee meetings and bicameral review, and any passed laws are subject to a potential gubernatorial veto. But here, the majority opinion enacts new law and thereby substitutes its policy preferences for the legislature's enacted law, without constitutional authority under article II, section three of the Florida Constitution.

By crafting a new statute in derogation of the plain text, the majority opinion thus fails to properly defer to the Florida Legislature: "Although the line of demarcation is not always clear, we have noted that the 'legislature's **exclusive power** encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies.'" Fla. House of Representatives v. Crist, 999 So. 2d 601, 611 (Fla. 2008) (quoting B.H. v. State, 645 So. 2d 987, 993 (Fla. 1994) (emphasis added)). In Florida House of Representatives, the Florida Supreme Court recognized that the legislature's broad policy-making power was only limited by the specific restrictions mandated in organic law. 999 So. 2d at 612 (holding that "even if the Governor has authority to execute compacts, its terms cannot contradict the state's public policy, **as expressed in its laws.**" (Emphasis added)).

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assigns that body the preeminent power to enact public policy. Fla. House of Representatives v. Crist, 999 So. 2d at 611-12.

Surprisingly, the majority opinion holds that "a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law **and is therefore eligible** to assert a claim for permanent and total disability benefits." (Majority Opinion, pg. 3; emphasis added.) But this is not a novel concept. Since our decision in Oswald, a claimant can now file a claim for permanent and total disability benefits despite the fact he has not reached MMI. Oswald, 710 So. 2d at 98 ("to be eligible for permanent total disability benefits, an employee whose temporary benefits have run out-or are expected to do so imminently-must be able to show not only total disability upon the cessation of temporary benefits but also that **total disability will be 'existing after the date of maximum medical improvement.'"**) (quoting § 440.02(19), Fla. Stat.; emphasis added)). Since Oswald, such a claim has never been classified as "premature" merely because the claimant has not reached MMI.

The majority opinion again repeats this incorrect premise when it concludes by stating: "[W]e hold that Mr. Westphal's claim for permanent and total disability benefits is not premature. If he can prove that he is totally disabled, he is entitled to receive his benefits now and he need not wait until such time in the future as he can offer medical proof that he has reached the point of maximum medical improvement." (Majority opinion, pg. 17; emphasis added.) But under

current law, this claim is not legally "premature." In this very case, for example, the record facts are not in dispute that Mr. Westphal was totally disabled when he asserted his claim for PTD benefits, even though he had not reached MMI. The majority opinion acknowledges this fact: "Mr. Westphal sought and obtained temporary total disability benefits for a period of 104 weeks but he was still totally disabled at the time those benefits expired." (Majority opinion, pg. 5.) The City never claimed otherwise; rather, the issue here, as in all such cases since Oswald, was whether Mr. Westphal will **remain** disabled "after the date of maximum medical improvement." Oswald, 710 So. 2d at 98.

So why remand the case for any purpose other than to enter judgment in favor of Mr. Westphal? Under the majority's new version of the statute, there is nothing left for Mr. Westphal to prove, as the majority opinion declares that "an injured worker who is still totally disabled at the end of his or her eligibility for temporary disability benefits is deemed to be at maximum medical improvement as a matter of law, **even if the worker may get well enough someday to return to work**. . . . [T]he claimant need not present medical proof that he or she has reached maximum medical improvement. The worker may immediately assert a claim for permanent total disability benefits, and the judge may award those benefits if the worker has proven that he or she is in fact totally disabled." (Majority opinion, pg. 8; emphasis added.) Again, Mr. Westphal has already proven he was disabled

when his temporary total disability benefits expired, and under current law, the status of maximum medical improvement was not dispositive; rather, the ultimate question was whether the claimant would remain totally disabled if and when he reached maximum medical improvement. Under the majority opinion's new judicial legislation, however, Mr. Westphal is once again relegated to a legal twilight zone where he is required to prove what he has already proven, that is, that he was totally disabled when he reached the expiration of 104 weeks of temporary total disability indemnity benefits.

The majority opinion should not force Mr. Westphal to engage in a waste of judicial resources, as under the majority's new version of the statute, Mr. Westphal prevails as a matter of law. He has already proven that he was totally disabled at the expiration of 104 weeks of temporary total disability benefits, and thus he is entitled to receive permanent total disability benefits. It is now legally irrelevant whether Mr. Westphal, or any other claimant in his position, will remain totally disabled when he reaches maximum medical improvement.

As I discuss in Part II of this opinion, the majority's holding enacting new substantive law is unnecessary, because Mr. Westphal was entitled to prevail under current law, as he proved through unrefuted expert testimony that he would remain totally disabled, both at the time his temporary disability indemnity benefits expired and when he would eventually reach MMI. The rule this court recognized

in Oswald, and affirmed for fifteen years, properly adheres to the statute, and does not allow a JCC to avoid making a decision when a claimant produces unrefuted expert medical and vocational testimony establishing that he is and will remain totally disabled upon reaching maximum medical improvement. Thus, we should adhere to our settled precedent and reverse only to direct the JCC to enter judgment for Mr. Westphal and require the payment for permanent total disability benefits for the period between the expiration of his temporary benefits and the time the City accepted his claim for permanent benefits.

Under article II, section three of the Florida Constitution, only the legislature can enact new policies regarding whether and how a disabled claimant may assert a claim for permanent disability. As the Florida Supreme Court stated in Whiley v. Scott, 79 So. 3d 702, 708-09 (Fla. 2011):

> '[S]eparation of powers recognizes three separate branches of government-the executive, the legislative, and the judicial-each with its own powers and responsibilities.' In applying the separation of powers doctrine, the Court has done so **strictly**, explaining 'that this doctrine 'encompasses two fundamental prohibitions. The **first** is that no branch may encroach upon the powers of another.''"

(Emphasis added; citation omitted.)

The majority opinion encroaches upon the power of the Florida Legislature by creating a newly defined "statutory" or "deemed" maximum medical improvement date, to automatically exist at the expiration of temporary total disability benefits, and declaring that at this point the claimant who is totally

disabled is entitled to permanent total disability indemnity benefits, **regardless whether the claimant will remain disabled at maximum medical improvement.**

The majority opinion bases this new interpretation on a purported interplay between the definitions of "permanent impairment" contained in sections 440.02(22) and 440.15(3)(d) and the limitation of temporary total disability benefits contained in section 440.15(2)(a), Florida Statutes. The legislature has in fact defined "maximum medical improvement" in unambiguous terms, and therefore there can be no proper use of a canon of judicial construction to avoid this clear definition. Knowles v. Beverly Enters.,-Fla., Inc., 898 So. 2d 1, 5 (Fla. 2004) (holding where language is clear and unambiguous, "there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning") (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984), which quotes A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)).

The legislature has defined MMI as follows: "'Date of maximum medical improvement' means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical **probability."** § 440.02(10), Fla. Stat. (emphasis

added). We have no constitutional authority to evade this unambiguous definition, as recognized by our supreme court in State v. Egan:

> 'The Legislature must be understood to mean what it has plainly expressed, and this excludes construction. . . . Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety, and policy of its passage. Courts have then no power to set it aside or evade its operation by forced or unreasonable construction.'

287 So. 2d 1, 4 (Fla. 1973) (quoting Van Pelt v. Hilliard, 78 So. 693, 694-95 (1918)).

Interestingly, only one state has defined maximum medical improvement in the terms enacted by the majority opinion, and in that state, the definition was enacted by the body of elected representatives of the people. In Texas, **by statute**, a claimant is deemed to have reached maximum medical improvement when the claimant's temporary disability benefits expire. Texas Labor Code sections 401.11(30)(a) and (b) (2009) define maximum medical improvement, in part, as "the earliest date after which . . . further improvement to an injury can no longer be reasonably anticipated" or "the expiration of 104 weeks from the date on which income benefits begin to accrue," whichever is earlier.[8] No other state so defines

[8] The Texas statute also extends a decision on maximum medical improvement "if the employee has had spinal surgery, or has been approved for spinal surgery . . .

the term maximum medical improvement, either by statute or judicial opinion. But the majority opinion declares that henceforth maximum medical improvement shall **not** mean what the legislature says it means, but it shall mean what the majority opinion thinks the statute should say, that is, when the disabled claimant's temporary indemnity benefits have expired. Thus, the majority opinion engrafts Texas statutory law onto Florida's statute, in abrogation of legislative power.

In my view, rather than defer to the proper branch of government, the majority opinion rewrites a statute that has been interpreted by this court for fifteen years in a manner explicitly approved by the Florida Legislature in this very case. Thus, again noting our supreme court's admonishment in Egan, "The court has no more right to abrogate the common law than it has to repeal the statutory law. . . . [A] legislative enactment may be repealed only by further legislation **and not by time or changed conditions.**" 287 So. 2d at 6-7 (emphasis added). Thus, the majority opinion violates both the Florida Constitution's requirement of the separation of powers and the venerable principle of *stare decisis*. By doing so, the

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within 12 weeks before the expiration of the 104-week period." The Texas statute provides that "the order shall extend the statutory period for maximum medical improvement to a date certain, **based on medical evidence** presented to the commissioner." Tex. Labor Code § 408.104, referencing Tex. Labor Code § 401.11(30)(b) (emphasis added). This Texas statutory provision is further evidence that the questions involved in such determinations, such as what types of injuries require longer periods for determining maximum medical improvement, are quintessentially issues of public policy involving medical classifications. In Florida, such fundamental policy issues must be resolved by the legislature, not the judiciary. Fla. House of Representatives v. Crist, 999 So. 2d at 611.

decision will create uncertainty in the law and instability in the workers' compensation system.

In addition to enacting substantive law, the majority opinion is not only receding from this court's recent en banc opinion in Hadley, as the opinion acknowledges, but also recedes from fifteen years of settled law, originating in Oswald.[9] Thus, not only does the opinion make law, in violation of the strict

[9] See East v. CVS Pharmacy, Inc., 51 So. 3d 516, 517 (Fla. 1st DCA 2010) ("A claimant seeking PTD benefits before she reaches overall MMI must prove she has a present total disability and that said disability will exist after the date of MMI."); Crum v. Richmond, 46 So. 3d 633 (Fla. 1st DCA 2010) ("We explained in City of Pensacola Firefighters v. Oswald, 710 So. 2d 95 (Fla. 1st DCA 1998), that a claimant who has exhausted entitlement to temporary disability benefits, but who has not yet reached MMI, may receive PTD benefits when he or she can prove present total disability and total disability existing after the date of MMI."); Fla. Transport 1982, Inc. v. Quintana, 1 So. 3d 388 (Fla. 1st DCA 2009) ("[I]f a claimant is not at overall MMI after receiving 104 weeks of temporary benefits, the claimant may nevertheless establish entitlement to PTD benefits by proving total disability due to an impairment 'existing after the date of [MMI],'. . . . In other words, a claimant can still prove entitlement to PTD **before reaching overall MMI, if the claimant can prove he is PTD** from one of his injuries standing alone.") (emphasis added; citation omitted)); Olmo v. Rehabcare Starmed/SRS, 930 So. 2d 789, 794 (Fla. 1st DCA 2006) (claimant was not required to assert entitlement to PTD benefits under Oswald until and unless "she is in a position to 'show not only total disability upon the cessation of temporary benefits but also that total disability [would] be 'existing after the date of maximum medical improvement.'") (quoting Oswald, 710 So. 2d at 98); Rivendell of Ft. Walton v. Petway, 833 So. 2d 292 (Fla. 1st DCA 2002) ("Given the unrefuted medical evidence indicating a **reasonable likelihood of psychiatric improvement** if Claimant receives psychiatric treatment and care, *and* the record evidence showing that Employer/Carrier authorized and provided a psychiatrist, we conclude that Claimant failed to meet her burden, as established in Oswald and Emanuel [v. David Percy Plumbing, 765 So. 2d 761 (Fla. 1st DCA 2000)], to show that she has reached psychiatric MMI.") (first emphasis added, second in original); Metro. Title

separation of powers mandate in article II, section three of the Florida Constitution, it also violates the venerable principle of *stare decisis*. Thus, although I agree and concur with Judge Wetherell's discussion of *stare decisis* in his dissenting opinion, I disagree with his conclusion that Mr. Westphal did not demonstrate entitlement to permanent and total disability benefits under the current law.

Ultimately, the majority opinion fails to delineate any persuasive analysis for violating the venerable judicial policy of *stare decisis,* especially where the majority opinion enacts judicial legislation in violation of organic law. In addition, the majority fails to even address, much less analyze, what impact it will have on 1) workers' compensation insurance rates; 2) litigation expectations; 3) employers'

& Guar. Co. v. Muniz, 806 So. 2d 637 (Fla. 1st DCA 2002) ("On remand, the claimant may present evidence that he has reached maximum medical improvement . . . [but] if that is not the case, and if temporary benefits have expired, the claimant may obtain an impairment rating and **seek permanent total disability benefits based on a future date of maximum medical improvements** under the procedure in Oswald.") (emphasis added); McDevitt Street Bovis v. Rogers, 770 So. 2d 180 (Fla. 1st DCA 2000) ("nobody testified either that the claimant had reached maximum medical (psychiatric) improvement **or that she would remain permanently and totally disabled when she did reach maximum medical improvement**," thus, PTD claim should have been denied) (emphasis added); Daws Mfg. Co., Inc. v. Ostoyic, 756 So. 2d 175, 176 (Fla. 1st DCA 2000) (noting that JCC did not have benefit of Oswald "where we explained that to establish entitlement to permanent total disability indemnity benefits under the revised version of chapter 440 which went into effect on January 1, 1994, a claimant must prove total disability on account of impairment existing after the date of maximum medical improvement [and] Ostoyic has conceded that the record on appeal does not establish . . . **under the exception to the 'venerable rule'** that permanent disability benefits are premature if claimant is not yet at MMI." (emphasis added).

willingness to agree to awards of temporary total disability payments, when under the majority view, such concessions will now be tantamount to a concession to the award of **permanent** disability indemnity benefits, where the claimant has not reached MMI at 104 weeks and remains totally disabled; and 4) the costs to employers who then must again litigate the continued entitlement to such permanent disability indemnity benefits.

Furthermore, the majority opinion disregards the **explicit approval** by the legislative branch of our prior decisions in Oswald and Hadley. By this silence, it must be presumed that the legislature's specific approval of our prior decisions has no relevance in the majority's calculus of its decision to abandon settled law. Significantly, **not one single judge** now espouses the view that section 440.15(2), which limits temporary total disability indemnity benefits, is unconstitutional. Thus, the majority's refusal to adhere to *stare decisis* violates Florida's "strict" constitutional separation of powers.

As I discuss in Part II of this opinion, the concurring (and majority) opinion's significant departure from *stare decisis* is not only unsound and devoid of support in the statutory text or legislative history, it is unnecessary. This is because the claimant here is entitled to prevail on appeal under current law, as explained in Part II of this opinion.

II. Mr. Westphal Was Entitled to Relief as a Matter of Law Based Upon the Unrefuted Expert Medical Testimony

In this case, the JCC improperly disregarded expert medical testimony, and instead relied on expert testimony that was so "equivocal, confusing, and internally contradictory and irreconcilable as [to] utterly to lack any probative value." See Grainger, 64 So. 3d at 1206 (jury may not reject uncontradicted expert medical testimony regarding permanent injury from accident, absent "some reasonable basis in the evidence. This can include conflicting medical evidence, evidence that impeaches the expert's testimony or calls it into question . . . ."); Simmons-Russ v. Emko, 928 So. 2d 397, 398 (Fla. 1st DCA 2006) (affirming trial court's order granting directed verdict on issue of causation based on plaintiff's insufficient expert testimony). In addition, a JCC cannot "reject unrefuted medical testimony without providing sufficient reason." Jefferson v. Wayne Dalton Corp., 793 So. 2d 1081, 1084 (Fla. 1st DCA 2001). Furthermore, even had the expert testimony produced a conflict, which it did not, the JCC would have been required to appoint an Expert Medical Advisor, whose testimony would have been presumed correct, absent clear and convincing contrary evidence. §§ 440.13(9)(c) & 440.25(4)(d), Fla. Stat.; Romero v. JB Painting & Waterproofing, Inc., 38 So. 3d 836, 838 (Fla. 1st DCA 2010) ("If there is a disagreement in the opinions of health care providers, the JCC **shall** appoint an EMA.") (emphasis added). Here, however, there was no conflict, because the only probative expert medical testimony was presented by

Dr. Hayes, the Independent Medical Examiner who established that Mr. Westphal was and would remain permanently and totally disabled.

Thus, I would reverse with directions to grant the permanent and total disability benefits for the time period at issue. The uncontroverted expert medical evidence showed that Mr. Westphal was entitled to permanent total disability benefits under the rule recently reiterated in Hadley. 78 So. 3d at 624-25 ("allowing an employee whose 104 weeks of temporary benefits are about to expire to establish entitlement to PTD benefits by proving that he or she will be permanently and totally disabled after MMI").[10]

Testifying at the merits hearing was Mr. Westphal, who was working for the City of St. Petersburg at the time of his industrial injury; Steven Cooley, a vocational expert; and John Orphanidys, who performed a reemployment assessment at the request of the City. Mr. Cooley testified: "Mr. Westphal lacks the residual functional capacity based on age, education, past relevant work, and his functional limitations . . . [and] lacks the ability to perform any sedentary work existing within a 50-mile radius of his home." Asked whether this situation was permanent or was "going to change at any point in the future," Mr. Cooley answered: "Dr. Hayes talked about that atrophy in his leg. The nerve damage is

[10] We further note that the City acknowledged at oral argument its agreement that Mr. Westphal was permanently and totally disabled within less than one year after the JCC denied his claim. This is consistent with Dr. Hayes' testimony that Mr. Westphal was and would remain permanently and totally disabled.

permanent. It's not going to go away. If anything, he's – I believe he's – if he gets – trying to do any type of work, he's going to end up back with an additional surgery in the future at the adjacent level to the fusion." Despite the JCC's best efforts, Mr. Cooley did not waver from his opinion that Mr. Westphal's total disability was permanent.

Several physicians testified by deposition or through "medical composites": Dr. Hayes, the claimant's independent medical examiner; Dr. McKalip, the authorized treating neurosurgeon; Dr. Le, the authorized pain management physician; Dr. Mixa, the authorized orthopedic physician who operated on Mr. Westphal's leg; and Dr. Uribe, an examining neurosurgeon. In the view of the JCC, the case turned on the testimony of Dr. Hayes and Dr. McKalip (including implications their testimony has for the vocational experts' assessments). While the JCC was free to conclude that Dr. McKalip was "in the best position to determine whether or not the claimant has reached physical [MMI]," that historical fact is not dispositive under the proper test, which requires the JCC to determine a claimant's medical status when MMI is reached. See Hadley, 78 So. 3d at 625-26.

Dr. Hayes, a board certified orthopedic spinal surgeon whose practice is limited to spine-related injuries, testified on behalf of Mr. Westphal. Dr. Hayes examined Mr. Westphal after the first spinal surgery Dr. McKalip performed ("L3-4 and L4-5 discectomies"), but before the second surgery, a five-level spinal

fusion. Dr. Hayes testified that his examination revealed atrophy in the left quadricep and upper thigh musculature ("His left leg is two inches smaller than his right leg."). Dr. Hayes testified he "basically had to hold the patient up. He can barely stand on one leg." Dr. Hayes described Mr. Westphal as a "fall risk," recommended that he use his cane, and testified "[h]e'll probably slowly lose the ability to walk." He also testified: "I don't think the patient can work. . . . . It would be impossible for this guy to go back to work in any capacity."

Asked whether the L3-4 and L4-5 discectomies which Dr. McKalip performed might make it possible for Mr. Westphal to return to the work force, Dr. Hayes testified that "the patient is disabled from my standpoint. . . . I do these type of surgeries. I don't remember the last time I did an L2 to S1 fusion on someone who [like Mr. Westphal] had weakness, objective weakness and atrophy in their leg, and then they went back to work." Dr. Hayes testified further: "The goal . . . is to stop the progressive nerve damage . . . so that he is not in a wheelchair in a few years . . . [T]he patient is in a really bad spot, to be honest with you. . . . [A]trophy doesn't get better. . . . All said and done, even if he had [the second operation, which Dr. McKalip in fact performed] **there's no way he is going to go back to work**." (Emphasis added.)

Dr. McKalip did not directly contradict these opinions, except that he was unwilling to say that Mr. Westphal had reached MMI even as of the (later) date on

which his own deposition was taken. In describing the purpose of the second surgery, Dr. McKalip testified, "The goal of surgery was to treat his pain, and to try to restore neurologic function and strength, if possible, and to do so while respecting the scoliosis he had, and preventing him from having any further abnormal curvature to his spine." While "hopeful he'll never need any more surgery," Dr. McKalip acknowledged that the extent of the spinal fusion he effected "certainly increases his risk from having adjacent level degeneration," explaining that "I took six segments of spine that were independently moving with their own fulcrums, and made them lose all their fulcrums or their bending points, turned them into a long lever, and now he's applying all that force at the level above the fusion at T12-L1." Dr. McKalip also testified, "I'm very skeptical he'll ever get his leg function back to normal . . . the chances are very low that he's going to get any return of muscle mass or function."

Asked what Mr. Westphal's "permanent restrictions may be" when he reaches MMI, Dr. McKalip testified:

> You know, this is speculation, but it's highly informed, and I think, you know, highly probable, that he's going to have permanent weakness in his leg that prevent[s] him from, you know, applying any force to his body that, you know, can't be supported by his weak leg.
>
> He certainly won't be able to do any sort of high intensity, you know, high impact job, or any work that would require him to rely on his leg, without question.

> I think he will be able to do other work, sedentary work, and maybe mild activities; but he's going to be, most probably be severely limited because of his weakness.

Dr. McKalip did **not** testify that, within reasonable medical probability, Mr. Westphal would ever be capable of anything more than sedentary work.

Furthermore, Dr. McKalip testified in direct contradiction of his above testimony, essentially conceding that he could not render **any** opinion concerning Mr. Westphal's return to work:

> Q: Would you agree that you'd be better able to determine what kind of work restrictions, what kind of functionality, at the time that he reaches MMI?
>
> A: I will, but I have a feeling I won't be able to do it myself. **I think ultimately determining work restrictions will require either a rehab doctor to do it or a Functional Capacity Evaluation.**
>
> Q: So at this time, any work restrictions that **you indicated today are just speculative**, and would be better assessed at that time?
>
> A: Yeah, or they're educated guesses. In general, that's correct.

(Emphasis added.) Thus, Dr. McKalip's candid acknowledgment that he could not determine whether Mr. Westphal would be permanently and totally disabled when he reaches MMI demonstrates that his testimony lacked any probative value, as it essentially was no opinion at all. As we have previously held, where a factual foundation is lacking in an expert medical opinion, "medical testimony lacks the necessary probative value to support a finding of causation." Gold Coast Paving Co., Inc. v. Fonseca, 411 So. 2d 259, 261 (Fla. 1st DCA 1982). Dr. McKalip's

testimony was, at its core, a declaration that he could not determine whether Mr. Westphal would or would not be permanently disabled when he fully healed from his surgery. Such speculation cannot support a finding of predicted non-disability any more than it can support a finding of expected disability.

In fact, none of the physicians who testified thought it possible that Mr. Westphal would ever be able to do more than sedentary work. (This was the basis on which Mr. Cooley testified—without contradiction—that Mr. Westphal was permanently and totally disabled.) Indeed, Dr. McKalip's testimony is not clear that even he thought the possibility existed of Mr. Westphal performing more than "sedentary" work. While he did testify he thought Mr. Westphal would "be able to do other work, sedentary work, and maybe mild activities," it is unclear what Dr. McKalip meant by "maybe mild activities" —whether he may have been contemplating non-work activities, such as recreation, or what vocational experts call "light duty" or "medium duty" work. In any event, he quite clearly said "maybe" after identifying his testimony on the whole topic as speculative to begin with. As the JCC stated, Dr. McKalip's opinion "that permanent medical restrictions would best be determined at the time the claimant reaches maximum medical improvement," is both self-evident and altogether beside the point because, as noted above, the ultimate conclusion which must be reached is whether the injured claimant will be permanently disabled when he reaches MMI.

While Dr. Hayes and Dr. McKalip did not agree on the date Mr. Westphal had or would reach MMI, that question is immaterial under an unbroken line of precedent. The only other disagreement between these experts was also immaterial. Dr. Hayes testified Mr. Westphal would never be able to work at all, while Dr. McKalip testified that Mr. Westphal might be able to perform sedentary work after he recovered from his five-level spinal fusion. This disagreement is immaterial, however, because uncontroverted vocational testimony established that there was **no such work available to Mr. Westphal.**

Where, as here, a claimant has not reached MMI, but his 104-week temporary benefit eligibility period has expired, a determination of permanent and total disability compensation benefits is not premature. We have categorically rejected the "contention that a claimant whose eligibility for temporary benefits is to expire in less than six weeks cannot establish entitlement to permanent total disability benefits by proving that permanent total disability will follow maximum medical improvement, which is expected to occur after temporary benefits must end." Oswald, 710 So. 2d at 98. See Hadley, 78 So. 3d at 624-25 ("the 1994 amendments to chapter 440 'have given rise to a narrow but necessary exception' to this rule allowing an employee whose 104 weeks of temporary benefits are about to expire to establish entitlement to PTD benefits by proving that he or she

will be permanently and totally disabled after MMI.") (citing Oswald, 710 So. 2d at 97-98)).

Here, the JCC nevertheless ruled: "The claimant has not reached physical maximum medical improvement and, therefore, a determination of permanent and total disability compensation benefits is premature." We reversed in Hadley because the JCC awarded "PTD benefits based on Claimant's present disability status, rather than his status after reaching MMI as required by the statutes and case law . . . ." Hadley, 78 So. 3d at 623. Here, once again, the JCC has erroneously focused on Mr. Westphal's "present disability status, rather than [on] his status after reaching MMI." This was error. "The test is whether a claimant is totally disabled upon the expiration of temporary benefit eligibility, and will remain totally disabled after the date of MMI as that phrase is statutorily defined." Crum v. Richmond, 46 So. 3d 633, 636 (Fla. 1st DCA 2010). Perhaps the JCC was led to this error by the City's arguments opposing Mr. Westphal's motion for rehearing, in which the City stated that "the Claimant has to be at overall MMI in order to determine whether or not he's permant(ly) total(ly)" disabled. That argument is legally incorrect.

"A claimant seeking PTD benefits before she reaches overall MMI must prove she has a present total disability and that said disability will exist after the date of MMI." CVS Pharmacy, Inc., 51 So. 3d at 517. That MMI has not been

attained by the time 104 weeks has run is no bar to recovery; neither is the inability to prove the exact date when MMI will occur. The requirement is simply to prove that total disability will be "existing after the date of maximum medical improvement." Oswald, 710 So. 2d at 98 (quoting "permanent impairment" definition found in § 440.02(19), Fla. Stat. (1994 Supp.), now codified in § 440.02(22)).

Here, the JCC could not rely on Dr. McKalip to reject Dr. Hayes' testimony because, as the Florida Supreme Court and our court have noted, a factfinder must have a "rational basis" to reject expert testimony. As we stated in Duclos v. Richardson:

> If a jury rejects expert medical testimony that an injury caused by an auto accident is permanent without ***any*** contrary evidence on the record, a JNOV or directed verdict is warranted. Wald v. Grainger, 64 So. 3d 1201 (Fla. 2011); State Farm Mut. Auto. Ins. Co. v. Orr, 660 So. 2d 1061 (Fla. 4th DCA 1995). Even if contrary expert evidence is presented, a directed verdict is justified '[w]here an expert's testimony is so equivocal, confusing, and internally contradictory and irreconcilable as utterly to lack any probative value.' Simmons–Russ v. Emko, 928 So. 2d 397, 398 (Fla. 1st DCA 2006). On the other hand, 'the trial court may not weigh the evidence or assess a witness's credibility" and must deny a directed verdict "if the evidence is conflicting or if different conclusions and inferences can be drawn from it.' Moisan v. Frank K. Kriz, Jr., M.D., P.A., 531 So. 2d 398, 399 (Fla. 2d DCA 1988). If an expert opinion is sufficient to raise a fact question for the jury and the jury makes a determination supported by that expert opinion, a motion for JNOV should be denied. Hancock v. Schorr, 941 So. 2d 409 (Fla. 4th DCA 2006).

113 So. 3d 1001, 1004 (Fla. 1st DCA 2013) (emphasis in original). There, although our court reversed the trial court's order granting a judgment notwithstanding the verdict, the legal principle remains controlling, that a factfinder or court cannot rely on expert testimony that is so "equivocal" as to lack probative value.

This rule limiting a factfinder's legal authority to reject uncontroverted expert testimony is especially relevant in workers' compensation proceedings, where both the legislature and this court have recognized that a JCC is not at liberty to simply reject or discredit one expert's medical testimony over another. Here, Dr. McKalip's testimony did **not** contradict Dr. Hayes, because Dr. McKalip never testified that Mr. Westphal would not be permanently and totally disabled when he reached MMI. Rather, Dr. McKalip, in testimony that was inherently and internally inconsistent, said he might speculate that Mr. Westphal could one day perform sedentary work.

But even assuming there was a conflict in the experts' testimonies, the JCC was not authorized to simply choose which doctor he found to be more persuasive; rather, the JCC would be legally required to appoint an Expert Medical Advisor ("EMA") to resolve the conflict. §§ 440.13(9)(c) & 440.25(4)(d), Fla. Stat.; see Romero v. JB Painting & Waterproofing, Inc., 38 So. 3d 836, 838 (Fla. 1st DCA 2010) ("If there is a disagreement in the opinions of health care providers, the JCC

shall appoint an EMA.") (emphasis added). As we recognized in Romero, a JCC must appoint an EMA where the evidence establishes a conflict between medical witnesses' testimonies. Implicit in the requirement of appointing an EMA where a conflict exists is that a JCC has no legal authority to simply "rely on" or "choose" to disregard an expert medical opinion without a rational basis; that is, where a conflict exists, it is a doctor who must essentially decide which expert's medical testimony is more probative, within certain parameters not relevant here.

Again, it is instructive that we have recognized that a JCC may not reject uncontroverted medical testimony without "sufficient reason." Wayne Dalton Corp., 793 So. 2d at 1084. In its final order, the JCC cited insufficient reasons as a matter of law in ignoring Dr. Hayes' uncontroverted testimony: "While claimant urges reliance on the opinion of his independent medical examiner, Dr. Hayes, **I choose** to rely on the testimony of Dr. McKalip . . . as being in the best position to **to determine whether the claimant has reached physical maximum medical improvement.**" (Emphasis added.) This is insufficient as a matter of law, because this is not the question to answer in such a case; rather, the ultimate question is whether the claimant **will be permanently and totally disabled once he or she reaches MMI.** CVS Pharmacy, 51 So. 3d at 517. The JCC's finding that "it is too speculative to determine whether [Mr. Westphal] will remain totally disabled after

the date of [MMI]" did not rectify this error, because such a conclusion could not rationally be grounded on Dr. McKalip's testimony.

Furthermore, where an expert medical witness testifies unequivocally that a claimant will be permanently and totally disabled after reaching MMI, another expert medical witness's speculation and equivocation cannot prevail against the testimony of the witness who actually possesses an opinion. Grainger, 64 So. 3d at 1205. Factual findings cannot be based on inherently and internally contradictory evidence or speculation under the Florida Supreme Court's decision in Grainger.

Conclusion

Because the majority opinion enacts substantive law in violation of Florida's strict separation of powers and unnecessarily departs from *stare decisis*, I cannot join in the majority opinion. In my view, this court should hold that Mr. Westphal is entitled to relief, as he established he was and will remain totally disabled at the expiration of the temporary total disability benefits, under section 440.15(2), Florida Statutes. This court should adhere to its precedent, grant relief, and comply with the limitations on our authority established in the superior organic law in article II, section three of the Florida Constitution.

WETHERELL, J., dissenting.

I dissent.

The judge of compensation claims (JCC) found that Westphal was not yet at maximum medical improvement (MMI) and this finding is supported by competent substantial evidence. Thus, under the rule announced in City of Pensacola Firefighters v. Oswald, 710 So. 2d 95 (Fla. 1st DCA 1998), and reaffirmed by the en banc court less than two years ago in Matrix Employee Leasing, Inc. v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011), in order to obtain permanent total disability (PTD) benefits, Westphal had the burden to prove that (1) he was totally disabled when his 104 weeks of temporary total disability (TTD) benefits expired and (2) he will be permanently and totally disabled upon reaching MMI. The JCC found that Westphal proved the first element, but not the second, and accordingly denied the petition for PTD benefits.

This ruling is in accord with the applicable statutes and this court's settled precedent and, contrary to the original panel opinion, does not render any portion of section 440.15, Florida Statutes, unconstitutional.[11] Accordingly, the JCC's order should be affirmed.

[11] The panel opinion declared the 104-week limitation on TTD benefits in section 440.15(2)(a) unconstitutional using an erroneous analysis that, if allowed to stand, could have led to the incremental dismantling of entire workers' compensation system. See 38 Fla. L. Weekly D504 (Fla. 1st DCA Feb. 28, 2013). The main flaw in the panel's analysis was that it focused on the limitation on TTD benefits

The majority opinion avoids the result compelled by the facts and existing law by receding from Hadley and reinterpreting the applicable statutes. Judge Thomas' concurring in result only and dissenting in part opinion avoids this result by reweighing the evidence before the JCC. I disagree with both approaches.

I

The approach adopted by the majority is an unprecedented flip-flop. This court has receded from panel opinions in the past, but prior to this case, the court had **never** receded from an en banc opinion.

The en banc decision repudiated by today's majority opinion reaffirmed 15 years' worth of settled case law. It also expressly, and emphatically, rejected the precise interpretation of section 440.15 that the majority adopts today.

To make matters worse, the approach adopted by the majority was not even raised by the parties. It was mentioned[12] by two of the amicus curiae as a fall-back

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and the potential "gap" in disability payments in isolation rather than assessing whether despite these issues, the workers' compensation system as a whole remains a viable alternative to tort litigation. See, e.g., Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991); Acton v. Ft. Lauderdale Hosp., 440 So. 2d 1282 (Fla. 1983); Sasso v. Ram Prop. Mgmt., 431 So. 2d 204 (Fla. 1st DCA 1983); John v. GDG Servs., Inc., 424 So. 2d 114 (Fla. 1st DCA 1982). It certainly does for Westphal because it is highly unlikely that he would have ever had a tort claim against his employer for the injury at issue in this case, but he has nevertheless been provided hundreds of thousands of dollars of free medical care along with indemnity and impairment benefits.

[12] I say "mentioned" rather than "raised" because it is well-settled that amicus curiae may not raise an issue not presented by the parties. See Acton v. Ft. Lauderdale Hosp., 418 So. 2d 1099, 1100-01 (Fla. 1st DCA 1982).

approach to preserve the constitutionality of section 440.15 if the en banc court was inclined to agree with the original panel decision; however, these amici made clear that their first preference was for the court to reaffirm the interpretation of section 440.15 as laid out in Oswald and Hadley.[13] Moreover, Westphal expressly disavowed any reliance on the fall-back approach advanced by these amici in his supplemental briefs when he referred to the approach as "impractical [and] unworkable" and he asserted that "[t]here is no alternative [statutory] interpretation to [that in] the Hadley case."

It is unclear whether the majority elected to reinterpret section 440.15 in order to avoid declaring the statute unconstitutional or whether it did so simply because three additional votes could be mustered since the last failed effort to recede from Oswald. However, it appears that the latter occurred because the majority opinion conspicuously avoids any suggestion that the statute would be unconstitutional if it were not reinterpreted. And at least two of the eight judges who voted to recede from Hadley are of the view that "our prior interpretation [of

[13] See Brief of Amicus Curiae Associated Industries of Florida, et al., at 8-10 (discussing the "principle of judicial restraint called the 'last resort rule,' in which the court will refrain from considering a constitutional question when the case can be decided on non-constitutional grounds" and suggesting reconsideration of Hadley as one possible non-constitutional ground); Brief of the Florida Senate and the Florida House of Representatives as Amici Curiae in Support of Appellees, at 20 ("Although the Legislature urges this Court to reaffirm the consistent interpretation it has provided to this 20-year old statutory provision, this Court has the authority and obligation to recede from its precedent if necessary to preserve a constitutional outcome.").

the statute] met constitutional scrutiny." See supra, at 19 (Wolf, J., concurring, joined by Lewis, C.J.).

The en banc court certainly has the authority to recede from a prior en banc decision, either at the urging of a party or sua sponte. But just because the court can do so, does not mean that it should. Indeed, the doctrine of stare decisis requires this court to adhere to settled precedent unless there is a compelling reason to recede from it. See Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."); id. at 377 (Roberts, C.J., concurring) (stating that "departures from precedent are inappropriate in the absence of a 'special justification'") (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

Moreover, "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992); see also Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment)("The doctrine of stare decisis protects the legitimate expectations of those who live under the law, and . . . is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained, [citation omitted]. Who ignores it must give reasons, and reasons that go beyond mere demonstration that the

overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)."); Brown v. Nagelhout, 84 So. 3d 304, 309 (Fla. 2012) ("Stare decisis does not yield based on a conclusion that a precedent is merely erroneous."). This does not mean that a court is required to blindly adhere to a decision that is patently wrong; however, the majority's broad assertions that an appellate court should always be "willing to consider the correctness of its prior work" and "willing to admit that it has made a mistake" espouses a theory of stare decisis that is more suited for a supreme court construing the constitution than it is for an intermediate court of appeal construing a statute because in the former situation, the only way to correct an erroneous interpretation is by amending the constitution, whereas in the latter situation, an erroneous interpretation can be corrected by a higher court or by the Legislature amending the statute. Compare Payne v. Tennessee, 501 U.S. 808, 828 (1991) (noting that the fact that stare decisis is not an inexorable command "is particularly true in constitutional cases, because in such cases, 'correction through legislative action is practically impossible.'") (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)) and Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (plurality) (explaining that stare decisis "has less power in constitutional cases, where, save for constitutional amendments, [the Supreme] Court is the only body able to make needed changes.") with Ill. Brick Co. v. Ill., 431 U.S. 720, 736 (1977) (explaining that "considerations

of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

Stare decisis "is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries." N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 637 (Fla. 2003). It is "the means by which [courts] ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." Vasquez v. Hillery, 474 U.S. 254, 265 (1986); see also State v. Gray, 654 So. 2d 552, 554 (Fla. 1995) ("Stare decisis provides stability to the law and to the society governed by that law.").

Stare decisis contributes to the legitimacy of the courts and the integrity of our constitutional system of governance, both in appearance and in fact, by requiring decisions to be grounded in the rule of law "rather than in the proclivities of individuals." Vasquez, 474 U.S.at 265; see also State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004) ("As an institution cloaked with public legitimacy, this Court cannot recede from its own controlling precedent when the only change has been the membership of the Court."). Accordingly, "[w]here a rule of law has been adopted after reasoned consideration and then strictly followed over the course of years, the rule should not be abandoned without a change in the circumstances that justified its adoption." State v. Schopp, 653 So. 2d 1016, 1023 (Fla. 1995)

(Harding, J., dissenting) (cited with approval in N. Fla. Women's Health & Counseling Servs., 866 So. 2d at 637 n.59); see also Perez v. State, 620 So. 2d 1256, 1261 (Fla. 1993) (Overton, J., concurring) (explaining that "**[d]issenters ordinarily accept the majority view in subsequent decisions where the issue involved two intellectually reasonable but opposing views**" and noting that the contrary approach "undermines the rule of law and places courts in the political arena") (cited with approval in N. Fla. Women's Health & Counseling Servs., 866 So. 2d at 637 n.59) (emphasis added); Tyson v. Mattair, 8 Fla. 107, 124-25 (1858) ("It is an established rule to abide by former precedents, stare decisis, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion . . . . [citation omitted]. Where a rule has become settled law, it is to be followed . . . . If there is a general hardship affecting a general class of cases, it is a consideration for the Legislature, not for a Court of Justice.") (emphasis in original).

Stare decisis has "special force" where the legislative branch has relied upon or acquiesced in the ruling in the prior case. See Hubbard, 514 U.S. at 714 ("Stare decisis has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'") (quoting Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991)); see also Ill.

Brick Co., 431 U.S. at 736; Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting) ("[W]hen this Court first interprets a statute, then the statute becomes what this court has said it is. . . . When the law has been settled by an earlier case then any subsequent 'reinterpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute."); Gulfstream Park Racing Ass'n v. Dep't of Bus. Regulation, 441 So. 2d 627, 628 (Fla. 1983) ("When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary."). Here, not only has the Legislature not amended section 440.15 in response to Oswald, but it has described the decision as "consistent with legislative intent" and "a precedent that the Legislature has left intact." See Brief of the Florida Senate and the Florida House of Representatives as Amici Curiae in Support of Appellees, at 9, 18.

Stare decisis is especially important when this court decides workers' compensation cases because those involved in the workers' compensation system look to this court's decisions to provide the certainty and stability in the law that is needed for the self-executing system to operate as intended. Additionally, the workers' compensation bench and bar need to be able to rely on this court's

definitive interpretations of the law without concern that the interpretation will change the next time the issue is before the court.

Here, there is no compelling reason to recede from the rule announced in Oswald. Nothing except the composition of the court and the minds of several judges has changed since Hadley when this court, sitting en banc, reaffirmed Oswald and expressly rejected the precise interpretation of section 440.15 that the majority opinion now embraces.

The interpretation of the statute adopted by the current majority is no more persuasive today than it was two years ago when it was contained, almost verbatim, in the dissent in Hadley. The court rightly rejected this interpretation in Hadley, explaining:

> The statutory interpretation advocated by the dissent would eliminate the "gap" by equating the expiration of the eligibility for temporary benefits with the date of MMI, as that phrase is used in the definition of "permanent impairment." The main problem with this interpretation is that "date of maximum medical improvement" is statutorily-defined as the date after which the employee is not reasonably anticipated to have further medical recovery or improvement from the injury, see § 440.02(10), Fla. Stat., whereas the date temporary benefits cease by operation of law has nothing to do with the employee's ultimate medical condition or prognosis. Additionally, the dissent's interpretation would have the effect of authorizing a class of pre-MMI disability benefits—whether characterized as "temporary PTD" or "continuing/extended TTD"—that are not authorized by statute and that have been previously disavowed by this court. See Quintana, 1 So.3d at 390-91 (reversing pre-

> MMI award of "'temporary' PTD benefits" and distinguishing cases authorizing "temporary" award of PTD benefits based on the claimant's post-MMI status); and cf. Oswald, 710 So.2d at 101 (Padovano, J., concurring) (explaining that pre-MMI award of PTD benefits based on the claimant's condition at the expiration of the 2–year period for temporary benefits would subvert the statutory limit on temporary benefits).

78 So. 3d at 626 n.6. Accord Oswald, 710 So. 2d at 100 (Padovano, J., concurring) (joining the majority opinion "in all respects" and "writ[ing] separately to explain why other possible interpretations of the Worker's Compensation Law must be rejected").

The fact that Westphal was unable to meet his burden of proof is not, in my view, a legitimate justification for receding from Hadley. First, the purpose of the rule was not, as the majority contends, "to ensure a continuous flow of disability benefits for those who are truly disabled;" the purpose of the rule was to enable totally disabled claimants who are not yet at MMI, but who will be permanently and totally disabled upon reaching MMI, to begin receiving PTD benefits earlier than the law otherwise would allow. Second, even if the majority was correct regarding the purpose of the rule, it does not follow that every claimant must prevail in order for the rule to be valid because, by statute, PTD benefits are available to only a limited class of claimants and "truly," but not permanently, disabled claimants are not within the class. See § 440.15(1)(b), Fla. Stat. ("Only claimants with catastrophic injuries or claimants who are incapable of engaging in

employment . . . are eligible for permanent total benefits. In no other case may [PTD benefits] be awarded.") (emphasis added).

The majority cites the handful of cases in which Oswald was applied and extrapolates from the results in those cases that "the rule in Oswald is now used almost exclusively as authority to deny benefits." This is rank speculation. We have no way of knowing whether these cases are a representative sample of all of the cases in which Oswald has been applied. Indeed, it is quite possible that there have been hundreds, if not thousands, of cases over the past 15 years that were not litigated, not appealed, or were not the subject of written opinions in which injured employees received PTD benefits prior to MMI based on the rule announced in Oswald. And, in any event, the fact that this issue has arisen in only a handful of opinions over the past 15 years suggests that the rule was workable and not in need of a judicial overhaul.[14]

With respect to the merits of the majority opinion, I agree with the criticisms leveled by Judge Thomas in his concurring in result only and dissenting in part

[14] Judge Wolf suggests in his concurring opinion that the rule adopted in Oswald is flawed because it "put doctors in an untenable position of looking into a crystal ball and speculating on the future." But the testimony required by the rule is no different than the kind of opinions that medical experts are routinely asked to give in personal injury, medical malpractice, and a myriad of other types of cases. See Oswald, 710 So. 2d at 101 (Padovano, J., concurring) (noting that a doctor's opinion on the injured employee's prospective, post-MMI impairment is "subjective, but no more so than other kinds of projections that we ask medical experts to make").

opinion, see supra, at 37-39, and stand by the analysis of section 440.15 in my opinion for the en banc court in Hadley. I will not repeat that analysis here, except to quote the following passage explaining why, under a proper interpretation of the statute, entitlement to PTD benefits must be based on the claimant's condition at MMI, rather than the claimant's condition upon expiration of TTD benefits:

> The remaining question is whether section 440.15(3)(a)4. [now section 440.15(3)(d)] requires an evaluation of the impairment at the time of the medical examination (during the six-week period before the temporary benefits expire), or at the time the employee will subsequently reach [MMI]. As the court explains, the answer to this question is that the doctor must evaluate the injured employee to determine the prospective level of impairment when the employee is at [MMI]. The opinion will be subjective, but no more so than other kinds of projections we ask medical experts to make. In any event, **the evaluation must be made prospectively to preserve the distinction between temporary and permanent benefits.**
>
> If we were to construe section 440.15(3)(a)4. [now section 440.15(3)(d)] to mean that the doctor must determine the degree of impairment at the time of the medical examination, we would then subvert the two-year limit in section 440.15(2)(a) for the payment of temporary benefits. An injured worker may have a high impairment rating at the time of the examination, and yet have a low impairment rating subsequently, at the time of [MMI]. Arguably, one solution would be to award [PTD] benefits based on the current degree of impairment and then revisit the employee's eligibility under section 440.15(1)(d) when the employee reaches [MMI]. **The weakness in this approach is that it treats what may be a temporary disability as permanent and extends the payment of benefits beyond the two-year limit.**

Hadley, 78 So. 3d at 625 (quoting Oswald, 710 So. 2d at 101 (Padovano, J., concurring)) (emphasis added).

The majority claims that its interpretation of section 440.15 "does not extend temporary benefits beyond the statutory limit," but as recognized in the language quoted above, that is precisely what it does. Henceforth, under the rule adopted by the majority, any injured employee who establishes that he or she is still totally disabled upon expiration of the 104-weeks of TTD benefits will be at so-called "statutory MMI"[15] and will be entitled to immediately begin receiving PTD benefits as a matter of law. Such benefits – which, as noted in Hadley, are more aptly characterized as "temporary PTD" or "continuing/extended TTD" – will presumably continue until such time as the employee reaches MMI and the true extent of his permanent impairment is determined or the employer/carrier is able to prove that the employee has regained earning capacity. This court has long, and rightly, eschewed the judicial creation of this type of benefit.

I recognize that section 440.15, as written, may result in a "gap" in disability

[15] Although the majority opinion does not use this term, the concept is clearly embodied in the holding that a totally disabled claimant "is deemed to be at [MMI]" upon the expiration of 104 weeks of TTD benefits. Compare supra, at 11-12 with Hadley, 78 So. 3d at 629 (Padovano, J., dissenting) (explaining that "statutory MMI" is the colloquial term used to describe the situation when MMI exists "as a matter of law" upon the expiration of TTD benefits, and asserting that an injured worker who is still totally disabled at the end of the maximum period of eligibility for TTD benefits should be "deemed to be at [MMI], regardless of any potential for improvement").

benefits where, as here, the claimant is totally disabled after the expiration of TTD benefits but is unable to prove that he will be permanently and totally disabled upon reaching MMI.[16] This problem pre-dated the current version of the statute and was acknowledged by the Florida Supreme Court in 1969. See Thompson v. Fla. Indus. Comm'n, 224 So. 2d 286, 287 (Fla. 1969) (explaining that carrier was justified in ceasing payments of TTD benefits after the then statutory limit of 350 weeks even though claimant had not reached MMI and was still totally disabled and noting that the "Florida Workmen's Compensation Act is inadequate in failing to provide for a situation such as this."). The solution to this problem – assuming one is needed – is for the Legislature to revise the statute.[17] Id.; accord Hadley, 78

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[16] The "gap" in this case was only approximately nine months because Westphal's eligibility for TTD benefits statutorily ended on December 11, 2011 and, according to documents filed in this court by Westphal, he was "voluntarily accept[ed] as PTD effective 9/21/12." Additionally, it is noteworthy that Westphal was not without income during the "gap" period as the record reflects that he was receiving approximately $2,700 per month from his pension and $2,100 per month in Social Security Disability benefits during this period.

[17] Judge Wolf states in his concurring opinion that if the majority's new interpretation of section 440.15 is incorrect, "the legislature may address it." That is certainly true, but it does not justify the majority's decision to recede from Hadley because the same could be said of the interpretation adopted in Oswald: if that interpretation was incorrect, the Legislature could have – and presumably would have – addressed it at some point during the past 15 years. Indeed, over that same period, the Legislature did not hesitate to enact statutory amendments to "correct" judicial interpretations that it found inconsistent with legislative intent. See, e.g., State v. Adkins, 96 So. 3d 412, 415 (Fla. 2012) (discussing section 893.101, which was adopted in response to Scott v. State, 808 So. 2d 166 (Fla. 2002), and Chicone v. State, 684 So. 2d 736 (Fla. 1996), and which specifically referred to those decisions as being "contrary to legislative intent"); Kauffman v.

So. 3d at 626.

Accordingly, we should adhere to the rule announced in Oswald and reaffirmed in Hadley and leave it to the Legislature to determine whether, and how, to fill the "gap" in disability benefits to claimants such as Westphal who are unable to meet their burden of proof under Oswald.

Cmty. Inclusions, Inc./Guarantee Ins. Co., 57 So. 3d 919, 920 (Fla. 1st DCA 2011) (recognizing that the Legislature's deletion of the word "reasonable" in section 440.34 was a direct response to the supreme court's decision in Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008)); Pearson v. Paradise Ford, 951 So. 2d 12, 16 (Fla. 1st DCA 2007) (recognizing that the 2003 amendments to section 440.09(1)(b) were intended to "overrule" this court's interpretation of the phrase "major contributing cause" in Closet Maid v. Sykes, 763 So.2d 377 (Fla. 1st DCA 2000) (en banc)); Dep't of Health v. Merritt, 919 So. 2d 561, 564 (Fla. 1st DCA 2006) (recognizing that the 2003 amendments to chapter 120 "legislatively overruled" this court's decision in Florida Board of Medicine v. Academy of Cosmetic Surgery, Inc. 808 So. 2d 243 (Fla. 1st DCA 2002)); Douglas v. Fla. Power & Light, Inc., 921 So. 2d 750, 753 (Fla. 1st DCA 2006) (recognizing that the 2003 amendments to section 440.15(1)(e)1. "effectively overruled" this court's decision in Eckert v. Publix Supermarkets, Inc., 783 So. 2d 1187 (Fla. 1st DCA 2001)) (quoting John J. Dubreuil, Florida Workers' Compensation Handbook, § 13.52[5][b] (2005)); Barfield v. Dep't of Health, 805 So. 2d 1005, 1011 (Fla. 1st DCA 2002) (recognizing that the 1999 amendments to section 120.57(1)(l) were a "direct legislative response" to this court's decision in Department of Children & Families v. Morman, 715 So. 2d 1076 (Fla. 1st DCA 1998), and an acceptance of the dissenting opinion in that case); Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000) (recognizing that the 1999 amendments to section 120.52(8) rejected the standard adopted by this court in St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998)); Consolidated-Tomoka, 717 So. 2d at 79 (recognizing that the 1996 amendments to section 120.52(8) "overrule[d]" a number of judicial decisions to the extent they established the test to determine the validity of an administrative rule). But the Legislature did not do so here, apparently because it agreed with the interpretation adopted in Oswald. See Brief of the Florida Senate and the Florida House of Representatives as Amici Curiae in Support of Appellees, at 9, 18.

II

Judge Thomas' concurring in result only and dissenting in part opinion would adhere to Hadley, but would reverse the order on appeal on the basis that there is no competent substantial evidence to support the JCC's finding that Westphal did not prove that he will be permanently and totally disabled upon reaching MMI. I agree with the portion of the opinion explaining why we should adhere to Hadley, but I disagree with the remainder of the opinion.

There was conflicting evidence – both medical and vocational – as to whether Westphal would be permanently and totally disabled upon reaching MMI. Dr. Hayes, the independent medical examiner, testified that Westphal would be totally disabled upon reaching MMI. By contrast, Dr McKalip, Westphal's treating physician, testified that it was too soon after surgery to determine the extent of Westphal's permanent work restrictions once he reaches MMI,[18] but he also testified that Westphal will likely be able to perform at least sedentary work in the future.[19] Westphal's vocational expert testified that from a vocational

[18] Dr. McKalip testified that he was not yet able to determine Westphal's permanent restrictions because he had not seen Westphal for a detailed post-surgery physical exam. He further testified that Westphal would be in a brace for three months and then have to undergo approximately six months of rehabilitation and, thus, Westphal would likely not be at MMI until nine months after surgery.

[19]

> [Westphal's counsel]: Okay. At this point in time, Doctor, are you able to forecast what some of his

perspective Westphal is not able to perform any sedentary work within a 50-mile radius of his home. By contrast, the vocational expert presented by the employer/carrier testified that he was unable to determine what work Westphal could perform after MMI until he knew what permanent work restrictions would be assigned by Dr. McKalip.

The JCC, as the fact-finder, was responsible for resolving these conflicts in evidence.[20] See Chavarria v. Selugal Clothing, Inc., 840 So. 2d 1071 (Fla. 1st

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> permanent restrictions may be, based upon your experience with these type of surgeries?
>
> [Dr. McKalip]: Well, yeah. You know, this is speculation, but it's **highly informed**, and I think, you know, highly probable, that he's going to have permanent weakness in his leg that prevent[s] him from, you know, applying any force to his body that, you know, can't be supported by his weak leg.
>
> He certainly won't be able to do any sort of high intensity, you know, high impact job, or any work that would require him to rely on his leg, without question.
>
> I think he will be able to do other work, **sedentary work**, and maybe mild activities; but he's going to be, most probably be severely limited because of his weakness.

(emphasis added).

[20] Judge Thomas' concurring in result only and dissenting in part opinion suggests that the JCC was required to appoint an expert medical advisor (EMA) to resolve the conflicts in the medical opinions. However, neither party requested the appointment of an EMA and the JCC's failure to appoint an EMA sua sponte is not fundamental error. See Quiroga v. First Baptist Church at Weston, 38 Fla. L.

DCA 2003) (en banc) (reaffirming Jefferson Stores, Inc. v. Rosenfeld, 386 So. 2d 865 (Fla. 1st DCA 1980), in which the court held that "[i]t is the [JCC]'s function to determine credibility and resolve conflicts in the evidence, and he may accept the testimony of one physician over that of several others" (citations omitted)). The JCC explained in his order why he accepted the testimony of Dr. McKalip over the testimony of Dr. Hayes, and he further explained why, based on Dr. McKalip's testimony, Westphal failed to meet his burden of proof. We have no authority to second-guess these findings.

Dr. McKalip testified that all of his opinions were within a reasonable degree of medical certainty, and as Judge Padovano noted in his concurring opinion in Oswald, the doctor's opinion on the injured employee's prospective, post-MMI condition is "subjective, but no more so than other kinds of projections we ask medical experts to make." 710 So. 2d at 101 (Padovano, J., concurring). Thus, unlike Judge Thomas, I see no basis to conclude that the Dr. McKalip's testimony concerning Westphal's post-MMI disability status and potential future ability to work is so lacking that it could not be given any weight by the JCC. Accordingly, contrary to the premise underlying Judge Thomas' concurring in result only and dissenting in part opinion, Dr. Hayes' testimony was not

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Weekly D139 (Fla. 1st DCA Jan. 16, 2013). Moreover, any error in the failure to appoint an EMA was not raised as an issue on appeal.

"uncontroverted" and it could be properly rejected by the JCC if he explained his reasons for doing so, which he did.

The fact that there was evidence that would support a finding that Westphal would be permanently and totally disabled upon reaching MMI is immaterial to our review. See Pinnacle Benefits, Inc. v. Alby, 913 So. 2d 756, 757 (Fla. 1st DCA 2005) (explaining that findings in a compensation order will be upheld if supported by any competent substantial evidence and that "[i]t matters not that other persuasive evidence, if accepted by the JCC, might have supported a contrary ruling") (emphasis in original). It is not the function of the appellate court to reweigh the evidence before the JCC, even if we think the JCC should have accepted the testimony of one witness over the other. See Fla. Mining & Materials v. Mobley, 649 So. 2d 934, 934 (Fla. 1st DCA 1995) (rejecting argument that this court should undertake an independent review of the medical evidence because "the case may not be retried on appeal, and a ruling which is supported by competent substantial evidence will be upheld even though there may be some persuasive evidence to the contrary.").

In sum, the JCC discredited the evidence that Westphal would be permanently and totally disabled when he reached MMI and relied instead on the testimony of a doctor who said that he was not certain that would be the case. On this conflicting evidence, the JCC was entitled to find that Westphal's future

disability status was uncertain and with that assessment of the evidence, the JCC was correct in concluding that the claim for PTD benefits was not proven. This is so because if evidence of Westphal's future recovery was speculative or uncertain, it cannot be said that he sustained his burden of proof under Oswald and Hadley. See Mitchell v. XO Communications, 966 So. 2d 489, 490 (Fla. 1st DCA 2007) (explaining that the claimant has the burden to prove entitlement to PTD benefits and, to do so, the claimant must present evidence the JCC finds persuasive).

* * *

For the foregoing reasons, I would affirm the order denying Westphal's petition for PTD benefits.