DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT
TALLAHASSEE, FLORIDA

Bradley Westphal,	DOCKET NO:	1D12-3563
Appellant,	OJCC NO:	10-019508SLR
vs.	D/A:	12/11/09
City of St. Petersburg/City of St. Petersburg Risk Management & State of Florida,		
Appellees.		

BRIEF OF *AMICI 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 THE APPELLEES' MOTIONS FOR REHEARING *EN BANC*

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PRELIMINARY STATEMENT

The Appellant, Bradley Westphal, is referred to as the "claimant." The Appellees, City of St. Petersburg and City of St. Petersburg Risk Management, are referred to as the "employer/carrier." The Judge of Compensation Claims is abbreviated "JCC." Temporary total disability is abbreviated "TTD." Temporary partial disability is abbreviated "TPD." Impairment benefits are abbreviated "IB's." Permanent total disability is abbreviated "PTD." Maximum medical improvement is abbreviated "MMI."

CONCISE STATEMENT OF THE IDENTITY OF THE *AMICI CURIAE* AND THEIR INTEREST IN THE CASE

Associated Industries of Florida (AIF) is a statewide association of business, trade, commercial and professional organizations in the State of Florida. The members of AIF have a significant interest in the issues currently pending before this Court as a result of the panel decision.

Associated Builders and Contractors of Florida (ABC) is a non-profit corporation organized and existing under the laws of Florida. ABC is a statewide trade association for commercial industrial construction. It represents the interests of over 2,000 corporate members employing more than 100,000 individuals

in commercial construction in Florida. ABC has a significant interest in the issues currently pending before this Court.

The Florida Insurance Council (FIC) is the largest not for profit insurance trade association in the State of Florida. It represents the interests of forty-two insurance groups consisting of 245 insurance companies, many of which write workers compensation coverage in Florida and who are therefore significantly affected by the panel decision.

The Florida Chamber of Commerce (The Chamber) is a Florida non-profit corporation. The Chamber is a federation of employers, local chambers of commerce, and associations, representing more than 139,000 businesses across Florida and consisting of more than three million employees. The Chamber therefore has significant concerns regarding the panel decision.

The Property Casualty Insurers Association of America (PCI) promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is a national trade association composed of more than 1,000 member insurance companies. Member companies write 41 percent of the private workers' compensation market, including 55.1 percent of the private workers compensation market in Florida. Therefore, members are concerned with the impact of the panel decision on the stability of the workers' compensation system.

The Florida Justice Reform Institute (The Institute) is a not-for-profit organization dedicated to reform of the state's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in civil justice. The Court's decision will have a direct impact on the mission of The Institute. The equitable administration of civil justice, as well as the availability and affordability of workers' compensation in Florida, are squarely implicated by this case.

United Parcel Service, Inc. (UPS) is a significant employer in the state of Florida that relies on a stable Workers' Compensation system to determine expected costs. UPS believes that this case has destabilized the workers' compensation system in Florida.

Publix Super Markets employs 116,000 in the state of Florida. The state's largest private employer believes that the panel decision imperils the stability of workers' compensation in Florida and therefore it imperils the welfare of its associates.

Florida Roofing, Sheet Metal and Air Conditioning Contractors Association (FRSA) is a non-profit corporation organized and existing under the laws of Florida. FRSA is a statewide association of licensed roofing, sheet metal, and air

conditioning contractors in the State of Florida. It represents the interests of over 650 corporations, partnerships, and proprietorships. The members of FRSA have a significant interest in the issues presented in this case.

The Florida Retail Federation (The Federation) serves as the chief advocate for Florida's retail industry, which is the second largest industry in Florida. The Federation represents over 7,000 business members in the state of Florida, ranging from national chains to small "mom-and-pop" stores. Almost all of these businesses will be heavily impacted by any potential increase in workers' compensation premiums.

The American Insurance Association (AIA) is a leading national trade association representing some 350 major property and casualty insurance companies that collectively write more than $372 million in workers' compensation insurance premiums in Florida, representing 21% of the market. AIA members range in size from small companies to the largest insurers with global operations. AIA and its members have significant concerns with this case.

The National Federation of Independent Business (NFIB) is the nation's leading small business association whose mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member

businesses nationwide, including 10,500 in Florida. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. The NFIB is concerned about the adverse impact of the panel decision in its members.

The Florida United Businesses Association, Inc. (FUBA) is a statewide trade association representing over 7,000 employers across the state of Florida. FUBA represents its members on business-related issues before the Florida Legislature, the executive branch of state government, and the judicial branch. FUBA's members have a significant interest in the issue currently pending before this Court.

The Florida Association of Self Insured's (FASI) was formed in 1969 by individual and group self-insurers to promote and maintain a healthy environment for self insurance. FASI's purpose is be a voice for the Florida self insured market for all lines of coverage including Workers' Compensation. FASI and its members are acutely interested in court cases and rulings which could impact the self insurance environment in Florida and have participated in amicus briefs in order to weigh in on critical and pending cases before the Florida Supreme Court. FASI has grave concerns with the instant ruling.

SUMMARY OF ARGUMENT

The panel decision misapplied *Kluger v. White,* 281 So.2d 1 (Fla. 1973) because it improperly considered a decrease in the quantum of benefits to be the elimination of a cause of action. *Kluger* applies *only* where the Legislature completely eliminates a cause of action. The 1994 amendment to section 440.15(2)(a), Fla. Stat. reduced, but did not abrogate, a cause of action.

The panel decision reflects an abandonment of the Court's obligation to avoid declaring a statute unconstitutional where alternatives exist and because doing so must be the Court's last resort. Section 440.15(2)(a) as applied by the JCC is constitutionally sound notwithstanding any "statutory gap" in benefits. If the entire Court believes, however, that such a gap is offensive to fundamental fairness and natural law, the invalidated statute is subject to at least two alternate constructions that permit the Court to avoid the constitutional question. The panel decision failed to address either one and *en banc* consideration is needed in order to do so.

The panel decision improperly applied "natural justice" to invalidate a duly enacted statute. Such an anachronistic and imprecise equitable doctrine may not be used to invalidate a lawfully adopted statute. Courts are bound to apply objective legal criteria and are not free to rule based on vague and

variable notions of right and wrong.

Although the panel decision invalidates a limitation to a single class of benefits, the decision imperils the entirety of Chapter 440 and does so in a manner that is inconsistent with pervasive case law. Should the panel decision stand the Court will soon face a multitude of similar challenges based primarily on subjective notions about what is fair. *En banc* consideration is required to correct this erroneous opinion which is of exceptional importance and contrary to pervasive case law.

STANDARD OF REVIEW PRESENTED

This appeal addresses the constitutionality of section 440.15(2)(a), Fla. Stat., as amended effective January 1, 1994. Constitutional questions are reviewed *de novo.* See *Medina v. Gulf Coast Linen Services*, 825 So.2d 1018, 1020 (Fla. 1st DCA 2002).

ARGUMENT

EN BANC REVIEW IS ESSENTIAL BECAUSE THE PANEL DECISION CREATES A RADICAL NEW METHOD FOR *AD HOC* ATTACK ON INDIVIDUAL SECTIONS OF CHAPTER 440, FLORIDA STATUTES, WHICH IMPERILS THE ENTIRETY OF FLORIDA'S WORKERS' COMPENSATION SYSTEM

A. The panel decision improperly applied *Kluger v. White,* 281 So.2d 1 (Fla. 1973) because the panel improperly considered a "change in the quantum of benefits" to be the "elimination of a cause of action."

The panel decision misapplied *Kluger v. White,* 281 So.2d 1

(Fla. 1973) in the context of a Legislative change to a single class of workers' compensation benefits and, therefore, the panel decision improperly invalidated section 440.15(2)(a), Fla. Stat. (2009) as applied. The panel opinion, relying on *Kluger*, invalidated the 104 week cap on TTD benefits based on a comparison of benefits available in 1968 with those available today. In doing so, the panel misapplied *Kluger* as it relates to a change in the quantum of benefits payable under the Act.

Kluger applies where the Legislature *abolishes* a cause of action. "The Constitution does not require a substitute remedy unless legislative action *has abolished or totally eliminated a previously recognized cause of action.*" *Jetton v. Jacksonville Elec. Authority*, 399 So.2d 396 (Florida 1st DCA 1981) (emphasis added). The panel erred by invalidating section 440.15(2)(a) because the 1994 amendment reduced the maximum number of weeks of TTD benefits, but did not abolish a cause of action.

In 1935, the Legislature abolished the right to sue one's employer for injury suffered in the course and scope of employment. Therefore, at the time of the 1968 adoption of the Declaration of Rights an injured worker had no common law cause of action. Instead, an injured worker's sole cause of action was prescribed by Chapter 440. The 1994 amendment to section 440.15(2)(a), which reduced a claimant's potential recovery

within the workers' compensation system, diminished but did not abolish the cause of action. While the recovery was reduced, the cause of action remains. As stated by this Court in *John v. GDG Services, Inc.*, 424 So.2d 114 (Fla. 1st DCA 1982):

> "As discussed in *Kluger* and borne out in later decisions, no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action...." 424 So.2d at 115. See also *Amorin v. Gordon*, 996 So.2d 913, 917 (Fla. 4th DCA 2008).

The panel decision incorrectly analyzed "a decrease in the quantum of benefits" as "an elimination of a cause of action" implicating *Kluger*. Prior to this case courts applied *Kluger* to invalidate workers' compensation statutes only where an amendment abrogated a common law cause of action. See, e.g., *Sunspan Engineering & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975) (Section 440.11, Fla. Stat. (1972) unconstitutional as it abrogated a third party plaintiff's common law right of action).

Reductions in benefits, even ones that end altogether entitlement to certain benefits, are valid precisely because such reductions reflect a limitation or abolishment of a *class of benefits*, but are not an abolishment of a *cause of action*. When benefits are periodically adjusted by the Legislature the same cause of action remains even where the amount due increases or decreases. Thus, *Kluger* plays no role here, which is

precisely why courts approved previous reductions and eliminations of benefits. [1]

Compounding the misapplication of *Kruger*, this Court mistakenly relied upon the non-workers' compensation case *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987). Unlike here, where the Legislature reduced, but did not abolish, a cause of action, *Smith* addressed the complete abolishment of a cause of action in existence at the time of the 1968 Declaration of Rights (the right of trial by jury to determine non-economic

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1 *Carr v. Central Florida Aluminum Products, Inc.*, 402 So.2d 565 (Fla. 1st DCA 1981) (Amendment reducing, to a maximum of $7,500.00, compensation for three types of permanent injuries was valid); *Acton v. Fort Lauderdale Hosp.*, 440 So.2d 1282 (Fla. 1983) (Amendment eliminating scheduled impairment benefits and replacing them with wage loss benefits was valid); *Sasso v. Ram Property Management*, 452 So.2d 932 (Fla. 1984) (Amendment abolishing wage loss benefits for those 65 and older was valid); *Eller v. Shova*, 630 So.2d 537 (Fla. 1993) (Amendment raising burden of proof in a tort claim to culpable negligence was valid); *Strohm v. Hertz Corp.*, 685 So.2d 37 (Fla. 1st DCA 1996) (Statute reducing unlimited chiropractic care to a maximum of eighteen visits was valid); *Berman v. Dillard's*, 91 So.3d 875 (Fla. 1st DCA 2012) (Amendment ending PTD benefits at age 75 was valid); *Bradley v. Hurricane Restaurant*, 670 So.2d 162 (Fla. 1st DCA 1996) (Amendment replacing wage loss benefits with lesser impairment benefits was valid); *Morrow v. Amcon Concrete, Inc.*, 433 So.2d 1230 (Fla. 1st DCA 1983) (Reduction by up to 50 percent wage loss benefits at age sixty-two when the employee is receiving social security benefits was valid); *Mahoney v. Sears, Roebuck & Company*, 419 So.2d 754 (Fla. 1st DCA 1982) (Statute that placed a dollar cap on benefits for eye injuries was valid); *Medina v. Gulf Coast Linen Services*, 825 So.2d 1018 (Fla. 1st DCA 2002) (Forfeiture of all benefits for making false or misleading statement was valid).

personal injury damages in excess of $450,000.00). Moreover, courts rejected all post-*Smith* access to courts challenges based on reductions or eliminations of workers' compensation benefits (at least prior to the instant decision).

Even if the 1994 amendments to Chapter 440 *were* properly considered as the elimination of a cause of action, they pass muster under *Kluger*. The workers' compensation system provides an adequate, sufficient, and even preferable alternative to tort litigation in its 1968 iteration. Here, the claimant would have had no recovery in tort since his injury was not due to employer negligence. Even in the presence of such negligence the claimant would face time consuming and expensive litigation with no recovery at all until the end. He would bear the added burden of overcoming defenses such as assumption of the risk and contributory negligence. Moreover, his employer is a municipality entitled to sovereign immunity.

Instead of no recovery at all, the instant claimant received nearly $100,000.00 in indemnity benefits along with free medical care. He received such benefits at no cost to himself, regardless of fault, and through a self-executing system. He currently receives PTD benefits and supplemental benefits. He remains entitled to lifetime medical care without limitation. Yet, the panel decision invalidated a limitation to

a single class of benefits because it purportedly resulted in a "statutory gap" in payments, something the panel found anathema to natural justice and fundamental fairness. Slip Op. at 5.

The Florida Constitution, however, grants no one a right to the uninterrupted receipt of indemnity benefits in our workers' compensation system. The reduction of TTD benefits was part of the Legislature's comprehensive and successful plan intended to reduce excessive workers' compensation insurance rates and to improve Florida's economy. Such legislative policy decisions are constitutionally valid.

A reduction of benefits that does not eliminate the system in its entirety, and which leaves in place a system that compensates injured workers in a no-fault and self-executing manner, satisfies the Florida Constitution. In fact, the panel decision finds that "severing the 104-week limitation on temporary total disability benefits is both permissible and necessary, because this limitation can be separated from the remainder of the Act, leaving a complete system of recovery suited to fulfill the express legislative intent contained in section 440.015, Florida statutes." Slip Op. at 22. Thus, the panel decision acknowledges that "a complete system of recovery" remains despite the purportedly invalid 1994 amendment to section 440.15(2)(a). That such a system remains demonstrates

that the amendment did not *entirely eliminate* a cause of action. Therefore, the panel decision misapplied *Kluger* and *en banc* consideration is needed in order to correct the panel's error.

B. The panel decision reflects an abandonment of the Court's obligation to avoid declaring a statute unconstitutional where alternatives exist and because doing so must be the Court's last resort.

The opinion declares a lawfully enacted statute unconstitutional. Statutes, however, enjoy a strong presumption in favor of constitutionality. See *Wright v. State,* 739 So.2d 1230, 1231 (Fla. 1st DCA 1999). Courts are obligated to construe statutes to avoid declaring them unconstitutional. See *Gray v. Cent. Fla. Lumber Co.,* 140 So. 320, 323 (1932). "[B]efore a court may declare a statute unconstitutional, it is obligated to construe the statute in a manner that avoids a finding of unconstitutionality." *Wegner v. State,* 928 So.2d 436, 439 (Fla. 2d DCA 2006).

Moreover, since at least 1888, Florida courts have subscribed to a 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. See Kloppenberg, *Avoiding Constitutional Questions,* 35 B.C. L.Rev. 1003, 1025 (1994) (referring to the prudential rule of avoiding constitutional questions as the

"last resort rule"). The Amici submit that section 440.15(2)(a) as plainly applied by the JCC below is constitutionally sound. Even if the entire Court disagrees, however, and believes that the "statutory gap" is offensive to natural law and represents a systematic deprivation of justice, the Court can avoid a constitutional ruling in two ways.

The simplest method is to construe the statute as requiring the payment of IB's immediately following the payment of 104 weeks of TTD, thereby avoiding the gap in benefits that the Court found repugnant to the Florida Constitution. In fact, the Court adopted that very construction in both *Pospisil v. Osmond Lincoln Mercury*, 820 So.2d 1076 (Fla. 1st DCA 2002) and *Integrated Administrators v. Sackett*, 799 So.2d 448 (Fla. 1st DCA 2001). The panel decision seemingly overlooked both *Pospisil* and *Sackett* since the Court stated that the employer/carrier "should not have paid" IB's at the expiration of the 104 weeks. Slip Op. at 3. Under *Pospisil* and *Sackett* employer/carriers are *required* to do so.

Alternatively, the Court could reconsider *Matrix Employee Leasing, Inc. v. Hadley*, 78 So.3d 621 (Fla. 1st DCA 2011). *Hadley* rejected the concept of "temporary PTD benefits" at the expiration of the 104 weeks. Had the Court adopted the contrary construction, then the cessation of TTD benefits would not

result in a "gap" in benefits. Claimants paid 104 weeks of TTD benefits, but who remain in a TTD status, would be eligible for temporary PTD benefits.

The panel decision reached a constitutional question unnecessarily. Section 440.15(2)(a) is valid as construed by the JCC below. Even if it were not, however, the Court has clearly enunciated options that would permit a construction of the statute that avoids a constitutional issue. The Court is obligated to avoid declaring statutes unconstitutional and doing so should be the Court's last resort. *En banc* consideration is needed in order to restore these principles.

C. The panel decision improperly utilized a "natural justice" theory to invalidate a duly enacted statute.

Natural justice is an enigmatic legal concept never before applied in a Florida workers' compensation case. Moreover, the Amici submit that no modern Florida court should *ever* invalidate a lawfully enacted statute based on the court's notions of natural justice. "Natural justice" dates to the English courts of equity and is based on the idea that a judge, applying equity powers, could rule based not on the law, but instead on his own concepts of right and wrong:

> "In the early history of equity jurisprudence when the chancellor was the mouthpiece of the crown and his prerogatives and duties were loosely understood and

> his decrees could not be resisted, he sometimes acted on the dictates of conscience and what appeared to be natural justice." *Home Owners' Loan Corp. v. Wilkes*, 178 So. 161, 163 (Fla. 1938).

Early workers' compensation laws throughout the country were challenged based on natural law, natural justice, fundamental fairness and similar theories. Those challenges uniformly failed. See *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571 (1915); *New York Cent. R.R. v. White*, 243 U.S. 188 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919); *Middleton v. Texas Power & Light Co.*, 249 U.S. 152 (1919). They failed because courts ultimately recognized that the workers' compensation systems as designed in each state were acceptable, and even necessary, in order to promote both workers' rights and economic growth. The alternatives to such systems were worse for *both* labor and industry.

Using "natural justice" to invalidate legislative action is an anachronistic relic of an earlier time. **2** Contemporary courts

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2 In fact, the application of any common law equitable theory that pre-dates the 1935 adoption of Chapter 440 is of questionable validity: "'Workers' compensation is a branch of law which is entirely statutory in origin.' *Shaw v. Cambridge Integrated Servs. Group, Inc.*, 888 So.2d 58, 61 (Fla. 4th DCA 2004). Its creation 'involved a legislative balancing of competing interests, creating a system of shared benefits and burdens for its participants.' *Sun Bank/South Fla., N.A. v. Baker*, 632 So.2d 669, 672 (Fla. 4th DCA 1994). Given this

may not apply notions of natural justice that are not in accord with established legal concepts. See *Federal Home Loan Mortg. Corp. v. Taylor*, 318 So.2d 203, 207 (Fla. 1st DCA 1975); *David v. Sun Federal Sav. & Loan Ass'n*, 461 So.2d 93, 95 (Fla. 1984). Respectfully, a court should not use "natural justice" to create through judicial decree remedies not actualized through the constitutionally mandated legislative process.

What constitutes natural justice is subject to the vagaries of human nature. The concept provides no meaningful standards for its application. The panel decision provides the Legislature with no principles to guide their establishment of a constitutionally sound workers' compensation system beyond a message that lower benefit levels and "gaps" in benefit classes are disfavored by at least three judges on the First District Court of Appeal.

The panel's application of natural justice to invalidate a statute is also contrary to the separation of powers doctrine. The Legislature alone is authorized to set policy and this Court's disagreement with such policy does not grant a corresponding authority to invalidate it. As this very Court

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background, workers' compensation 'was unknown to the common law.' *Shaw*, 888 So.2d at 61." *Summit Claims Management, Inc. v. Lawyers Exp. Trucking, Inc.*, 913 So.2d 1182, 1184 (Fla. 1st DCA 2005).

stated in *Fast Tract Framing, Inc. v. Caraballo*, 944 So.2d 355, 357 (Fla. 1st DCA 2008):

> "Under the separation of powers requirement of our state's constitution, when interpreting a statute, it is not the judiciary's prerogative to question the merit of a policy preference or to substitute its preference for the Legislature's judgment. Art. II, § 3, Fla. Const. As the supreme court stated in *State v. Rife*,'[W]hen faced with an unambiguous statute, the 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.' This principle is 'not a rule of grammar; it reflects the constitutional obligation of the judiciary to respect the separate powers of the Legislature.'"

According to the Florida Supreme Court, a court may not "substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute." *State v. Rife*, 789 So.2d 288 (Fla. 2001). The natural justice standard applied by the panel decision is, at its core, a simple declaration of disagreement with the Legislature's policy decisions in connection with validly enacted workers' compensation laws. Consideration by the entire Court is both appropriate and necessary.

D. Although the panel decision invalidates a limitation on a single class of benefits, the decision imperils the entirety of Chapter 440 and does so in a manner that is inconsistent with pervasive case law.

The panel decision determined that, as applied to the

claimant, the Legislature's reduction of TTD benefits was unconstitutional. This landmark decision is the first to invoke "natural justice" and "fundamental fairness" in order to invalidate a legislative adjustment to the menu of benefits available. The decision deals a potentially catastrophic blow to Florida's workers' compensation system.

The panel decision creates a radical new method to mount *ad hoc* attacks on other sections of the Act based on the sufficiency of benefits and their method of delivery. [3] The panel focused on the "statutory gap" between the termination of TTD benefits and a potential future receipt of PTD benefits. Such gaps can and do exist between the expiration of other types of benefits and PTD benefits, including TPD benefits, impairment benefits, and rehabilitation TTD benefits. Respectfully, Florida's injured workers are entitled to a vast menu of benefits, but they are not constitutionally guaranteed to the uninterrupted receipt of such benefits.

The opinion describes the workers' compensation system as applied to the instant claimant as "repugnant to fundamental fairness, because it relegates a severely injured worker to a

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[3] The panel decision is also likely to be cited in the appeal of *Myers v. McCarty*, Case No. 2013-CA-73 (Leon County Cir. Ct., March 15, 2013), where Judge Lewis struck down portions of the PIP law for reasons quite similar to those reflected in the panel decision.

legal twilight zone of economic and familial ruin." Respectfully, the instant claimant, injured in an accident having nothing to do with employer negligence, was likely *saved* from economic ruin by the generous benefits provided him through the workers' compensation system, including nearly $100,000.00 in disability benefits and free medical care.

Florida's citizens often suffer completely uncompensated tragic loss. Absent a negligent defendant with assets or insurance the right to "access to courts" means nothing. Only where injury occurs in the course and scope of employment does one have rapid and guaranteed redress. Respectfully, this Court has no authority to create individualized need-based remedies based on notions of fundamental fairness. Anecdotal examples of economic hardship caused by injury have existed since the inception of the workers' compensation system, but until now compassion for the plight of an individual injured worker has never been the basis for statutory invalidation.

The instant claimant is admittedly a sympathetic figure. He is a firefighter injured while responding to an emergency call. He has the respect and admiration of his employer, his community, and the Amici. He is not, however, entitled by the constitution to a recovery beyond that granted by the Legislature. The Legislature alone has the constitutional

authority to design a workers' compensation system that meets the competing interests of labor and industry.

The inevitable tension between labor's desire to have more generous benefits on the one hand, and industry's desire to maintain an affordable and stable insurance market on the other, is best resolved through the political process. The precedent established by the panel decision will inevitably lead to a case-by-case assault on the entirety of Chapter 440 via fact patterns purporting to demonstrate "economic ruin repugnant to fundamental fairness." Examples are easy to posit.

Consider a worker earning $2,000.00 per week who is limited to the $816.00 per week maximum compensation rate if injured in 2013. One can easily imagine a 61% decrease in income causing economic ruin. A 74-year-old, dependent on her PTD benefits, may suffer economic ruin when those benefits end at age 75. A permanently injured laborer released to sedentary work will need to perform a lengthy and exhaustive job search in order to establish entitlement to PTD benefits, but will have no wage loss benefits to prevent a fall into economic ruin while doing so. An injured worker whose back injury is 25% pre-existing may suffer economic ruin when he must pay for 25% of the cost of his back surgery. Additional examples are numerous and constrained only by the page limitations of this brief.

The system cannot survive a legal construction permitting the courts to strike down parts of the Act because they cause hardship to an individual. Workers' compensation can only work as a comprehensive and predictable *system* and not as a tailor-made remedy to be applied based on individual needs and unforeseeable judicial perceptions of right and wrong. In rejecting an early fairness-based challenge to the unemployment compensation system, the Florida Supreme Court articulated the necessity of preserving the system even where individual hardship results:

> "It may be that (our ruling) will work a hardship in this case but individual cases should not be permitted to overthrow a long settled rule that the public has relied on and in a multitude of instances would be adversely affected by it if overthrown. Rules of law must be grounded on reason and justice rather than on what emotional impulse would dictate." *Gentile Bros. Co. v. Florida Industrial Commission*, 10 So.2d 568 (Fla. 1942).

Although this Court has never before applied natural law to construe a workers' compensation provision, consideration by the full Court is necessary to maintain the uniformity of decisions in this Court. The panel decision is contrary to prior cases establishing that the expiration of the 104 weeks of temporary benefits does not result in a "gap" in benefits because the

claimant becomes immediately entitled to impairment benefits. [4] The decision is also contrary to those cases establishing that reductions in benefits are constitutionally valid because such reductions do not eliminate a cause of action and because the Act continues to provide a comprehensive and self-executing system of no-fault benefits to Florida's injured workers. [5]

The panel decision also conflicts with the *en banc* decision *Matrix Employee Leasing, Inc. v. Hadley*, 78 So.3d 621 (Fla. 1st DCA 2011). *Matrix* impliedly rejected the very constitutional concerns at issue here, as reflected by the *Matrix* dissenting opinions. The *en banc* Matrix court properly determined that any remedy for a "statutory gap" in benefits is the prerogative of

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[4] *Pospisil v. Osmond Lincoln Mercury*, 820 So.2d 1076 (Fla. 1st DCA 2002) (holding that impairment benefits are to be paid immediately after 104 weeks of temporary benefits are paid); *Integrated Administrators v. Sackett*, 799 So.2d 448 (Fla. 1st DCA 2001) (holding that the Legislature contemplated that temporary indemnity benefits may expire before a claimant has reached maximum medical improvement and that IB's are paid thereafter).

[5] *Carr v. Central Florida Aluminum Products, Inc.*, 402 So.2d 565 Fla. 1st DCA 1981); *Acton v. Fort Lauderdale Hosp.*, 418 So.2d 1099 (Fla. 1st DCA 1982); *Sasso v. Ram Property Management*, 431 So.2d 204 (Fla. 1st DCA 1983); *Strohm v. Hertz Corp.*, 685 So.2d 37 (Fla. 1st DCA 1996); *Berman v. Dillard's*, 91 So.3d 875 (Fla. 1st DCA 2012); *Bradley v. Hurricane Restaurant*, 670 So.2d 162 (Fla. 1st DCA 1996); *Morrow v. Amcon Concrete, Inc.*, 433 So.2d 1230 (Fla. 1st DCA 1983); *Mahoney v. Sears, Roebuck & Company*, 419 So.2d 754 (Fla. 1st DCA 1982); *Medina v. Gulf Coast Linen Services*, 825 So.2d 1018 (Fla. 1st DCA 2002).

the Legislature.

Finally, the Court must consider the practical application of the panel decision. Claims adjusters will bear the burden of properly providing benefits in this new era of customizable remedy. Is terminating TPD benefits in compliance with the statute proper or will it offend "natural justice?" Does one apply the plain language of the apportionment provision where doing so may later be viewed as "repugnant to fairness" by a reviewing court? When an adjuster stops paying PTD benefits to an indigent 75-year-old will it be viewed as "fundamentally unjust?"

The panel decision further fails to acknowledge that JCC's cannot apply the opinion's holding to the inevitable flood of cases to follow because the Court invalidated section 440.15(2)(a) *as applied.* JCC's are without authority to rule on constitutional grounds. See *Punsky v. Clay County Bd. of County Com'rs*, 60 So.3d 1088, 1092 (Fla. 1st DCA 2011). Therefore, even if faced with facts identical to those present here, a JCC must apply the statute and deny a claim for TTD benefits in excess of 104 weeks. Thus, this Court will be repeatedly called upon to address, as a matter of first impression, cases where the claimant asserts that benefits prescribed by statute are fundamentally unfair and offensive to natural justice.

The panel decision purports to invalidate a single provision as applied only to Mr. Westphal. The decision, however, is a shot over the bow of the entirety of the Act. Should it stand, an inevitable parade of cases will follow. Benefits due will not be certain and predictable. Instead, they will be subject to individualized consideration and malleable judicial views about what is fair. The panel decision cannot stand. The entire Court must correct it.

CONCLUSION

The 1994 amendment to section 440.15(2)(a) was part of the periodic Legislative re-adjustment of benefits payable under the Act. The panel decision adopted an entirely new equitable benefit-by-benefit constitutional analysis. Respectfully, the Act cannot stand in the face of such *ad hoc* attacks on discrete sections of the statute. The entire Court should correct this erroneous decision. The Amici respectfully ask this Court to reconsider this case *en banc* and that the Court retract the slip opinion and replace it with one affirming the constitutionality of section 440.15(2)(a) as applied to the instant claimant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Jason Fox, Esquire, Jayfoxesq@aol.com; Kimberly D. Proano, Esquire, Kimberly.proano@stpete.org; Richard A. Sicking, Esquire, Sickingpa@aol.com; and Rachel E. Nordby, Esquire, Rachel.nordby@myfloridalegal.com by Electronic Mail on this 25th day of March 2013.

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CERTIFICATION

I HEREBY CERTIFY that the foregoing Brief complies with the font type and size requirements designated in Rule of Appellate Procedure 9.210 on this 25th day of March, 2013.

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