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**IN THE SUPREME COURT OF FLORIDA**

| | |
|---|---|
| Marvin Castellanos,<br><br>Petitioner,<br><br>vs.<br><br>Next Door Company and Amerisure Mutual Insurance Company,<br><br>Respondents. | Case No.: SC13-2082<br><br>Lower Tribunal No.: 1D12-3639<br><br>OJCC No: 09-027890GCC |

# BRIEF OF *AMICUS CURIAE*, THE WORKERS' COMPENSATION SECTION OF THE FLORIDA BAR

Christopher J. Smith, Esquire
2805 W. Busch Blvd.
Suite 219
Tampa, Florida 33618
Florida Bar No.: 0821901
Chair
Workers' Compensation Section
of The Florida Bar

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**SUPREME COURT OF FLORIDA**



**FLORIDA FIRST DISTRICT COURT OF APPEAL**

## PRELIMINARY STATEMENT

The Appellant, Marvin Castellanos, is referred to as the "claimant." The Appellees, Next Door Company and Amerisure Mutual Insurance Co., are referred to as the "employer/carrier." The Judge of Compensation Claims is referred to as the "JCC." The Workers' Compensation Section of The Florida Bar is referred to as the "Section."

## CONCISE STATEMENT OF THE IDENTITY OF THE *AMICUS CURIAE* PARTY AND ITS INTEREST IN THE CASE

The Workers' Compensation Section of The Florida Bar is an organization within The Florida Bar, which is open to all members in good standing of The Florida Bar who have a common interest in the workers' compensation law. The Section provides a forum for discussion and exchange of ideas leading to the improvement of individual trial and appellate abilities in workers' compensation cases. The Section further assists the workers' compensation judiciary in establishing methods for the more certain and expeditious administration of justice. The Section attempts to increase members' effectiveness in trial and appellate review of workers' compensation cases with a view toward better service to their clients and the cause of justice. Finally, the Section aids in the development of the workers'

compensation law in order to serve the public generally and The Florida Bar specifically in interpreting and carrying out the public and professional needs and objectives in the field. The Section's arguments in this brief are based on the Section's duly adopted Legislative positions.

The Florida Bar Board of Governor's Executive Committee authorized the Section to file this brief. It is tendered solely by the Workers' Compensation section supported by the separate resources of this voluntary organization, not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

## SUMMARY OF ARGUMENT

The Workers' Compensation Section of The Florida Bar, pursuant to its bylaws and duly adopted Legislative positions, supports an interpretation of the workers' compensation law that maintains the JCC's abilities to discharge the duties of their office through an adjudicatory process. The First District's interpretation of section 440.34 has the potential to divest JCCs of such ability. Such interpretation strips the JCCs of authority to *adjudicate* attorney's fees and instead requires them to simply supervise the application of a strict mathematical formula.

The Section supports an interpretation of the workers' compensation law that maintains access to Courts and permits stakeholders in the system to obtain competent legal representation. The interpretation of section 440.34 reached below has the potential to impede access to courts to injured workers. Moreover, the nominal fee awarded in this case may discourage competent counsel from representing injured workers in workers' compensation matters.

The Section is concerned that the First District's interpretation of section 440.34 puts the entirety of Chapter 440 at the risk of a successful constitutional challenge. Fee restrictions that may be arbitrary or capricious as applied,

along with criminal penalties for accepting a reasonable fee for the provision of legal advice, are of great concern to the Section. The Section urges this Court to interpret section 440.34 in a way that both supports the Section's Legislative positions and maintains the constitutionality of the broader workers' compensation law.

Finally, the Section respectfully asserts that the First District's interpretation of section 440.34 impedes the efficient administration of justice in the workers' compensation system. A fixed and inflexible fee statute, which mandates either unreasonably high or unreasonably low fees, does so by either over or under compensating those lawyers representing injured workers. Section 440.34, as interpreted below, usurps this Court's authority by requiring a legislatively fixed, arbitrary fee, and one that is devoid of any consideration of reason or the facts of the case. The Section respectfully suggests that this Court, not the Legislature, is the final arbiter of legal fees.

## STANDARD OF REVIEW PRESENTED

This appeal addresses the interpretation of section 440.34, Fla. Stat. (2009). Thus, the standard of review is *de novo*. See *Bolanos v. Workforce Alliance,* 23 So.3d 171 (Fla. 1st DCA 2009). Under the applicable standard of review this Court will

consider the questions presented without deference to the lower court rulings. See *Gilbreth v. Genesis Eldercare*, 821 So.2d 1226, 1228 (Fla. 1st DCA 2002).

## CERTIFIED QUESTION

> WHETHER THE AWARD OF ATTORNEY'S FEES IN THIS CASE IS ADEQUATE, AND CONSISTENT WITH THE ACCESS TO COURTS, DUE PROCESS, EQUAL PROTECTION, AND OTHER REQUIREMENTS OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

## ARGUMENT

The Section represents the interests of both lawyers representing injured workers and those representing their employers. This brief neither expressly supports either party to the case nor endorses any of their arguments. The Section's arguments are based on the Section's duly adopted legislative positions. Based on those legislative positions, the Section believes that the certified question should be answered in the negative.

### I. THE ORDER APPEALED RESTRICTS THE JUDGES OF COMPENSATION CLAIMS' ABILITY TO DISCHARGE THE DUTIES OF THEIR OFFICE THROUGH AN ADJUDICATORY PROCESS.

The Section raises this issue in connection with its duly adopted legislative position number 1(a), which reads, in pertinent part:

> "[The Section] supports any changes in the current workers' compensation law that would: ensure the independence of the Judges of Compensation Claims' ability to discharge the duties of their office in the adjudicatory process..."

The statute at issue in this appeal reads, in pertinent part, as follows:

> (1) **A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal** to 20 percent of the first $5,000 of the amount of the benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. **The judge of compensation claims shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter which provides for an attorney's fee in excess of the amount permitted by this section.** The judge of compensation claims is not required to approve any retainer agreement between the claimant and his or her attorney. The retainer agreement as to fees and costs may not be for compensation in excess of the amount allowed under this subsection or subsection (7).
>
> Section 440.34(1), Fla. Stat. (2009) (Emphasis added)

Section 440.34, Fla. Stat. (2009) addresses attorney's fees

payable to a claimant's attorney whether paid by the claimant or the employer/carrier. All such fees must be "approved" by the JCC. The statute, however, primarily addresses what the JCC may *not* do. The JCC may not consider reason or the facts of the case. In fact, the JCC may do nothing other than supervise a mathematical calculation.

The Section is concerned that section 440.34, as interpreted by First District, reduces the JCC from a "Judge" of compensation claims to a functionary whose only role is to supervise the application of a mathematical formula. The Section's stated goals include preservation of the system whereby the JCC discharges the duties of his or her office through an adjudicatory process. The mandates of section 440.34, as interpreted by the First District in the instant case, strip the JCC of the power to *adjudicate* attorneys fees. Instead, the JCC may only approve a set and inflexible formula prescribed by the Legislature.

The office of the JCC is not an Article V Court. See *Pruden v. Herbert Contractors, Inc.*, 988 So.2d 135 (Fla. 1st DCA 2008). Instead, JCCs are executive branch officers. See *Rollins v. Southern Bell Tel. and Tel. Co.*, 384 So.2d 650, 652 (Fla. 1980). Their authority is derived solely from Chapter 440. See *Jones v. Chiles*, 638 So.2d 48 (Fla. 1994).

JCC's, however, are more similar to circuit judges than to administrative law judges. Workers' compensation litigation is quite complex and similar to general civil practice. See *Pierce v. Piper Aircraft Corp.*, 279 So.2d. 281 (Fla. 1973). JCCs are granted the authority to adjudicate workers' compensation matters. They act as quasi-judicial officers and they are empowered to do all things conformable to law which may be necessary to enable them to effectively discharge the duties of their office. See section 440.33(1), Fla. Stat. (2009).

The current version of section 440.34, as interpreted by the First District, strips the JCC of the authority to adjudicate attorney's fees in workers' compensation matters, reducing them to the role of calculator. Therefore, it fails to promote the independence of the Judges of Compensation Claims' and their ability to discharge the duties of their office in an adjudicatory process.

**II. THE ORDER APPEALED IMPEDES ACCESS TO COURTS AND FURTHER POTENTIALLY IMPEDES THE ABILITY OF STAKEHOLDERS IN THE SYSTEM TO OBTAIN LEGAL REPRESENTATION IN THE HANDLING OF WORKERS' COMPENSATION CLAIMS.**

The Section raises this issue in connection with its duly adopted legislative position number 6, which reads,

> "[The Section] supports legislation which promotes access to courts and the ability of employer/carriers, self-insured's and

> employees to obtain legal representation in the handling of workers' compensation claims."

The attorney's fee award below was in the amount of $1.53 per hour. The claimant's attorney was successful in overcoming the defenses of the employer/carrier in this matter. While the unsuccessful defense attorney was paid a reasonable contractual fee negotiated with his client, the successful claimant's attorney was awarded only a nominal attorney's fee, which is inadequate as a practical matter.

The Section is concerned that the award of manifestly unfair attorney's fees impedes access to courts and further impedes the abilities of at least one class of stakeholder in the system to obtain legal representation in the handling of workers' compensation claims. Clearly, an hourly award of $1.53 is insufficient to attract competent counsel to represent claimants in such disputes.

Additionally, the very dispute reflected in this matter is a typical workers' compensation dispute. The result reflected in this record is a common result given the interpretation of section 440.34 reached by the First District. Such an interpretation neither promotes access to courts (at least for injured workers) nor promotes the ability to obtain legal representation in the handling of workers' compensation claims.

Moreover, while the instant dispute involves a fee awarded against an employer/carrier the result would have been the same had the fee been paid by the claimant. Despite any contractual agreement between a claimant and a lawyer the fee is strictly limited to the guideline. The statute does not permit the JCC to consider the fee contract; the lawyer's skill; the complexity of the case; or the claimant's sophistication and ability or desire to pay a reasonable fee for services rendered. The JCC may consider only the value of the benefits obtained and then apply the guidelines to that value.

Courts acknowledge the "peculiar complexity of workers' compensation litigation." *Aguilar v. Kohl's Dept. Stores, Inc.*, 68 So.3d 356, 358 (Fla. 1st DCA 2011). The very existence of a fee shifting provision in section 440.34 reflects "public policy decision that claimants are entitled to and are in need of counsel..." *Pilon v. Okeelanta Corp.*, 574 So.2d 1200, 1201 (Fla. 1st DCA 1991).

The JCC's primary role is to protect the due process rights of the parties. At its core, due process requires the state to fairly consider the interests of the parties to a dispute and to neutrally adjudicate that dispute in accordance with the law. Due process requires both fair notice and a *real* opportunity to be heard. See *Borden v. Guardianship of Borden-Moore*, 818 So.2d

604, 607 (Fla. 5th DCA 2002). The opportunity to be heard must be meaningful. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The opportunity to be heard cannot be illusory or meaningless. See *955 N.E. 125th St. Corp. v. County Nat. Bank of N. Miami Beach*, 349 So.2d 758, 760 (Fla. 3d DCA 1977).

A fixed and inflexible fee scheme means that lawyers have an incentive to represent only those injured worker's with very high-dollar-value claims because the fee will be correspondingly large, even unreasonably so. That same scheme punishes any lawyer who represents an injured worker with a low-dollar-value claim because it guarantees an unreasonably low fee, whether the fee is paid by the client or the opponent. Such a scheme discourages legal representation, which in turn impedes due process.

Litigants need lawyers to help them navigate their way through the "the complex nature of Florida's current Workers' Compensation Law, and the myriad of thorny legal and medical issues which accompany even the most fundamental decisions regarding an injured worker's entitlement to [benefits]." *Bysczynski v. United Parcel Services, Inc.*, 53 So.3d 328, 330 (Fla. 1st DCA 2010). Further, lawyers must earn reasonable fees in order to practice and, conversely, lawyers are ethically precluded from charging unreasonably large fees. The rigid

guideline all but guarantees fees that are unreasonable (either too high or too low). Neither result is appropriate.

Section 440.34, as interpreted by the First District, requires a JCC to limit compensation of the lawyer to $1.53 per hour. Moreover, the statute also prevents the lawyer from collecting any additional fee from his own client under threat of criminal prosecution. Courts have recognized that the workers' compensation law is so complex that unrepresented claimant's have essentially no chance of prevailing.

"[W]e recognize the importance of injured employees having access to competent counsel to provide advice and assistance on workers' compensation matters." *Elms v. Castle Constructors Co.*, 109 So.3d 1274, 1276 (Fla. 1st DCA 2013). "Without the assistance of competent counsel, claimant would similarly have been 'helpless as a turtle on its back...'" *Davis v. Keeto, Inc.*, 463 So.2d 368, 371 (Fla. 1st DCA 1981).

As recognized by at least one judge as early as 1981, "Section 440.34(1), which precludes freedom to contract and restricts the ability to obtain needed services, seriously impairs the right of claimants to obtain compensation benefits due to them in what has become a complex area of the law, thereby penalizing, rather than protecting, the injured worker." *Khoury v. Carvel Homes South, Inc.*, 403 So.2d 1043, 1047 (Fla.

1st DCA 1981)(Booth, J., dissenting).

**III. THE ORDER APPEALED REFLECTS AN INVALID RESTRICTION ON THE PAYMENT OF ATTORNEY'S FEES TO ONE CLASS OF STAKEHOLDERS IN THE WORKERS' COMPENSATION SYSTEM.**

The Section raises this issue in connection with its duly adopted legislative position number 8, which reads,

> "[The Section] opposes legislation restricting the payment of attorney's fees - either to the attorney of the injured worker or to the attorney for the employer / carrier / self-insured."

The Legislature is not generally required to grant a fee shifting statute in any particular type of civil matter. The Legislature has done so, however, in the workers' compensation law. The Section is concerned that the First District's application of section 440.34 may render that fee shifting statute invalid.

When the Legislature enacts a fee shifting statute, it may not restrict the amount of the fee in an arbitrary or capricious manner. While the Legislature has the authority to enact laws that address attorney's fees, it may not do so in a way that makes the statutory cap confiscatory of the lawyer's time, energy, and talent. See, generally, *Florida Dept. of Financial Services v. Freeman*, 921 So.2d 598, 600 (Fla. 2006); *Anderson v. E.T.*, 862 So.2d 839, 841 (Fla. 4th DCA 2003); *Marion County v.*

*Johnson*, 586 So.2d 1163, 1167 (Fla. 5th DCA 1991).

Although the instant case involves an employer/carrier paying an attorneys fee to a claimant's attorney, the restrictions on attorney's fees in section 440.34 apply to attorney's fees paid to claimants' attorneys by their own clients. An attorney accepting any fee from an injured worker outside the provisions and limitations prescribed by section 440.34 is guilty of a crime. See 440.105(3)c, Fla. Stat. (2009).

A licensed Florida attorney may provide advice to a client for a reasonable fee in connection with almost any legal issue. But, if that issue is workers' compensation, and the potential client is an injured worker, providing paid advice to that client outside the strict constraints of section 440.34 is a crime. Given the complex nature of the workers' compensation law, any interpretation of section 440.34 that restricts an injured worker's ability to obtain counsel has the potential of leaving that injured worker as "helpless as a turtle on its back." *Davis*, 463 So.2d at 371.

The Legislature created two classifications relating to workers' compensation attorney's fees. One class, injured workers, consists of citizens of the state of Florida. The other class, employers, also consists of citizens of the state of Florida. The latter class is permitted to freely contract

with lawyers to represent their interests, while the former is strictly prohibited from doing so under the threat of criminal prosecution of the lawyer.

The classification is arbitrary. Many people hurt on the job have sufficient funds to pay a lawyer for their advice or representation. Most injured workers are sufficiently intelligent and educated to enter into a fee contract with a lawyer without being harmed. In addition, lawyers are sworn to an oath of conduct and subject to regulatory rules that alleviate concerns that attorneys will fleece their own clients. Thus, the classification is not rationally related to protecting the rights of the class as a whole. Some members of the class may need protection from unscrupulous attorneys or ill-advised fee arrangements. Others do not. Therefore, the classification has no rational relationship to a legitimate legislative goal of protecting the class because not all members of the class are similarly situated.

Moreover, the classification bears no rational relationship to another legitimate legislative goal: reducing costs to the system. While reducing or even eliminating *employer paid* fees to injured workers' lawyers may reduce the costs to the system, restricting *injured worker paid* fees does not reduce the costs to the system by even one penny. Either the injured worker pays

the fee out of funds already in his possession or he pays the fee out of benefits to which he was entitled in the first place. Therefore, the restriction and criminalization of injured worker paid fees bears no rational relationship to the legislative goal of reducing costs to the system.

The Legislature first attempted to make the guideline fee mandatory in all instances in a 2003 Special Legislative Session, an effort thwarted by this Court in *Murray v. Mariner Health*, 994 So.2d 1051 (Fla. 2008). *Murray* led to the almost immediate passage of section 440.34, Fla. Stat. (2009), which is at issue here. The constitutional question avoided in Murray must be addressed here.

The Section opposes a construction of the law that restricts the payment of attorney's fees to either the attorney of the injured worker or to the attorney of the employer/carrier. Section 440.34, as interpreted by the First District, is both inconsistent with the Section's duly enacted legislative position and potentially imperils the entirety of the Act.

## IV. THE ORDER APPEALED IMPEDES THE ADMINISTRATION OF JUSTICE IN THE FLORIDA WORKERS' COMPENSATION SYSTEM

The Section raises this issue in connection with its duly adopted legislative position number 2, which reads,

> [The Section] supports any legislation that would streamline and make more efficient the administration of justice in the workers' compensation system.

The Section respectfully asserts that the First District's interpretation of section 440.34 fails to promote the efficient administration of justice in the workers' compensation system. In fact, the converse is true. A fixed and inflexible fee statute, which mandates either unreasonably high or unreasonably low fees, impedes justice by either over or under compensating those lawyers representing injured workers.

The workers' compensation system is complex, requiring skilled lawyers to navigate those complexities. Lawyers are ethically required to charge their clients (or their opponents) only reasonable fees. The First District's interpretation of section 440.34 requires claimant's lawyers to charge and receive fees that are often unreasonably low, but that are sometimes unreasonably high. What the law rarely does is to provide for a reasonable fee, and when it does it is through mere luck.

The administration of justice requires that the parties to a workers' compensation claim be permitted to obtain lawyers to represent their interests. An arbitrary fee scheme defeats that goal because it prevents lawyers, their clients, and the courts from determining fees that are reasonable. Thus, the inflexible

fee schedule improperly violates the separation of powers because this Court has the ultimate authority for the regulation of attorney's fees:

> "The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court." Rules Regulating the Florida Bar, Chapter 1; *The Florida Bar re: Rules Regulating The Florida Bar*, 494 So.2d 977 (Fla. 1986).

With Rule 4-1.5, Rules Regulating The Florida Bar, this Court determined the method by which fees must be determined. That method precludes unreasonable fees and requires intelligent analysis, using appropriate benchmarks, for the calculation of what is reasonable. Section 440.34, as interpreted below, usurps this Court's authority by requiring a legislatively fixed, arbitrary fee, and one that is devoid of the consideration of reason or the facts of the case. The Section respectfully suggests that this Court, not the Legislature, is the final arbiter of legal fees.

## CONCLUSION

The Workers' Compensation Section of The Florida Bar urges an outcome in this case that is consistent with its duly adopted legislative positions.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy hereof has been furnished by email to Kimberly A. Hill, Esquire (kimberlyhillappellatelaw@gmail.com), William McCabe, Esquire (mccabelaw5@gmail.com), Mark Touby, Esquire (mark.touby@fortheworkers.com), Richard Chait, Esquire (richard.chait@fortheworkers.com, Michael J. Winer, Esquire (mike@mikewinerlaw.com); Geoff Bichler, Esquire (Geoff@bichlerlaw.com); Richard Sicking, Esquire (sickingpa@aol.com); Richard Ervin, Esquire (richardervin@flaappeal.com); Kenneth Schwartz, Esquire (kbs@flalaw.com); Mark Zientz, Esquire (mark.zientz@mzlaw.com); and Roberto Mendez, Esquire (rmendez@mendezlawgroup.com) by Electronic Mail on this 17th day of April, 2014.

Christopher J. Smith, Esquire
2805 W. Busch Blvd.
Suite 219
Tampa, Florida 33618
Florida Bar No.: 0821901
Chair
Workers' Compensation Section
of The Florida Bar

**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 17th day of April, 2014.

Christopher J. Smith, Esquire
2805 W. Busch Blvd.
Suite 219
Tampa, Florida 33618
Florida Bar No.: 0821901
Chair
Workers' Compensation Section
of The Florida Bar