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FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

MARVIN CASTELLANOS,

Petitioner,

vs.

NEXT DOOR COMPANY and
AMERISURE INSURANCE COMPANY,

Respondents.

CASE NO.: SC13-2082

FIRST DCA NO: 1D12-3639

OJCC NO: 09-027890GCC

D/A: 10/12/2009

AMICUS CURIAE BRIEF OF VOICES INC. IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

A. Statement of interest of amicus:

The amicus curiae, VOICES, INC., is a nonprofit advocacy group for injured workers in Florida and their supporters. The purpose of Voices, Inc. is to guide injured workers and their families through the Workers' Compensation system and educate them as to their rights under the law. The matter before this Honorable Court will significantly impact an injured worker's ability to obtain counsel in a workers' compensation case.

B. Issue to be addressed:

The issue to be addressed is how the inflexible statutory formula based solely on "benefits secured" set forth in F.S.440.34(1)(2009) is a denial of an injured worker's equal protection rights under the Florida and Federal Constitution.

SUMMARY OF THE ARGUMENT

F.S.440.34(1)(2009) restricts the amount of a claimant's attorney's fees to an inflexible percentage of the amount of "benefits secured".

VOICES, Inc. submits the appropriate standard of review is the strict scrutiny standard because F.S. 440.34(1)(2009) abridges a fundamental right, De Ayala v. Florida Farm Bureau Casualty Insurance Company, 543 So.2d 204 (Fla.1989).

VOICES, Inc. submits F.S. 440.34(1)(2009) is also unconstitutional based on the lesser rational basis test. To satisfy the rational basis test, in evaluating an equal protection challenge, the statute must bear a rational and reasonable relationship to a legitimate State objective and it cannot be arbitrarily or capriciously imposed, Estate of Michelle Evette McCall v. United States of America, 39 F.L.W. S104(Fla.2014).

F.S.440.34(1)(2009) is unconstitutional as a denial of claimant's equal protection because:

(1) It imposes an inflexible cap on the amount of attorney's fees counsel for claimant can receive, but imposes no such cap upon the amount of attorney's fees counsel for the Employer/Carrier (E/C) can receive;

(2) Claimant's attorneys can only receive attorney's fees when they prevail, whereas E/C's attorneys may be paid whether they win or lose; furthermore, an injured worker is the only person in the worker's compensation system who can not pay for legal advice or assistance.

(3) F.S.440.105(3)(c)(2009) makes it a crime for a claimant's attorney to receive an attorney's fee unless such fee is approved by the JCC, but the statute does not apply to an E/C, Altstatt v. Florida Department of Agriculture, 1 So.3d 1285(Fla.1st DCA 2009).

(4) F.S.440.34(2)(2009) allows an E/C to make an offer of settlement to a Claimant thereby potentially reducing their attorney fee exposure, yet there is no corresponding ability for a Claimant to make an offer of settlement to an E/C.

VOICES, INC. acknowledges the state has a legitimate interest in reducing workers' compensation premiums, Acosta v. Kraco, Inc., 471 So.2d 24 (Fla. 1985). However, since enactment of the October 1, 2003 amendments to Chapter 440, the overall average statewide rate decreased by 60% by July 1, 2009, the effective date of F.S. 440.34(1)(2009). Florida Staff Analysis, H.B. 903, 3/13/2009, page 1, Appendix-1.

In addition, VOICES, INC. submits passage of F.S. 440.34(1)(2009) bears no rational and reasonable relationship to any state objective, yet severely restricts an injured workers ability to obtain legal counsel.

ARGUMENT

POINT I

F.S.440.34(1)(2009) IS UNCONSTITUTIONAL, IN THAT IT VIOLATES CLAIMANT'S RIGHT TO EQUAL PROTECTION, PER ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION AND ARTICLE XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION.

VOICES, INC. submits that although F.S. 440.34(1)(2009) is an attorney fee statute, this case is not just about attorney's

fees. It is about an injured worker's ability to obtain counsel in a worker's compensation case.

As noted by the court in Pilon v. Okeelanta Corporation, 574 So.2d 1200 (Fla.1st DCA 1991), the true party in interest in an attorney's fee issue is the claimant. As the court stated in Pilon v. Okeelanta Corporation, Supra, any barrier which would affect the ability to review a decision to award an attorney's fee in a workers' compensation case could:

"Ultimately result in a net loss of attorneys willing to represent workers' compensation claimants. This could ultimately result in a chilling effect on claimant's ability to challenge an employer/carrier decision to deny claims for benefits and disrupt the equilibrium of the party's rights intended by the Legislature in enacting section 440.34." Pilon v. Okeelanta Corporation, Supra at 1201.

The necessity of a claimant having representation of adequate counsel in a workers' compensation proceeding has long been recognized by this Honorable Court. In Lee Engineering and Construction Company v. Fellows, 209 So.2d 454 (Fla.1968), this Honorable Court noted:

"It is obvious that a fee should not be so low that capable attorneys will not be attracted. . ." Lee Engineering and Construction Company v. Fellows, Supra at 457.

In Davis v. Keeto, Inc., 463 So.2d 368 (Fla.1st DCA 1985), the court stated:

"Without the assistance of competent counsel, claimant would have similarly been 'helpless as a turtle on its back'." Davis v. Keeto, Inc., Supra at 371.

In Rivers v. SCA Services of Florida, Inc., 488 So.2d 873(Fla.1st DCA 1986), the court stated:

"Application of the provisions of section 440.34(1) in a manner that promotes such a chilling effect on the claimant's right to obtain legal services. . . is inconsistent with the benevolent purposes of the Workers' Compensation Act."

Furthermore, although Chapter 440 is cited as the "Workers Compensation Law", F.S. 440.01(2009), an injured worker is the only person in the system who can not pay a Lawyer for legal advice concerning his rights and obligations under the worker's compensation law, or for legal services. Any lawyer who provides such advice for pay has committed a crime, F.S. 440.105(3)(c)(2009).

1. STANDARD OF REVIEW

VOICES respectfully submits this Honorable Court should apply the "strict scrutiny standard" to determine whether F.S.440.34(1)(2009) is a violation of a claimant's equal protection rights.

When considering a statute that abridges a fundamental right, courts are required to apply the strict scrutiny standard to determine whether the statute denies equal protection, Level 3 Communications LLC v. Jacobs, 841 So.2d 447(Fla.2003).

Article I, Section 2 of the Florida Constitution provides as follows:

"Basic Rights. - All natural persons female and male alike are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry. . . . No person shall be deprived of any right because of . . . physical disability." (emphasis mine).

Florida's workers' compensation program was established for a two-fold reason: (1) to see that workers were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents, De Ayala v. Florida Farm Bureau Casualty Insurance Company, 543 So.2d 204 (Fla.1989). Since a workers' compensation claim involves the right to be rewarded for industry, VOICES submits equal protection arguments are subject to strict judicial scrutiny under the equal protection clause, De Ayala v. Florida Farm Bureau Casualty Insurance Company, *Supra*. Similarly, since a workers' compensation claimant is, in most instances, at least temporarily disabled, the injured worker is also a constitutionally protected individual, which would also subject the analysis to strict scrutiny.

On the other hand, if a suspect class or fundamental right protected by the Florida Constitution is not implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge, Estate of Michelle

Evette McCall v. United States of America, 39 F.L.W. S104(Fla.2014). To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate State objective and it cannot be arbitrary or capriciously imposed, Estate of Michelle Evette McCall v. United States of America, Supra.

VOICES respectfully submits that even under the lesser rational basis test, F.S.440.34(1)(2009) is a denial of a claimant's equal protection rights. The rest of this brief shall analyze the statute under the rational basis test.

F.S.440.34(1)(2009) provides in pertinent part:

"(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% of the first \$5,000 of the amount of benefits secured, 15% of the next \$5,000 of the amount of the benefits secured, 10% of the remaining amount of the benefits secured to be provided during the first ten years after the date the claim is filed, and 5% of the benefits secured after ten years. . ."

2. DISPARATE TREATMENT OF INJURED WORKER'S ABILITY TO OBTAIN COUNSEL AND EMPLOYER/CARRIER'S ABILITY TO OBTAIN COUNSEL.

The manner in which the aforesaid statute provides disparate treatment of an injured worker's ability to obtain counsel and an E/C's ability to obtain counsel is discussed hereinbelow.

A. F.S. 440.34(1)(2009) IMPOSES AN INFLEXIBLE STATUTORY CAP ON A CLAIMANT'S ATTORNEY FEE, WITH NO CORRESPONDING CAP ON AN EMPLOYER/CARRIER'S ATTORNEY FEE.

F.S. 440.34(1)(2009) limits a Claimant's attorney's fee to an inflexible statutory cap based on a percentage of monetary "benefits secured." There is no corresponding cap on an E/C attorney fee.

In Corn v. New Mexico Educators Federal Credit Union, 889 P.2d 234 (NM Ct. of App. 1995). the New Mexico Court of Appeals held the Workers' Compensation Statute, which capped a Claimant's attorney's fee at \$12,500.00, was unconstitutional as a denial of Claimant's equal protection rights because there was no corresponding cap on the amount of attorney's fee an E/C could pay their attorney. The Court in Corn, stated, inter alia:

"The attorney's fee handicaps one side of an adversarial proceeding and thus imposes the risk of appearing without representation solely upon a class of litigants, the class we have traditionally thought of as disadvantaged in these kinds of proceedings and the class in whose interest the legislation has been created. . . ." Corn v. New Mexico Educators Federal Credit Union, Supra at 243.

The Court in Corn, also characterized the one-sided attorney fee restriction as: "so attenuated as to render the distinction arbitrary and irrational.", Corn, supra at 243.

While Corn, supra was pending, the New Mexico legislature partially corrected the inequality by amending the fee limitation provision to apply to both employers and workers,

Wagner v. AGW Consultants, 114 P.3d 1050 (N.M. 2005), at 1058. Even at that, the New Mexico Supreme Court in Wagner v. AGW Consultants, supra noted Claimants and Employers are still treated differently, because Claimants must obtain judicial approval of their fees, Employers do not; Employers can pay their attorneys any amount up to the cap regardless of the work expended and regardless of whether they win, whereas a Claimant's attorney only gets paid if they win and they only get paid based on the amount of benefits secured, Wagner v. AGW Consultants, supra at 1058, 1059. Although the New Mexico Supreme Court in Wagner v. AGW Consultants, supra upheld the constitutional challenge of the amended fee statute capping both Claimant and E/C fees, it did not address equal protection arguments based on the remaining inequities addressed above, because that issue was not raised and briefed by the parties.

In Wood v. Florida Rock Industries, 929 So.2d 542 (Fla. 1st DCA 2006), the first case in which the First DCA interpreted the October 1, 2003 version of F.S. 440.34(3)(2003) to also result in an inflexible statutory cap on a Claimant's attorney fee, the Honorable Judge Barfield stated in his concurring opinion:

"The validity of the statute which severely impairs, if not eliminates, the ability of claimants to obtain the assistance of counsel, has not been raised." Wood v. Florida Rock Industries, supra at 545.

The First DCA decision in Wood v. Florida Rock Industries, supra and other cases, such as Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So.2d 506 (Fla. 1st DCA 2006), were superseded by this Honorable Court's decision in Murray v. Mariner Health, 994 So.2d 1051 (Fla. 2008).

It is evident that an injured worker will have considerable difficulty obtaining counsel when F.S. 440.34(1) (2009) can restrict Claimant's attorney's fees to \$1.53 per hour for 107 hours, for a total of \$164.54, while advancing \$4,630.00 in costs, such as occurred in this case (R-13,18,19). On the other hand, the E/C can hire as many attorneys as they want and can pay them whatever fee they want to defend a case.

The complex nature of the current workers' compensation law has been recognized by the court, Byszynski v. United Parcel Services, Inc ., 53 So.3d 328 (Fla.1st DCA 2010). The JCC herein noted: "it is highly unlikely that the claimant could have succeeded and obtained the favorable result he did without the assistance of capable counsel. . ." (R-13). To impose severe restrictions on a Claimant's ability to obtain legal counsel, yet impose no such restrictions on an E/C's ability to obtain legal counsel unquestionably places the injured worker at a considerable disadvantage in a worker's compensation proceeding.

B. A CLAIMANT'S ATTORNEY MUST PREVAIL TO RECOVER AN ATTORNEY FEE, WHEREAS COUNSEL FOR THE E/C IS ENTITLED TO A FEE, WIN OR LOSE.

Since a claimant's attorney's fee is based on the amount of "benefits secured" a claimant's attorney cannot recover a fee unless the claimant prevails. To the contrary, counsel for the E/C can be paid an attorney's fee whether they win or lose.

In East Coast Tire Co. v. Denmark, 381 So.2d 336 (Fla. 1st DCA 1980) (a case where claimant was paying his own fee) the First DCA, interpreting F.S. 440.34(1)(1979), which set forth a statutory fee schedule based on a percentage of benefits secured, but which also allowed the JCC to consider the criteria previously set forth in Lee Engineering & Construction Company v. Fellows, 209 So.2d 454 (Fla. 1968), and increase or decrease the statutory fee accordingly, concluded that benefits secured under factor 1(d) which provided "the amount involved in the controversy and the benefits resulting to the claimant" included non-monetary benefits reasonably accruing to a claimant who seeks legal advice on his rights under the statute. The court reached this conclusion after noting F.S. 440.34(1)(1979) no longer required (at that time) the successful prosecution of a claim before a fee (paid by Claimant) is approved.

However, F.S. 440.34(2)(2009) provides, inter alia:

"In awarding a claimant's attorney's fee, the judge of compensation claims shall consider only those benefits secured by the attorney. . . . The amount, statutory basis, and type of benefits obtained through legal representation shall be listed on all attorney's fees awarded by the judge of compensation claims..."

It is clear, based on F.S. 440.34(1)(2009) and F.S. 440.34(2)(2009), that a Claimant's attorney, as occurred in this case, is only entitled to a fee based on a percentage of monetary benefits secured for the Claimant. In order to secure monetary benefits for the Claimant, the Claimant's attorney must win the case in order to be paid a fee.

This also means an injured worker can not pay an attorney for advice, since advice is a non-monetary benefit. The former Lee Engineering factors and the factors set forth in Rule 4-1.5(b) of the Rules Regulating the Florida Bar, are no longer incorporated in F.S. 440.34. Thus there is no statutory basis to be paid for legal advice to an injured worker. In addition, there is no way to take a percentage of a non-monetary benefit.

Therefore, the only person in the worker's compensation system who can not pay an attorney for legal advice or for legal assistance is the very person the system is set up to help, the injured worker. On the other hand, if an E/C seeks a consultation concerning their rights and obligations under the workers' compensation law, they can pay that attorney whatever the parties agree to and can do so without approval of the JCC.

C. IT IS A CRIME FOR A CLAIMANT'S ATTORNEY TO RECEIVE AN ATTORNEY FEE WITHOUT APPROVAL OF THE JCC, BUT AN E/C'S ATTORNEY IS NOT REQUIRED TO GET APPROVAL OF THEIR FEE FROM THE JCC

F.S.440.105(3)(c)(2009) provides as follows:

"(3) Whoever violates any provision of this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

.

(c) It is unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a Judge of Compensation Claims or by the Deputy Chief Judge of Compensation Claims."

Pursuant to the aforesaid statute, if a claimant's attorney accepts a fee from or on behalf of a claimant, without approval from the JCC, that attorney has committed a crime. This again prevents an injured worker from paying an attorney for legal advice or services regarding a worker's compensation claim.

F.S. 440.105(3)(c)(2009) does not apply to employer/carriers, Altstatt v. Florida Department of Agriculture, 1 So.3d 1285(Fla.1st DCA 2009).

D. THE OFFER OF SETTLEMENT STATUTE, ENABLING THE EMPLOYER/CARRIER TO REDUCE THE AMOUNT OF THEIR EXPOSURE TO PAYMENT OF CLAIMANT'S ATTORNEY FEES, DOES NOT ALLOW A CLAIMANT TO ALSO FILE AN OFFER OF SETTLEMENT.

Chapter 440 has an offer of settlement statute that applies only to E/C's and not claimants. F.S.440.34(2)(2009) provides:

". . . In the event an offer to settle an issue pending before a Judge of Compensation Claims, including attorney's fees as provided for in this section, is communicated in writing to the claimant or the claimant's attorney at least

thirty days prior to the trial date on such issue, for purposes of calculating the amount of attorney's fees to be taxed against the employer or carrier, the term 'benefits secured' shall be deemed to include only that amount awarded to the claimant above the amount specified in the offer to settle. . . ."

This statute only permits a carrier to make an offer to settle. Furthermore, by allowing an E/C to make an offer of settlement, the E/C has the potential of reducing their exposure if they must pay Claimant's attorney's fees, by reducing what constitutes "benefits secured" for purposes of calculating the Claimant's attorney's fees.

F.S.440.34(2) (2009) does not provide an equal opportunity for claimant to make an offer to settle. There is no provision therein for a Claimant to make an offer to settle and there is nothing in the statute that would indicate what the result would be if Claimant did make an offer to settle.

The purpose of an offer to settle statute is to lead litigants to settle by penalizing those who decline offers that satisfy the statutory requirements, Allstate Property and Casualty Insurance Company v. Lewis, 17 So.3d 1230 (Fla.1st DCA 2009). It is a means by which each side can attempt to resolve cases early to avoid incurring substantial amounts of court costs and attorney's fees. VOICES respectfully submits it is arbitrary and capricious to allow an E/C the ability to make an offer of settlement, with a corresponding ability to reduce

their liability for a claimant's attorney's fees, without giving claimant the same opportunity.

Clearly, F.S. 440.34(2009) provides disparate treatment of an injured worker's ability to obtain counsel as opposed to an Employer/Carrier's ability to obtain counsel.

3. LEGITIMATE STATE INTERESTS

VOICES, INC. recognizes the state has a legitimate interest in: (1) reducing worker's compensation premiums, Acosta v. Kraco, Inc., 471 So.2d 24 (Fla. 1985), (2) Regulating attorney fees in workers compensation cases, Samaha v. State, 389 So.2d 639 (Fla. 1980) and (3) regulating attorney's fees to preserve the benefits awarded to the Claimant, Lundy v. Four Seasons Ocean Grand Palm Beach, supra.

4. THE INFLEXIBLE STATUTORY CAP ON A CLAIMANT'S ATTORNEY'S FEE, BASED ONLY ON MONETARY BENEFITS SECURED, DOES NOT BEAR A RATIONAL AND REASONABLE RELATIONSHIP TO A LEGITIMATE STATE INTEREST.

A. THERE IS NO CURRENT NEED TO REDUCE WORKER'S COMPENSATION PREMIUMS.

In Estate of Michelle Evette McCall v. United States of America, supra, this Honorable Court decided whether the statutory cap on wrongful death non-economic damages, F.S. 766.118, violated the Plaintiff's right to equal protection. In finding the statute was unconstitutional, this Honorable Court held the statutory cap on wrongful death non-economic damages

did not bear a rational relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida.

In reaching that conclusion, this Honorable Court in Estate of Michelle Evette McCall v. United States of America, supra undertook its own investigation to determine whether there was even a medical malpractice crisis which would warrant legislation which would purportedly address that crisis.

F.S. 440.34(1)(2009) was passed on May 29, 2009 and went into effect on July 1, 2009. VOICES, INC. questions whether there even was a worker's compensation crisis in Florida at that time that would warrant passage of a statute imposing an inflexible cap on Claimant's attorney's fees, based solely on monetary benefits obtained. The Florida Staff Analysis on HB 903, the applicable bill, observed that since the 2003 legislation:

"the Office of Insurance Regulation (the OIR) has approved six consecutive decreases in workers' compensation rates, resulting in a cumulative decrease of the overall statewide average rate by more than 60 percent." Florida Staff Analysis, HB-903, page 1, Appendix-1.

Similarly, according to the 2012-2013 OJCC Annual Report, the number of Petitions for Benefits filed between 2003-2004 and 2008-2009 has dropped from 127,611 to 67,971, 2012-2013 OJCC Annual Report at page 10, Appendix-6.

VOICES, INC. acknowledges it is possible this drop is due in part to the decisions of the First DCA in Wood v. Florida Rock Industries, supra and Lundy v. Four Seasons Ocean Grand Palm Beach, supra, which interpreted F.S. 440.34(3)(2003), the E/C attorney fee paid provisions, as also imposing an inflexible statutory cap on a Claimant's attorney's fee. Certainly, F.S. 440.34(1)(2009) was passed in response to this Honorable Court's decision in Murray v. Mariner Health, supra, which held an E/C was required to pay a Claimant a reasonable fee under F.S. 440.34(3)(2009) and was not restricted to the statutory cap set forth in F.S. 440.34(1)(2003).

Of course a Claimant, at the time of Murray v. Mariner Health, supra F.S.440.34(3)(a)-(d)(2003), as well as at the current time, F.S. 440.34(3)(a)-(d)(2009) may recover E/C paid fees only in certain limited circumstances. In addition, an E/C is only required to pay a claimant's attorney's fee if they fail to provide benefits within 30 days after the E/C receives a petition for benefits, F.S.440.34(3)(2009). Therefore, an E/C has ample time to determine whether they should provide a benefit to an injured worker before becoming liable to pay Claimant's attorney's fees.

Furthermore, even if there is an ongoing worker's compensation crisis which would warrant legislation which attempts to reduce worker's compensation premiums, VOICES, INC.

suggests that arbitrarily providing an inflexible cap on a Claimant's attorney's fees, based solely on monetary benefits obtained, does not bear a rational or reasonable relationship to that legitimate state interest. Fees paid to Claimant's attorneys is less than that paid to E/C attorneys.

F.S.440.345(2009) requires all fees paid to attorneys for services rendered under chapter 440 be reported to the Office of the Judges of Compensation Claim. According to the 2012-13 OJCC Annual Report, the percentage of attorney's fees paid to claimant's attorneys is 36.27% of the aggregate fees paid, whereas defense fees constitute 63.73% of the aggregate fees, 2012-13 OJCC Annual Report, page 31, Appendix 8. In fact, during the fiscal year 2009, when F.S.440.34(1)(2009) went into effect, defense fees constituted 60.45% of the aggregate fees, yet it was claimant's attorney's fees that were capped (Appendix 8).

B. PUTTING AN INFLEXIBLE CAP ON CLAIMANT'S ATTORNEY'S FEES AND PROVIDING A FEE ONLY FOR MONETARY BENEFITS IS AN ARBITRARY AND CAPRICIOUS MEANS TO REGULATE FEES IN WORKER'S COMPENSATION CASES

As previously argued, F.S. 440.34(1)(2009) combined with F.S. 440.105(3)(c)(2009) precludes an injured worker from being able to even consult with an attorney, for a fee, about his rights under the worker's compensation system. Any attorney who provides such advice for a fee has committed a crime.

VOICES, INC. respectfully submits there is no rational basis for a statute that arbitrarily prevents only the injured worker and only in a worker's compensation case, from being able to obtain legal advice about his case, for a fee. VOICES, INC. is unaware of any other provision in the law that precludes an individual for paying for legal advice about his case.

C. PUTTING AN INFLEXIBLE CAP ON CLAIMANT'S ATTORNEY'S FEES WHEN THE FEE IS BEING PAID BY THE E/C DOES NOT ASSIST TO PRESERVE BENEFITS AWARDED TO AN INJURED CLAIMANT.

F.S.440.34(3)(2009), which requires an E/C to pay a Claimant's attorney's fee under certain conditions is a fee shifting statute. Since a workers' compensation claimant's benefits are limited, allowing an attorney to obtain a portion thereof from a claimant, particularly when it is a substantial sum, would thwart the public policy of affording the claimant necessary minimum living funds and cast the burden of support for that person on society generally, Lundy v. Four Seasons Ocean Grand Palm Beach, supra, Samaha v. State, Supra. Therefore, a statutory cap would bear a rational relation to a legitimate state interest when claimant pays his own fees.

However, when an E/C fails to timely pay benefits and they are required to pay Claimant's attorney fee, there is no diminishment in the amount of benefits obtained by the claimant. Additionally, the legislative determination that a fee is

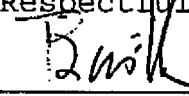
payable by the E/C in certain circumstances, reflects a public policy decision that claimants are entitled to and in need of counsel under those conditions, Murray v. Mariner Health, supra.

In First Baptist Church of Cape Coral Florida, Inc. v. Compass Construction, Inc., 115 So.3d 978(Fla.2013), this Honorable Court held an alternative fee recovery clause which provides that should anyone other than the client be required to pay attorney's fees, the rate for attorney's fees may be an amount as determined by the court, is appropriate when there is a fee shifting provision in either a statute or a contract. As such, in a workers' compensation case, when the fee is shifted from the claimant to the E/C claimant should be entitled to receive a "reasonable" fee as determined by the JCC which is what an E/C has always been required to pay, in a workers' compensation case, until the passage of F.S.440.34(1)(2009).

CONCLUSION

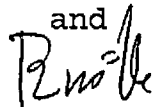
VOICES respectfully submits that F.S.440.34(1)(2009) is a violation of an injured worker's equal protection rights.

Respectfully submitted


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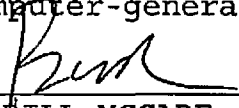
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished on this 21 day of April, 2014 by email to: Richard A. Sicking at SickingPA@aol.com, Michael Winer at Mike@MikeWinerLaw.com, Mark Touby at Mark.Touby@Fortheworkers.com, Richard W. Ervin, III at RichardErvin@FlAppeal.com, Geoffrey Bichler at Geoff@Bichlerlaw.com, Mark Zientz at Mark.Zientz@MZLaw.com, Kenneth Schwartz at KBS@FlaLaw.com, Christopher Smith at Chris@CJSmithLaw.com, Kimberly Hill at KimberlyHillAppellateLaw@Gmail.com, and Roberto Mendez at RMendez@MendezLawGroup.com.


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CERTIFICATE OF TYPE FACE COMPLIANCE

I hereby certify that this Amicus Curiae Brief of Appellant was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.


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