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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

MARVIN CASTELLANOS,

Petitioner,

CASE NO.: SC13-2082

L.T. Case Nos.:
1D12-3639
OJCC No.: 09-027890GCC

vs.

NEXT DOOR COMPANY/
AMERISURE INSURANCE CO.,

Respondents.

BRIEF OF CENTRAL FLORIDA TRIAL LAWYERS ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Amicus Central Florida Trial Lawyers Association (CFTLA) is a non-profit organization of lawyers dedicated to strengthening and upholding Florida's civil justice system. Exclusively representing individuals, it is dedicated to upholding and defending the Constitution of the United States and the State of Florida. It seeks to advance the science of jurisprudence, excellence in advocacy, and the administration of justice for the public good. Its goal is to educate, support, and advocate on behalf of its membership with programs and information to advance the cause of those who are damaged in person or property and who must seek redress in a court of law. CFTLA promotes fellowship, learning, and networking among trial lawyers throughout Central Florida. It encourages cooperation and camaraderie among its members, upholds the honor and dignity of the legal profession, and pursues the highest standards of ethical conduct and integrity.

Amicus briefs are typically submitted for the purpose of assisting the court in cases of public interest or in aiding the court in the presentation of difficult issues. See Ciba-Geigy Limited v. Fish Peddler, 683 So. 2d 522 (Fla. 4th DCA 1996). As this court is aware, the 2009 amended version of section 440.34(1), with the deletion of the word "reasonable" therefrom, remains virtually the same as its predecessor. Thus, the instant case is not only one of great public interest, it also involves

constitutional issues for which this Court could use the aid of CFTLA.

The brief of amicus supports the arguments made in petitioner's initial brief to the extent they assert that the First District Court of Appeal's rejection of the challenges to the attorney fee schedule provided in section 440.34(1), Florida Statutes (2009), and to section 440.105(3)(c), Florida Statutes (2009), disallowing a JCC from approving a fee in excess of the schedule, is a violation of counsel's basic fundamental right to be rewarded for industry, as provided in Article I, section 2 of the Florida Constitution, and that it brings about a confiscation of the claimant's attorney's time, efforts and talents, thereby requiring that the statute be declared unconstitutional as an unwarranted intrusion into the inherent judicial powers of the courts, contrary to Article II, section 3 of the Florida Constitution, as applied to facts showing that the application of the statutory schedule in Richardson resulted in a total fee of $1,750, equating to an hourly fee of approximately $16.60, based on the reasonable expenditure by claimant's attorney of 105.45 hours.

PRELIMINARY STATEMENT

This brief is accompanied by an appendix containing portions of the record before the First District Court of Appeal in Richardson v. Aramark/Sedgwick CMS, No. 1D13-4138, currently pending in this court as Richardson v. Aramark/Sedgwick CMS, No. SC14-738, pursuant to a certified question from the First District. This

court in Richardson, by order dated 6/20/14, permitted Richardson to file a motion for leave to file an amicus curiae brief in support of the petitioner in Castellanos, together with an appendix with relevant documents from Richardson's trial proceedings and the appellate proceedings in the First District Court of Appeal. The motion for leave was granted by order dated 7/9/14. Marvin Castellanos, petitioner, will be referred to in this brief by his surname, while Cynthia Richardson, the petitioner in Richardson, will be referred to by her surname or as claimant, and the respondents in both cases as the "employer/carrier," or "E/C." References to the appendix will be designated by the letter "App.," followed by the applicable page number in parentheses, and the judge of compensation claims by the letters "JCC."

SUMMARY OF ARGUMENT

It is claimant's position that this court should decide that sections 440.34(1), and 440.105(3)(c), Florida Statutes (2009), are, as applied to the facts in the present case, by restricting claimant's attorney to a maximum statutory fee of no more than $1,750, despite the claimant's attorney's reasonable expenditure of a total of 105.45 hours in successfully prosecuting his client's claims, an unconstitutional violation of his right to be rewarded for industry and the separation of powers provision of the Florida Constitution. Accordingly, this court should declare the statute unconstitutional in its application and remand the case with directions for a fee to

be awarded which is not confiscatory of the attorney's services.

ARGUMENT

ARE SECTIONS 440.34(1), AND 440.105(3)(c), FLORIDA STATUTES (2009), LIMITING CLAIMANT'S COUNSEL TO AN ATTORNEY'S FEE IN THE TOTAL AMOUNT OF $1,750, UNCONSTITUTIONAL AS APPLIED TO FACTS SHOWING THAT COUNSEL REASONABLY EXPENDED 105.45 HOURS IN PREVAILING ON A CLAIM FOR REQUESTED BENEFITS?

Standard of Review: Because the above issue involves a constitutional challenge, it is governed by the *de novo* review standard. See Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).

A. The provisions of sections 440.34(1) and 440.105(3)(c), Florida Statutes (2009), in restricting claimant's attorney to the guideline fee therein, regardless of the amount of time required to successfully prosecute the claims for benefits, are, as applied to the facts in the present case, invalid as a violation of the attorney's basic, fundamental right to be rewarded for industry.

The JCC's order awarded claimant's counsel, Charles H. Leo, Esquire, $1,750 in fees to be paid by the E/C, based on the guideline fee formula provided in section 440.34(1), which the evidence at the fee hearing showed resulted from counsel's services in securing total benefits for claimant in the amount of $10,000, despite evidence that he reasonably expended 105.45 hours in succeeding on the claim, which, at $250-$300 per hour, the fee that David Mallen, claimant's expert witness, opined was reasonable, results in a total fee ranging from $26,362.50 to $31,635

(App. 1).

In addressing the unreasonableness of the fee awarded, Mr. Mallen noted that Mr. Leo has been board-certified in the field of workers' compensation since 1998, was named a Super Lawyer by his peers for several years, was chosen as one of the top 100 trial lawyers in Florida by the National Trial Lawyers, and is AV rated by Martindale Hubbell, all of which should entitle him, in Mr. Mallen's unrebutted opinion, to a much higher hourly rate than that awarded, $16.60 (App. 2).

In making such award, the JCC observed that as an executive branch officer, he lacked inherent judicial power to modify the statutory fee cap, but he had permitted the parties to make a record to support a possible constitutional challenge to the statute (App. 3). The evidence further showed that in addition to the inflexible fee cap based on a percentage of benefits obtained, required by section 440.34(1), section 440.105(3)(c) makes it unlawful for any attorney to receive a fee relating to services rendered in connection with workers' compensation proceedings unless the fee is approved by a JCC.

The fundamental right impacted by the challenged statutes in the present case is the right to be rewarded for industry, which, under Article I, section 2 of the Florida Constitution, is a basic, fundamental right,[1] and a statutory deprivation of

[1] See Art. I, § 2, Fla. Const., stating in pertinent part: "**Basic rights.**—All natural persons, female and male alike, are equal before the law and have inalienable

such right subjects the disputed statute to strict scrutiny. See De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So.2d 204, 206 (Fla. 1989), in which this court, in evaluating the constitutional validity of a statute (section 440.16(7), Florida Statutes (1983)), limiting the amount of death benefits available to certain nonresident alien beneficiaries to $1,000, rather than the $100,000 otherwise afforded resident and other alien beneficiaries, applied a strict scrutiny analysis to the statute because it impacted the deceased worker's right to be rewarded for industry, and, in so doing, the court ruled the statute invalid as it impinged too greatly on such right.

It appears that the primary reason for the court's decision in De Ayala is that "Florida's worker's compensation program was established . . . to see that workers . . . were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents." Id. at 206. By analogy, the link between unreasonable statutory fee caps and the resulting lack of representation for injured workers has long been judicially recognized. As the supreme court observed in Makemson v. Martin County, 491 So.2d 1109, 1112 (Fla. 1986): "[W]e must not lose sight of the fact that it is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus. We find the two inextricably interlinked."

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rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry...." (Emphasis added.)

In State v. J.P., 907 So.2d 1101, 1109 (Fla. 2004), this court explained that a fundamental right is one that "has its source in and is explicitly guaranteed by the federal or Florida Constitution." Once a fundamental right is implicated, the statutes reviewed are subjected to the test of strict scrutiny, meaning a showing must be made by those seeking to uphold the statutes challenged that they are necessary to promote a compelling governmental interest, are narrowly tailored to advance that interest, and accomplish their goal through the use of the least intrusive means. Id. at 1110.

Although reducing the overall cost of the workers' compensation system has been identified as an interest the state may have in enacting a statute under attack, see Jacobson v. Southeast Personnel Leasing, Inc., 113 So. 3d 1042, 1049 (Fla. 1st DCA 2013), the evidence admitted at the hearing in Richardson failed to show that any compelling state interest was achieved by the adoption of the attorney fee cap in 2009. David Mallen, an experienced practicing attorney in the field of workers' compensation, opined that if reducing the cost of the system was in fact the goal of the 2009 amendment to the fee statute, it is highly unlikely the legislature would have passed legislation in 2012, by amending section 627.215, Florida Statutes, to provide that workers' compensation insurers were no longer required to refund to their policyholders excess profits of $200 million, an amount which was more than the total $152,848, 003 paid claimants' attorneys during fiscal year 2011-12 (App. 4).

As a result, the E/C, the party on which the burden was placed to demonstrate a compelling state interest that the adoption of an inflexible statutory fee cap was needed to reduce the cost of the workers' compensation system, failed in its burden.

An article in the Insurance Journal Publication, which was admitted into evidence (App. 5), reported that the $200,000,000 in excess profits refunded was less than one percent of the total premium base (App. 4). If the guideline statutory fee were declared invalid with the result that the amount of claimants' attorneys' fees returned to their 2003 level of $211,045,657,[2] or approximately $60 million more than that paid claimants' attorneys in fiscal year 2011-12, the total of such fees, Mallen believed, would constitute no more than one-half of one percent of the state's total premium base, thus negating any conjecture that a legislative suppression of claimants' attorneys' fees was necessary as a means of containing employers' expenses (App. 6). His reason why excess profits are now greater than before is that since legislative "reforms" were enacted in 2003, insurers have been paying less in benefits; as a result, they succeeded in having legislation passed in 2012 permitting them to keep the profits so acquired (App. 7).

Mallen continued by stating that whatever interest the state might have in

[2]This amount is, as reported in the DOAH statistics admitted into evidence, approximately 49 percent of the total amount of fees ($430,705,423) paid to both claimants' and E/Cs' attorneys for the fiscal year 2003-04 (App. 13).

protecting the insurance industry's profits did not outweigh the claimants' attorneys' fundamental right to be rewarded for industry (App. 8). He considered that the restriction of the amount of fees awarded to the statutory guideline formula frequently results in injured workers being unable to find attorneys willing to handle their claims, because of the relatively small amount of benefits in controversy, such as those in the present case, causing such benefits to become uncollectible, as demonstrated by DOAH statistics showing the number of PFB filings were down by over 60 percent during the past 10 years (App. 9). For example, the total number of PFBs filed in 2002-03 was 150,801, compared with the total of 61,354 during the fiscal year 2011-012 (App. 10). On cross-examination, Mallen answered that in his opinion the sole reason for the drastic decline in the number of PFB filings was the legislative implementation of fee caps in 2003 and 2009 (App. 11).

As for statistical evidence of the amounts of attorneys' fees paid, the Division of Administrative Hearing's data disclose that of a total of $416,870,962 paid to both claimants' and defense attorneys for the fiscal year 2011-12, $152,848,003 was paid claimants' attorneys while the remaining $264,022,959 to defense counsel, or a percentage of approximately 37 to 63 percent respectively (App. 12). In contrast, the amount of fees paid in fiscal year 2002-03, before the effective date of the legislative amendments enacted by chapter 2003-412, was $430,705,423, of which nearly 49

percent consisted of fees paid to claimants' attorneys with the remaining 51 percent to carriers' counsel (App. 13). Mallen continued that, as applied to the present case, it would be very difficult for an injured employee to obtain an attorney to process a claim involving the expenditure of approximately 100 hours, which, if he or she were successful, would result in an award of the statutory fee of only $1,750, with much of such time involved in litigating against multiple defensive delays and litigation tactics that are endemic to the system (App. 14). In particular, Mallen pointed out that the practice of the E/Cs' counsel fighting a war of attrition in contesting claims has become so prevalent that it has resulted in, as he described it, the "Keeto" effect,[3] rendering the unrepresented claimant "helpless as a turtle on its back" (App. 14).

In comparison, the analysis this court applied in the very recent case of Estate of McCall v. U.S., 134 So.3d 894 (Fla. 2014) (per Lewis, J., with one justice concurring and three justices concurring in result), in holding the statutory cap (section 766.118) on wrongful death noneconomic damages recoverable in medical malpractice actions violates the right to equal protection under the Florida Constitution, is instructive. There the court noted that a proper equal protection analysis requires the court to determine (1) whether the challenged statute serves a

[3] See Davis v. Keeto, Inc., 463 So. 2d 368, 371 (Fla. 1st DCA 1985), in which the First District noted that if claimant did not have the assistance of counsel, the all too often result is that he or she "'would have been helpless as a turtle on its back'" (quoting Neylon v. Ford Motor Company, 27 N.J.Super. 511, 99 A.2d 665 (1953)).

legitimate governmental purpose, and (2) whether it is reasonable for the legislature to believe that the challenged classification would promote that purpose. Id. at 906. This court determined that the legislative findings "as to the existence of a medical malpractice crisis are not fully supported by available data. Instead, the alleged interest of health care being unavailable is completely undermined by authoritative government reports." Id. The court concluded its equal protection analysis with the following pertinent observations:

> [T]he cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members. Moreover, it has never been demonstrated that there was a proper predicate for imposing the burden of supporting the Florida legislative scheme upon the shoulders of the persons and families who have been most severely injured and died as a result of medical negligence. Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications.

Id. at 914-15.

As the E/C presented no rebuttal evidence, Mr. Mallen's opinion testimony was uncontradicted. Under the circumstances, claimant submits the statutes challenged fail the test of strict scrutiny and should be held invalid as applied to the facts.

> B. In the alternative, a rigid application of the fee schedule provided in section 440.34(1), Florida Statutes (2009), and the provision in section 440.105(3)(c), Florida Statutes (2009), forbidding a JCC to approve a fee in excess of the schedule, violates the separation of powers doctrine,

requiring that the statutes be declared unconstitutional as applied.

In Makemson v. Martin County, 491 So. 2d 1109, 1115 (Fla. 1986), this court observed

> that it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents.

(Emphasis added.) In Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So.3d 261, 271-72 (Fla. 2013), this court recently discussed the inherent judicial doctrine in the following terms:

> The parties also contend that "[the] courts have authority to do things that are absolutely essential to the performance of their judicial functions." Rose v. Palm Beach Cnty., 361 So.2d 135, 137 (Fla.1978). This authority emanates from the courts' constitutional powers set forth in the Florida Constitution. See art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided therein."); art. V, § 1, Fla. Const. ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts."). This doctrine of inherent judicial power "exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights." Maas v. Olive, 992 So.2d 196, 204 (Fla. 2008) (Olive II) (quoting Rose, 361 So.2d at 137).

Although it might be argued that the safe-guarding of a criminal defendant's Sixth Amendment right to counsel is at the core of the inherent judicial doctrine, it

is clear from the above comments that it has not been limited to such function. In fact, an examination of pertinent Florida case law clearly demonstrates the inherent judicial doctrine has not been confined to criminal cases only, but to parental termination and dependency cases as well. As an example, In the Interest of D.B., 385 So. 2d 83 (Fla. 1980), and Board of County Com'rs of Hillsborough County v. Scruggs, 545 So. 2d 910 (Fla. 2d DCA 1989), the courts noted that while there was no fundamental, constitutional right to counsel in dependency proceedings, the right to same might arise through the application of the Due Process of Law Clause, depending on the nature or complexity of the proceeding required by statute.

Although the JCC below correctly observed that he lacked the inherent judicial power to modify the statutory fee cap, this court, in exercising its de novo review authority as an Article V court for the purpose of addressing a constitutional challenge, does of course possess such power, which, in fact, one out-of-state case, the Minnesota Supreme Court, applied in striking down a fee cap enacted in a workers' compensation statute. In Irwin v. Sturdyk's Liquor, 599 N.W. 2d 132 (Minn. 1999), the court noted that a finding had been made at the trial level, which it approved, that the statutory fees awarded failed to reasonably compensate claimant's attorney. As a result, the court, in applying a separation of powers analysis, decided that the fee cap was unconstitutional as applied, stating:

> Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees. This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers. . . ." Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional.

Id. at 142. See also In re The Florida Bar, 316 So.2d 45, 47 (Fla. 1975) ("The authority for each branch to adopt an ethical code has always been within the inherent authority of the respective branches of government. . . . The judicial branch has both a code of conduct for the judiciary and a code of professional responsibility for lawyers. . . .").

In this regard, amicus calls to the court's attention Judge Lehan's dissent in White v. Board of County Commissioners of Pinellas County, 524 So. 2d 428, 432 (Fla. 2d DCA 1988), approved, 537 So. 2d 1376, 1378 (Fla. 1989), which noted that "[t]he invocation of the [inherent judicial] doctrine is most compelling when the judicial function at issue is the safeguarding of fundamental rights" (emphasis added). As Judge Lehan explained: "Makemson relied upon the inherent powers doctrine. Under that doctrine, the courts not only have the inherent power to regulate the practice of law, but also have the power to prohibit legislative regulation of the practice of law." Id. at 431.

It is also interesting to note that in reaching its decision in Irwin v. Sturdyk's Liquor, the Minnesota court specifically referred to Makemson, observing that while the Florida court had decided that the statutory maximums as applied interfered with the accused's Sixth Amendment right to counsel, it further noted that the statutory restrictions were "a violation of the Florida Constitution's separation of powers provision." Id.

Somewhat similar to the above cases, the Supreme Court in United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990), recognized that a contingency fee cap may impact a person's federal due process rights if the statutory scheme affects the person's ability to obtain counsel.. The question before the Court was the validity of the Department of Labor's administration of the Black Lung Benefits Act of 1972 (30 U.S.C. § 901, et seq.), which prohibits the attorney's acceptance of fees for the representation of claimants, unless such fees are approved by the Department or a court. Attorney Triplett violated the Act and contended that the Secretary of Labor's manner of implementing the fee restriction violated the Due Process Clause of the Fifth Amendment because the delay in payment under the Act's regulatory scheme rendered qualified attorneys unavailable, and thereby deprived claimants of legal assistance in the prosecution of their claims. Although the challenge as applied was rejected because Triplett had failed to show that the statutory scheme made attorneys

unavailable to prospective clients, it nevertheless recognized that Triplett had standing to raise the challenge because of his claim that enforcement of the fee scheme against him deprived his clients of their due process right to obtain legal representation. Id. at 721

Unlike the facts in Triplett, the record in the present case as above recited clearly supports the unrebutted opinion testimony of claimant's expert witness stating that the application of the statutory fee schedule has seriously impeded injured workers from obtaining counsel to represent them in the handling of their claims.

While this court's opinion in Murray v. Mariner Health and Ace USA, 994 So. 2d 1051 (Fla. 2008), did not specifically address the constitutional issues raised as to the fee statute's validity, but instead interpreted the statute in a manner avoiding a ruling on the constitutional questions, it strongly intimated that if it were to decide such issues, it most likely would hold the statute unconstitutional in its application. See Murray at 1053: "'We are also obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional'" (quoting State v. Giorgetti, 868 So. 2d 512, 518 (Fla. 2004)), and at 1057: "'Wherever possible, statutes should be construed in such a manner so as to avoid an unconstitutional result.' State v. Jefferson, 758 So.2d 661, 664 (Fla.2000)."

The above conclusion is also supported by the history of the litigation

involving the statutory fee cap provided in section 27.7002 for postconviction death penalty proceedings, which was amended shortly after this court decided Olive v. Maas, 811 So. 2d 644, 654 (Fla. 2002) (Olive I), holding that "trial courts are authorized to grant fees in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collateral cases." Thereafter Maas v. Olive, 992 So. 2d 196 (Fla. 2008) (Olive II), was decided only 28 days before this court's decision in Murray, and it, in addressing the state's argument that the rationale of Olive I was no longer effective because the legislature had enacted section 27.7002 for the purpose of clarifying its intent that the fee caps could not be exceeded under any circumstances, answered:

> While this may have been the Legislature's intent, such an interpretation of the statute would render it unconstitutional. . . . [T]he decision in Olive I rests on the courts' inherent power to ensure adequate representation for death row inmates in postconviction challenges. "[The] courts have authority to do things that are absolutely essential to the performance of their judicial functions." Rose v. Palm Beach County, 361 So.2d 135, 137 (Fla.1978). This authority emanates from the courts' constitutional powers in the Florida Constitution. See art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided therein."); art. V, § 1, Fla. Const. ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts.").

Id. at 203-204.

In the present case, claimant presented abundant evidence linking the statutory

fee caps challenged with the difficulty injured workers have been confronted over the past 10 years in securing counsel to represent them because of the inflexible application of the legislative fee schedule. The E/C, as the party defending the statute's validity, was required to present evidence of a compelling governmental interest for the statute's enactment, and, if it overcame that hurdle, to show that the statute was narrowly tailored to advance such interest, and that it accomplished its goal through the use of the least intrusive means; however, no such evidence was presented.

In contrast, claimant presented evidence showing that the legislative goal of reducing employers' workers' compensation insurance premiums could be achieved by means other than the draconian measure of inflexible fee caps, by, for example, enacting legislation requiring insurers once again to reduce the expense of their insureds' premiums by refunding to them the amount of excess profits retained. Although no burden was imposed on claimant to submit the absence of evidence affecting a compelling state interest, she did so through the evidence offered and admitted.

As this court is well aware, the Florida Legislature has by statute extended prevailing-party fees at the E/Cs' expense to claimants' attorneys, as specified in section 440.34(3)(a)-(d), Florida Statutes (2009). Under such circumstances, the

long recognized rule is that "[o]nce a state accords its citizens a right, it must accord it to all without invidious discrimination or run afoul of the equal protection clause. Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir.), cert. denied, 444 U.S. 943, 100 S.Ct. 299, 62 L.Ed.2d 310 (1979). Florida Dept. of Transp. v. E.T. Legg & Co., 472 So.2d 1336, 1337-1338 (Fla. 4th DCA 1985). Accord Rini v. State, Dept. of Health & Rehabilitative Serv., 496 So.2d 178, 180 (Fla. 1st DCA 1986). Based on the evidence presented before the JCC in Richardson, it can hardly be said that a statute such as section 440.34(1), which inflexibly limits claimant's attorney to an hourly fee of $16.60, is non-discriminatory or non-confiscatory of his time, energy, and talents.

It should be further noted that claimant's evidence showed what should have been a relatively simple case to handle, involving the authorization of another pain management physician. The claim however consumed 105-attorney hours, most of which resulted from "multiple . . . obstacles and delays in the pretrial on behalf of the Employer/Carrier" (App. 15). Claimant's expert, David Mallen, in reviewing the record, recited numerous defensive tactics, such as raising the fraud defense, the refusal to stipulate to the admission of medical records, while requiring the attendance of a records custodian for their admission, and the refusal to admit IME reports without the taking of the physician's depositions, etc., as typical litigation ploys which have the effect of prolonging the case and substantially driving up its

costs, with the consequence that more and more claimants' attorneys, faced with the prospect of minimal fees if they are eventually able to succeed, are leaving the practice of workers' compensation, causing more and more injured workers to be unrepresented in the prosecution of their claims (App. 16).

CONCLUSION

For the reasons stated, this court should hold sections 440.34(1), and 440.105(3)(c), Florida Statutes (2009), invalid as applied to facts showing that the $1,750 fee awarded pursuant to those statutes violates counsel's constitutional right to be rewarded for industry and the inherent judicial powers of the courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by electronic mail on this 16th day of July 2014, to Richard A. Sicking, Esq.(sickingpa@aol.com), co-counsel for petitioner, 1313 Ponce De Leon Blvd, #300, Coral Gables, FL 33134; Michael J. Winer, Esq.(mike@mikewinerlaw.com), Law Office of Michael J. Winer, P.A., co-counsel for petitioner, 110 North 11th Street, 2nd Floor, Tampa, FL 33602; Mark A. Touby, Esq. (mark.touby@tgclegal.com), Touby, Grindal & Chait, P.L., co-counsel for petitioner, 2030 South Douglas Road, Suite 217, Coral Gables, FL 33134; David P. Draigh, Esq. (ddraigh@whitecase.com), White & Case L L P, counsel for respondents Next Door Company/Amerisure Insurance Co., 200 S Biscayne Blvd Ste 4900, Miami, Florida 33131; James Wyman, Esq., jwyman@hinshawlaw.com, Dean, Hinshaw & Culbertson LLP, attorney for Respondents Aramark and Sedgwick CMS, 2525 Ponce de Leon Blvd, 4th Floor, Coral Gables, FL 33134; Christopher Smith, Esq. (chris@cjsmithlaw.com), 2805 W. Busch Blvd., Suite 219, Tampa, FL 33618, amicus curiae for the Workers' Compensation Section of The Florida Bar; Kimberly A. Hill, Esq. (kimberlyhillappellatelaw@gmail.com), 821 SE 7th St, Fort Lauderdale, Florida 33301, amicus curiae for Florida Workers' Compensation Advocates; Mark Lawrence Zientz, Esq. (mark.zientz@mzlaw.com), Two Datran Ctr, 9130 S Dadeland

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Richard W Tuin

Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

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

Richard W Morin
Attorney

APPENDIX

TABLE OF CONTENTS

Extracted from the Record of Proceedings,
Cynthia Richardson v. Aramark and Sedgwick CMS, 1DCA No. 1D13-4138

APPENDIX ITEM 1

treat the claimant.

3. The Employer/Carrier denied fee entitlement up through a Motion Hearing before this Court. A reasonable attorney fee for the Claimant's attorney, penalties and interest on all past due payments of compensation and costs of the proceedings. Attached as Exhibit "C" is a listing of taxable costs incurred by the Claimant's attorney in pursuit of this claim for the time period of 9/20/12-5/20/13 totaling $2,469.15.

4. Pursuant to §440.34, *Murray v. Mariners Health*, 994 So.2d 1051, (Fla.2008), and the email dated 4/22/13, the Employer/Carrier is responsible for reasonable attorney's fees. In the present csae, it required 105.45 hours to pursue the benefits. The claimant's attorney contends that a reasonable fee is due pursuant to The Florida Supreme Court's understanding that reasonable fees must be part of the equation for claimant to pursue benefits.

5. Claimant's attorney has expended 105.45 hours in attorney time in his successful efforts to secure benefits for the Claimant. A reasonable hourly fee would be $250-$300 per hour, for a total fee of $26,362.50-$31,635.00. A copy of Claimant's attorney's Affidavit of Time Spent is attached as Exhibit "D".

6. Pursuant to §440.34(3)(b),*Murray v. Mariners Health*, 994 So.2d 1051, (Fla.2008), and Florida Statutes (1991), Claimant's attorney is entitled to a reasonable attorney fee to be paid by the Employer/Carrier.

7. Pursuant to the factors enumerated in §440.34(1), *Lee Engineering & Construction Company v. Fellows*, 209 So.2d 454, 458 (Fla. 1968), and *Murray v. Mariners Health*, 994 So.2d 1051, (Fla.2008), the reasonable attorney fee due the Claimant's attorney by the Employer/Carrier is subject to enhancement. Said factors include the following:

a. **The time and labor required, the novelty and difficulty of the questions involved, and**

APPENDIX ITEM 2

350 an hour for someone with your -- um, qualifications, experience, and expertise.

Q Were you aware the amount on comp (INDISCERNIBLE) the benefits result to the claimant that's been stipulated to be 10,000?

A I am. Before we move onto that, do you --

Q And the guideline fee being $1,750?

A Yeah. Do you -- before we move on, do you want me to -- uh, go over what the rate would be -- what I think the rate would be for someone situated as -- in your --

Q We'll get down there, to H.

A Okay. Okay.

Q (Laughs.) What -- um.

A So, what was the question?

Q The nature and length of the professional relationship with the claimant?

A I think it's a significant factor.

Q And the -- the experience, reputation, and ability of the lawyer or lawyers performing the services?

A Significant factor.

Q Are you aware I'm AV rated --

A Yes.

Q -- by Martindale-Hubbell? Are you aware I'm board certified since 1998 in workers' compensation?

A I am, and recently recertified, I think.

Q I think I -- and what's -- what's the significance of board certification in workers' compensation?

A Um, well, it would entitle you to a higher hourly rate -- um, if the Court were -- if any court were to award a rate. And it -- uh, distinguishes you -- um, from the majority of lawyers -- uh, as having expertise in the field certified by the Florida Bar.

Q Are you aware I've also been chosen several years in a row as a Florida super lawyer? (INDISCERNIBLE) law and politics?

A I'm aware of that.

Q (Laughs.) Are you aware -- um, recently I've been named a top 100 trial lawyer by the national trial lawyers?

A Uh.

Q I don't know if my mom has (INDISCERNIBLE) on those, but --

A Can I say painfully aware of that, Judge? (Laughs.)

Q (Laughs.)

THE JUDGE: (Laughs.)

BY MR. LEO:

Q There and -- uh, you know, in light of the -- the experience -- are you -- so you're aware of my experience -- uh, in workers' compensation?

A Absolutely.

Q Uh, would you agree -- uh -- or what would you agree

would be a reasonable hourly rate for someone of my qualifications?

A Someone who's board certified, AV rated, a super lawyer at -- and as well as the other things, with -- uh, at least 21 years of experience -- um -- uh, representing injured workers, has done defense -- um, has done claimant's work -- um, -- uh, would be at -- at the low end at -- a reasonable hourly rate would be $250 an hour -- uh, probably depending on the venue, up to -- uh, $350 an hour depending on the venue, but in that range.

Q Uh, is -- uh, the contention or certainty of a fee a positive factor?

A A significantly positive factor. And this is a completely contingent case. No recovery, no fee.

Q And how is that different than defense work?

A Uh, defense -- uh, attorneys are paid -- uh, regardless of the result. Um, for example, if a defense lawyer says I'm going to object to the motion to admit authorized medical records which the statute says shall be admitted and you go to a hearing, you may get nothing for going to that hearing. The defense lawyer will get the same amount win or lose. They will get paid by the hour.

Q Based on -- uh, our -- my position of 90 hours of work, and your review of the file, what do you believe a -- a reasonable range for my fee would be if hours were awarded for

APPENDIX ITEM 3

in those states). See Joseph v. Oliphant Roofing Co., 711 A.2d 805, at 810-11 (Del. Super. 1997); Irwin v. Surdyk's Liquor, 599 N.W. 132 (Minn. 1999).

However, for the same reasons discussed in O'Shea v. Progress Energy, OJCC Case No. 05-000700TWS (2007), which is incorporated by reference into this order, I find that as an executive branch officer I do not have inherent judicial power to modify the fee cap contained in Section 440.34(3), Fla. Stat. (2009). Consequently, while I have permitted the parties to make a record to support a possible constitutional challenge to the statute, I am constrained to order the E/C to pay the statutory guideline attorney's fee of $1,750 in this case.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that:

1. The E/C is ordered to pay claimant's counsel $1,750 in attorney's fees.

2. The E/C is ordered to reimburse claimant costs in the amount of $1,250.

DONE and ORDERED in Orlando, Orange County, Florida.

This 1st day of August, 2013

Thomas W. Sculco

Thomas W. Sculco
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Orlando District Office
www.jcc.state.fl.us

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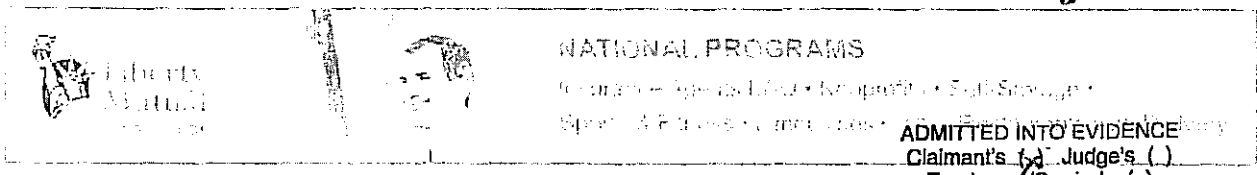

OBJ. HEARSAY, AUTHENTICATION, RELEVANCE. OVERRULED — ADMISSION BY EXPERT

INSURANCE JOURNAL

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Florida Revises Workers' Comp Certificates, Excess Profits, Premium Audit Laws

Florida's governor has signed workers' compensation legislation streamlining the workers' compensation certificate process, eliminating mandatory premium audits, and discontinuing refunds for insurers with excess profits.

Gov. Rick Scott signed into law HB 941, sponsored by Rep. Doug Holder, which made a number of noncontroversial changes including making the certificate of exemption process easier and clarifying the definition of a corporate officer. For the first time, business owners and officers will be able to file for an exemption electronically.

The new law clarifies that "corporate officers" include members of limited liability companies that own at least a 10 percent stake in the company. The LLC members would be considered employees, but may choose to be exempt from the workers' compensation law. Starting next January 1, all exemptions will be valid for two years.

Workers' compensation insurers will no longer be subject to the state's excess profit law, which had required them to refund money to policyholders if their underwriting gains were greater than their anticipated profit by more than five percent over the three preceding calendar years. State regulators reported that workers' comp insurers paid out only about $200 million in excess profits since 2003, which is less than one percent of the state's total premium base.

Premium audits will now only apply to workers' compensation insurers with more than $200 million in surplus. Audits may be required by policyholders and state regulators, but may no longer be required as part of a policy.

Workers' compensation companies and other companies writing commercial lines of business can now also transfer policies to a different Florida-licensed subsidiary. The transfers would be considered a policy renewal. Currently, to conduct such a transfer, the policy must be nonrenewed and then rewritten by the other company. The provision does not apply to residential property insurers.

The new law changes take effect July 1.

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APPENDIX ITEM 5

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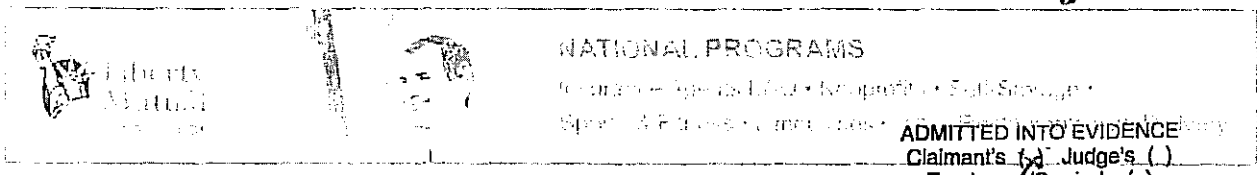

OBJ. HEARSAY, AUTHENTICATION, RELEVANCE. OVERRULED — ADMISSION BY EXPERT

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The following is a post by David DePaolo on linkedin

Tuesday, November 27, 2012

Where Claimant Attorneys Go, So Too Will Defense

Whether it's good or bad, the bottom line is that when a state wants to really control medical and indemnity costs in its workers' compensation system, the state will limit the participation of attorneys, and the way to do that is to limit the fees paid to attorneys representing injured workers.

The State of Florida has proven this point succinctly, as reflected in the state Office of Judges of Compensation Claims latest annual report.

Florida in 2003 passed landmark legislation to reel in its workers' compensation costs, a system that had been spiraling out of control with double digit rates of inflation well ahead of the pace of most other states. When challenged, the provisions of the reform legislation limiting claimant attorney fees was edited by the legislature by simply excising the word "reasonable" from the attorney fee provisions, in response to the Supreme Court's interpretation of the statute.

Since then, injured workers' petitions for benefits have dramatically declined to 61,354 petitions filed during fiscal year 2011-2012 - a 5.1% decrease over the previous fiscal year. This compares to 127,611 petitions for benefits filed during fiscal year 2003-2004.

In addition, mediations declined to 16,881 in fiscal year 2011-2012 - a 5.7% reduction over the previous fiscal year.

This same phenomenon was experienced in Texas as well, where the big reform bill in that state, HB 7, severely constricted attorney fees. Lawyers went elsewhere for income and claimants seeking adjudication over benefit disputes declined dramatically.

However, if lawyers just change sides then their income isn't so drastically affected.

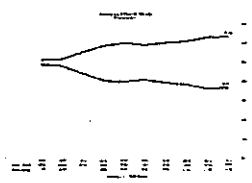
Here is the raw data of total attorney fee expenses in the Florida system since 2001, and proportion of those fees going to claimant lawyers and defense lawyers:

Fiscal Year	Fees	Applicant	Defense
02-03	430,705,423$	48.9%	51.1%
03-04	446,472,919$	48.2%	51.8%

04-05	475,215,605$	44.4%	55.6%
05-06	507,781,830$	41.0%	59.0%
06-07	478,640,476$	40.0%	60.1%
07-08	459,202,630$	41.1%	58.9%
08-09	459,324,903$	39.6%	60.5%
09-10	456,566,882$	38.8%	61.2%
10-11	428,036,787$	36.7%	63.3%
11-12	416,870,962$	36.7%	63.3%

As total fees in the system grew, so did the proportion going to the defense bar. Then, as fees proportionally declined for claimant attorneys, overall total attorney fee expenses declined, but the ratio going to the defense bar remained.

Here's a neat graph that consultant Bill Cobb did based on these numbers that more easilydisplays the disparity in this costs item:



Chief Deputy David Langham told WorkCompCentral Monday that payments to claimants' attorneys have declined by 42.05% during the past nine years, while defense

fees have declined by 4.17% adjusted for inflation.

Langham said the change in part tracks an overall decline in the number of petitions for benefits filed since the 2003 reforms. What isn't said is that the number of petitions filed since 2003 has declined because attorneys can't make any money doing so.

"I'm told anecdotally that lawyers are turning away clients who have cases that the lawyer perceives may have some value to the injured worker but don't have monetary value worth the efforts of a workers' compensation attorney," Langham said. "That could also be driving the frequency of the petitions that are being filed."

Curiously, then, one might expect a similar contraction in defense attorney fees, but this doesn't appear to be the case. While defense fees overall have gone down, as can be seen by the graph, proportionally spending on defense attorneys has increased when compared to the frequency of petitions for benefits filed.

At the peak in fiscal 2005-06 total attorney fees were almost $508 million. 59% of that went to defense lawyers, or $299.72 million. The gross number of petitions filed during this period was 90,991, which means that carriers and employers spent about $3,294 per claim.

This last fiscal year, 2011-12, total fees were nearly $417 million of which 63% went to defense lawyers, or the sum of $262.71 million. Gross petitions filed for this period totaled 61,354, so carriers and employers spent $4,282 per claim.

Either carriers and employers are failing to realize increased efficiencies and economies of scale in declining rates of workers' compensation litigation, or they are working harder to deny claims (perhaps legitimate claims), or they are getting fleeced by the defense bar.

If you're a claimant in Florida, the prevailing wisdom is to just accept what benefits are provided voluntarily unless there is some gross underpayment or desecration of benefits.

James Fee, president of Florida's Injured Workers' Advocates, a claimant's attorneys' group, told WorkCompCentral, "There's no question that in a system that's designed to be self-executing, there's an incredible amount of money being spent against the injured worker to defend these claims. It's unfortunate with the fee restraints that have been imposed on injured workers."

Defense lawyers, don't get smug. The writing's on the wall.

Every year I go to Orlando in August to attend the Workers' Compensation Institute's annual conference. The conference is legendary for defense firm hosted suite parties that go on into the early morning hours with free flowing alcohol, food, and other expensive niceties.

Eventually these will cease. When claims go down over 50%, but attorney fees to defend claims go up 23%, carriers and employers will take notice, and the sanctity of the defense bar will also be subject to the basic rules of finance and economy.

COST OF LIVING ALLOWANCE APPLIED TO

ATTORNEY'S FEES

PERIOD	NAWW	MAX	MIN	CL%	HOURLY FEES		
10/1/92-9/30/93	$360.57	$721.14	$180.29	3.03	**$200.00**	**$225.00**	**$250.00**
10/1/93-9/30/94	$369.15	$738.30	$184.58	2.38	$204.76	$230.36	$255.95
10/1/94-9/30/95	$380.46	$760.92	$190.23	3.06	$211.03	$237.40	$263.78
10/1/95-9/30/96	$391.22	$782.44	$195.61	2.83	$217.00	$244.12	$271.25
10/1/96-9/30/97	$400.53	$801.06	$200.27	2.38	$222.16	$249.93	$277.70
10/1/97-9/30/98	$417.87	$835.74	$208.94	4.33	$231.78	$260.75	$289.72
10/1/98-9/30/99	$435.88	$871.76	$217.94	4.31	$241.77	$272.00	$302.21
10/1/99-9/30/00	$450.64	$901.28	$225.32	3.39	$249.97	$281.21	$312.46
10/1/00-9/30/01	$466.91	$933.82	$233.46	3.61	$259.00	$291.37	$323.74
10/1/01-9/30/02	$483.04	$966.08	$241.52	3.45	$267.93	$301.42	$334.90
10/1/02-9/30/03	$498.27	$996.54	$249.14	3.15	$276.37	$310.91	$345.46
10/1/03-9/30/04	$515.39	$1,030.78	$257.70	3.44	$285.88	$321.60	$357.34
10/1/04-9/30/05	$523.58	$1,047.16	$261.79	1.59	$290.42	$326.72	$363.02
10/1/05-9/30/06	$536.82	$1,073.64	$268.41	2.53	$297.77	$334.99	$372.20
10/1/06-9/30/07	$557.22	$1,114.44	$278.61	3.80	$309.08	$347.72	$386.35
10/1/07-9/30/08	$580.18	$1,160.36	$290.09	4.12	$321.82	$362.04	$402.27
10/1/08-9/30/09	$600.31	$1,200.62	$300.16	3.47	$332.98	$374.60	$416.23

Scruggs 2nd DCA adopted

10/1/95-9/30/96	$391.22	$782.44	$195.61	2.83	**$225.00**	**$250.00**
10/1/96-9/30/97	$400.53	$801.06	$200.27	2.38	$230.36	$255.95
10/1/97-9/30/98	$417.87	$835.74	$208.94	4.33	$240.33	$267.03
10/1/98-9/30/99	$435.88	$871.76	$217.94	4.31	$250.69	$278.54
10/1/99-9/30/00	$450.64	$901.28	$225.32	3.39	$259.18	$287.98
10/1/00-9/30/01	$466.91	$933.82	$233.46	3.61	$268.54	$298.38
10/1/01-9/30/02	$483.04	$966.08	$241.52	3.45	$277.81	$308.67
10/1/02-9/30/03	$498.27	$996.54	$249.14	3.15	$286.56	$318.40
10/1/03-9/30/04	$515.39	$1,030.78	$257.70	3.44	$296.42	$329.35
10/1/04-9/30/05	$523.58	$1,047.16	$261.79	1.59	$301.13	$334.59
10/1/05-9/30/06	$536.82	$1,073.64	$268.41	2.53	$308.75	$343.05
10/1/06-9/30/07	$557.22	$1,114.44	$278.61	3.80	$320.48	$359.09
10/1/07-9/30/08	$580.18	$1,160.36	$290.09	4.12	$333.68	$370.76
10/1/08-9/30/09	$600.31	$1,200.62	$300.16	3.47	$345.26	$383.62

10/1/00-9/30/01	$466.91	$933.82	$233.46	3.61	**$225.00**	**$250.00**	**$275.00**
10/1/01-9/30/02	$483.04	$966.08	$241.52	3.45	$232.76	$258.63	$284.49
10/1/02-9/30/03	$498.27	$996.54	$249.14	3.15	$240.09	$266.77	$293.45
10/1/03-9/30/04	$515.39	$1,030.78	$257.70	3.44	$248.35	$275.95	$303.54
10/1/04-9/30/05	$523.58	$1,047.16	$261.79	1.59	$252.30	$280.34	$308.37
10/1/05-9/30/06	$536.82	$1,073.64	$268.41	2.53	$258.69	$287.43	$316.17
10/1/06-9/30/07	$557.22	$1,114.44	$278.61	3.80	$268.52	$298.35	$328.17
10/1/07-9/30/08	$580.18	$1,160.36	$290.09	4.12	$279.58	$310.64	$341.71
10/1/08-9/30/09	$600.31	$1,200.62	$300.16	3.47	$289.28	$321.42	$353.56

SOUTH FLORIDA BILLING SURVEY

A guide to our methodology

The hourly billing rates in the accompanying charts were culled from a variety of sources, including fee petitions filed in federal and state courts since November 2009. In addition, the Daily Business Review examined bills submitted to state agencies by law firms.

In some cases, the listed rates reflect what law firms reported they charge. The listed rates do not necessarily indicate what attorneys received for their work. The figures show only what lawyers and law firms sought for a specific case. Rates may have increased since the bills were compiled.

The listed rates are for bankruptcy, commercial litigation and other types of civil legal services. Rates for criminal defense attorneys were not collected.

The charts are not meant to be a complete survey of hourly rates for all firms and attorneys in South Florida. The Daily Business Review cannot say whether these are typical rates for the individual lawyers and firms that are listed nor what kind of fee arrangements these lawyers and firms make. For instance, it is common in fraud cases for court-appointed receivers to work for reduced hourly rates.

The data in the main chart are organized by law firm and arranged in alphabetical order. The chart shows rates for individual partners and ranges for associates and paraprofessionals. If a partner had offered more than one rate, the highest rate was used. In their fee petitions, some law firms disclose a range of hourly rates for all attorneys in the firm. But oth firms don't. For those firms, the listed ranges represents th highest and lowest rate that could be found in court documents for that firm. Therefore, rate ranges for some firms may be incomplete.

Firms / Professionals	Location	Hourly rates
Adorn [illegible]s		
Partn	Coral Gables	$350-$475
Associ.		$190-$300
Paraprofessionals		$145
Akerman Senterfitt		
Senior partners		$315-$760
Partners*		
Goldberg, Michael	Miami	$585
Wilson, J Everett	Miami	$475
Fleiberg, James	Miami	$450
Freitag, Dean M	Miami	$450
Marks, D. Brett	Fort Lauderdale	$420
Of counsel		$300-$925
Gennett, M.P.	Miami	$420
Gelfand, Joanne	Fort Lauderdale	$400
Associates		$220-$420
Paraprofessionals		$95-$235
Arnstein & Lehr		
Partners		
Chatz, James A.	Miami	$500
Hudson, Phillip M.	Miami	$475
Platts, Hilda	Miami	$325
Associates		$225
Becker & Poliakoff**		
Partners		$325-$500
Gary Rosen	Fort Lauderdale	$475
Steven Le	Fort Lauderdale	$450
Associa		$175-$335
Berger Singerman		
Partners		
Lichtman, Charles H.	Fort Lauderdale	$560
Singerman, Paul S.	Fort Lauderdale	$560
Berger, James L.	Fort Lauderdale	$535
Cloyd, Leslie G.	Fort Lauderdale	$525
Scruggs, Frank P.	Fort Lauderdale	$525
Spector, Arthur J.	Boca Raton	$525

Firms / Professionals	Location	Hourly rates
Kegerreis, Sharon	Miami	$500
Polish, Sheldon	Fort Lauderdale	$495
Jovanovich, Nick	Fort Lauderdale	$475
Shuster, Marc	Fort Lauderdale	$365
Of counsel		
Talenfeld, Deborah	Miami	$425
Moen, Stephanie	Fort Lauderdale	$365
Associates		$195-$425
Paraprofessional		$75-$195
Berman Rennert Vogel Mandler		
Partners		
Berman, Neil	Miami	$500
Rennert, Charles J.	Miami	$450
Associates		$275
Bilzin Sumberg Baena Price & Axelrod		
Partners		
Axelrod, Alan	Miami	$675
Baena, Scott	Miami	$675
Aronson, Daniel	Miami	$650
Trench, David W.	Miami	$580
Siegel, Robert	Miami	$575
Kretzer, Michael	Miami	$540
Widom, Mitchell	Miami	$530
Chassen, Jon	Miami	$525
Mora, Mindy A.	Miami	$520
Sakalo, Jay M.	Miami	$495
Kramer, Matthew I.	Miami	$425
Kaplan, Seth	Miami	$415
Jones, Jason Z.	Miami	$400
Associates		$290-$385
Paraprofessionals		$95-$215
Buchanan Ingersoll Rooney		
Partners		
Booken, Bruce E.	Aventura	$540

Firms / Professionals	Location	Hourly rates
Kessler, Jack J.	Miami	$520
Schermer, Richard	Miami	$445
Associate		$210
Paraprofessionals		$190-$220
Colson Hicks Eidson**		
Partners		
Colson, Dean	Coral Gables	$700
Martinez, Roberto	Coral Gables	$700
Ehrenstein Charbonneau Calderin		
Partners		
Ehrenstein, Michael	Miami	$425
Calderin, Jacqueline	Miami	$370
Associates		$165-$310
Paraprofessionals		$90-$115
Furr & Cohen		
Partners		
Furr, Robert C.	Boca Raton	$500
Goldstein, Alvin S.	Boca Raton	$425
Barnat, Marc P.	Boca Raton	$375
Genovese Joblove & Battista		
Partners		
Genovese, John H.	Miami	$595
Battista, Paul J.	Miami	$560
Cimo, David C.	Miami	$515
Van Vliet, Theresa	Fort Lauderdale	$495
Day, Allison R.	Miami	$425
Game, Greg M.	Miami	$450
Gruber, Barry P.	Fort Lauderdale	$435
Feluren, Mark S.	Fort Lauderdale	$425
Blum, W. Barry	Miami	$420
Elgilely, Robert F.	Fort Lauderdale	$350
Associates		$200-$275
Paraprofessional		$150-$160

Firms / Professionals	Location	Hourly rates
GrayRobinson		
Partners		
Term, Frank	Miami	$495
Solomon, Steven	Miami	$390
Of counsel		
Mancuso, Nathan G.	Fort Lauderdale	$350
Associates		$300
Paraprofessional		$160-$175
Greenberg Traurig		
Partners		
Bloom, Mark D.	Miami	$785
Schenker, Elliot	Miami	$645
Rosner, Ira N.	Miami	$630
Fornaris, Carl	Miami	$575
Becerra, Jacqueline	Miami	$525
Grossman, Scott M.	Miami	$525
Valcarcel, Manuel	Miami	$510
Kula, Eliot B.	Miami	$495
Leathe, Mindy B.	Miami	$490
Cantor, Lorne	Miami	$475
Siegel, William R.	Miami	$475
Associates		$240-$365
Paraprofessionals		$150-$200
Hinshaw & Culbertson		
Partners		
Partner range		$350-$600
Seese, Michael D.	Fort Lauderdale	$450
Associates/of counsel		$190-$400
Hunton & Williams		
Partners		
Basle, Craig	Miami	$715
Rausch, Robert	Miami	$695
Associates		$260-$365
Paraprofessionals		$135-$250

Firms / Professionals	Location	Hourly rates
Jennifer S. Carroll P.A.		
Carroll, Jennifer S.	Palm Beach Gardens	$300
Kozyak Tropin & Throckmorton		
Partner		
Lopez-Castro, Coral	Miami	$450
Associates		$250-$350
Paraprofessionals	Miami	$150
Miguel De Grandy P.A.		
Partner		
De Grandy, Miguel	Miami	$300
Meland Russin & Budwick		
Partners		
Meland, Mark S.	Miami	$525
Ferrara, Sandra	Miami	$385
McDonald Hopkins		
Partners		
Talarchyk, Tina	West Palm Beach	$480
Associates		$235-$275
Paraprofessionals		$170-$190
Rappaport Osborne & Rappaport		
Partner		
Osborne, Les	Boca Raton	$450
Associates		$250
Paraprofessionals		$160-$200
Sacher Zelman Hartman Patj Dolley & Rolnick		
Partner	Miami	$550
Associates		$165-$275
Paraprofessionals		$40-$195

Firms / Professionals	Location	Hourly rates
Segall Gordich		
Partners		
Gordich, Lawrence	Miami	$490
Silber, Norman	Miami	$475
Associates		$225-$275
Paraprofessionals		$110
Shutts & Bowen		
Partners		
Levitt, Peter H.	Miami	$250
Associates		$250
Squire Sanders & Dempsey		
Partner		
Vaughan, Robert C.*	Miami	$450
Associates		$305-$365
Stearns Weaver Miller Weissler Alhadeff & Sitterson		
Partners		
Moorefield Jr., Harold	Miami	$575
Dilworth, Drew M.	Miami	$475
McNamee, Andrew	Miami	$300
Associates		$210
Paraprofessionals		$195
Tabas Freedman Soloff Miller & Brown		
Partners		
Tabas, Joel	Miami	$495
Freedman, Gary	Miami	$495
Miller, Robert B.	Miami	$450
Soloff, Stacey F.	Miami	$425
Brown, Scott N.	Miami	$350
Associates		$250-$275
Paraprofessionals		$135-$175

*No longer with firm
**Provided by firm

HIGHEST BILLING PARTNERS

Miami-Dade County

	Attorney	Firm	Hourly ra
1	Bloom, Mark D.	Greenberg Traurig	$785
2	Raille, Craig	Hunton & Williams	$735
3	Colson, Dean**	Colson Hicks	$700
	Martinez, Roberto**	Colson Hicks	$700
5	Rausch, Robert	Hunton & Williams	$695
6	Axelrod, Alan	Bilzin Sumberg	$675
	Baena, Scott	Bilzin Sumberg	$675
8	Aronson, Daniel	Bilzin Sumberg	$650
9	Schenker, Elliot	Greenberg Traurig	$645
10	Rosner, Ira N.	Greenberg Traurig	$630

** Rates provided by firm

Broward County

	Attorney	Firm	Hourly r
1	Lichtman, Charles H.	Berger Singerman	$560
	Singerman, Paul S.	Berger Singerman	$560
3	Berger, James L.	Berger Singerman	$535
4	Cloyd, Leslie G.	Berger Singerman	$525
	Scruggs, Frank P.	Berger Singerman	$525
6	Polish, Sheldon	Berger Singerman	$495
	Van Vliet, Theresa	Genovese Joblove	$495
8	Jovanovich, Nick	Berger Singerman	$475
	Rosen, Gary	Becker Poliakoff	$475
10	Lester, Steven	Becker Poliakoff	$450
	Seese, Michael D.	Hinshaw & Culbertson	$450
12	Gruber, Barry P.	Genovese Joblove	$435
13	Feluren, Mark S.	Genovese Joblove	$425
14	Marks, D. Brett	Akerman Senterfitt	$420

Palm Beach County

	Attorney	Firm	Hourly r
1	Furr, Robert C.	Furr & Cohen	$500
2	Talarchyk, Tina	McDonald Hopkins	$480
3	Osborne, Les	Rappaport Osborne & Rappaport	$450
4	Goldstein, Alvin S.	Furr & Cohen	$425

APPENDIX ITEM 6

on top of the profit they planned to make.

Um, it also corresponds, the 200 million figure, to the amount -- uh, of claimant fees in the system. And if 200 million dollars of excess profit is less than 1 percent of the premium dollar or one percent of the system, then the 200 million dollars expended on claimants' fees is also less than one percent of the system, making -- uh, ah (Phonetic) -- again, evidence that this is a defense driven system. It is not a claimant driven system. The amount of fees paid to claimants' lawyers is not even -- it's not even 1 percent.

Q I was going to say --

A And --

Q -- you -- you're giving us more credit than we thought, because the last reported number is what, based on the exhibits you reviewed?

A Hundred and fifty-two million, eight hundred and forty-eight thousand and three dollars, which is again, anoh (Phonetic) -- another annual drop. It's dropping every year. And, you know, the claimants' fees are probably, probably about one half of one percent of the system and dropping. Um, and -- um, I think as -- it's evidence of the fact that -- that claimant's fees are used as a tool to keep injured workers from getting benefits, not to protect injured workers in any way.

Q Well, taking that number and --

APPENDIX ITEM 7

legislation.

Q And for the Court's benefit, let's define excess profits. Now, you're aware that they have to report what they think their profits are going to be?

A Yes, 2013 legislation.

MR. NOVELL: Objection, leading.

THE JUDGE: Yeah. Sustained. (Laughs.)

BY MR. LEO:

Q Are you aware of what excess profits mean?

A Um, it was a refund to policy holders when their underwriting gains are greater than the amount anticipated by more than 5 percent over the three preceding calendar years. I think that's an average.

Q So. They're making -- based on your understanding, what you think that means? They're making more money than they thought they were?

MR. NOVELL: Objection, leading.

BY MR. LEO:

Q What do you think that means?

THE JUDGE: Sustained. (Laughs.)

BY MR. LEO:

Q What do you think that means?

A Well, it -- it -- it means that carriers are paying out less in benefits than they thought, and they're taking in and retaining more than they ever planned to. And rather than

disgorge all that money, they went to the legislature and said, why don't you pass something that allows us to keep that money? Um, and they did. I think that was in -- uh --

Q Last year.

A Okay. Uh, so it's 2012. I stand corrected. Um, and again, but this -- you know, the -- the point is, is not only are they keeping the money -- well, I'll -- go ahead and ask me another question. (Laughs.)

Q Well, they refer to, in that article -- uh, the 200 million dollars in excess profits which is less than one percent of the state's total (Phonetic) -- total premium base.

A Sure. Right so -- um.

MR. NOVELL: Objection. There's no question --

THE JUDGE: Sustained.

MR. NOVELL: -- pending.

BY MR. LEO:

Q All right. Well --

MR. NOVELL: It will be leading.

BY MR. LEO:

Q What does 200 million dollars represent?

A Two hundred million dollars represents two things that are of import to this Court. First, 200 million dollars is the number in excess profits that the legislature is -- was inclined to tell the carriers, oh, just keep that. And -- uh, and these aren't profits. These are excess profits. This is

APPENDIX ITEM 8

A No.
Q -- with the federal constitution at all?
A What I'm saying what -- whatever -- whatever state interest might be espoused to protecting insurance company profits or protecting defense fees over claimants' fees -- uh, it does not outweigh a claimant's due process rights, claimant's fundamental due process rights or the attorney's fundamental -- uh, due -- um, fundamental right to reward for his industry which is -- the Supreme Court of Florida has said is a fundamental right.
Q Well, in practice, this court, the deputy chief judge, the appellate court says -- anybody ever flat-out said they do not have to get their fees approved?
A Has anybody ever said who duh (Phonetic) --
Q Defense?
A It's my understanding from speaking with defense attorneys about why -- because I've asked this to many defense attorneys. Why do you not get your fees approved, but the statute says you have to? And they've said that the -- uh, the chief judge has said this doesn't apply to carrier-paid fees.
Q Is there any statutory language that supports that?
A And not just carrier paid fees to the claimant; carrier-paid fees to their own lawyers. The -- the plain reading of the statute, the plain unambiguous reading of the

APPENDIX ITEM 9

correction -- question is if there's -- if -- is the Keeto effect a result of the caps? It is. And going back to -- uh, Keeto v Davis in 19 --

Q Eighty-five.

A Eighty-five the 1st DCA expressly said that but for the reasonable fee that claimants can -- uh, recover when their claim was wrongfully denied, a claimant will be as helpless as a turtle on its back. And these claims would become virtually uncollectable. The 1st DCA of Florida said that if we have a system like we have as of 2009, the small claims will be uncollectable. They have already said that. That is not me saying that. It is not another state saying it. It is the First District Court of Appeals saying these claims become uncollectable when you remove hourly fees as a penalty for a carrier wrongfully denying a case and losing it.

Q And do the Division statistics support everything in the numbers?

A Yes. When you take out reasonable fees, just as Keeto predicted -- um, you will have a -- uh, a lack of access to courts. You'll have claimants having uncollectable claims. Um, the Division statistics bear out that claims are down more than half. They're down 60 percent. Claimant's fees are down, and they drop every year. Claims drop every year. Fees drop every year. But defense fees go up per case every year and defense fees have not dropped. So, where you have fewer

than half the cases, defense fees are alive and well, no change, because they're just billing two to three times, requiring more hearings, more depos, longer hearings, longer depos.

Uh, I got in a notice -- I got in -- uh, notice to take three records custodian depositions this week, all of records custodians that I have already agreed to stipulate in the records, because the defense has to bill three times as much to make the same amount of money on a case where I've said there's no dispute. Just put the records in. They said, well, we want to take the records custodian depo to authenticate the records. There's no reason to do that other than to build your file.

That was on one case, by the way, three records custodian depos in one case where the records are already stipulated in.

Q And I -- I think Pudvah and O'Shea and certainly the present case are all reflections of the Keeto effect and what the lack of a -- what a cap on employer/carrier-paid fees equates to.

A And I think the O'Shea and the Pudvah courts -- I think one was in Tampa and one was in Orlando -- expressly said that they -- but for the fact that I am not allowed to address this issue, it's clear what's happening.

MR. LEO: I don't have any other questions, Your Honor.

APPENDIX ITEM 10

WORKERS' COMPENSATION LITIGATION REPORT
FISCAL YEAR 2002-2003

Executive Summary

More than 150,000 Petitions for Benefits were filed with the Office of Judges of Compensation Claims (OJCC) during Fiscal Year 2002-03, an increase of 30.71% over the previous year. Last year, the relatively modest 18.76% litigation growth rate was seen as evidence the system was in crisis. This year's report, which pertains to the period after the Governor and Legislature started planning the reforms but before the reforms took effect, shows that the urgency of reform was not overstated. By improving its efficiency for the second consecutive year, however, the OJCC was able to absorb the additional volume with virtually no increase in resources. Remarkably, the Judges made provision for collection of at least $11 million—two thirds of its total annual budget—in delinquent child support arrearages deducted from the proceeds of case settlements.

FY 2002-03 Key Data Summary	Current Year 2002-03	Change From Previous
Petitions Filed	150,801	30.71%
State Mediations Held	29,253	7.19%
Mediations Resulting in "Washout" Settlements	8,121	1.11%
Mediation Continuances	2,755	-57.04%
Orders Approving Agreements	71,555	6.41%
Procedural Orders	94,177	11.56%
Final Orders Entered	2,762	15.47%
Trial continuances granted	6,507	-1.26%
Percent of Final Orders more than 30 days after hearing	12.20%	-1.10%
Child Support Arrearages Collected	$11,031,544	n/a

The past year was successful, but the future is uncertain. A 31% growth rate is not manageable—it corresponds to a doubling in volume every 2.6 years. Some increase in litigation would be expected from Florida's relatively strong economy and rising numbers of jobs and housing starts, but those factors explain only a fraction of the explosive growth of workers' compensation litigation. It remains to be seen whether the 2003 amendments will prove effective in reducing litigation to a sustainable level. Since the amendments did not take effect until after the fiscal year was over, it is too soon to tell.

The OJCC itself has been required to do more with less for yet another consecutive year. It has continued to increase its efficiency to the extent possible, and the empirical measures show there has been some degree of success in this regard. In every category, the output level of the office was higher than in previous years, with no increase in personnel. Fortunately, the vast majority of the 150,801 petitions for benefits filed fiscal year 2002-03 were settled between the parties. The 31 judges entered about 42,000 orders approving complete settlements, another 29,500 resolving the disputed parts of an ongoing case, and 2,762 final decisions on the merits.

Table of Contents and Summary

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A They are the missing 60 percent of claims that are no longer filed.
Q So those -- because they can't get attorneys, that's why they're not filing claims?
A That's the only reason they're not --
Q That's -- that's the reason for the entire of this alleged 60 percent you're coming up with?
A It is --
Q The only --
A -- the sole reason. Yes, sir.
Q That's the sole reason.
What's the largest in -- in your 20 years of prah (Phonetic) -- twenty-plus years of practice, what's the largest -- uh, employment area of injured workers? Is there a general --
A I don't understand your question, and I don't want to be difficult. Ask me some other way --
Q Well, no. I just (Laughs.)
A -- and I'll --
Q What job industry would have the most injured workers?
A Uh, I see them --
MR. LEO: We're in Orlando. Disney.
THE WITNESS: I was going to say mostly from the parks. Uh, I -- I think the restaurant. I get most

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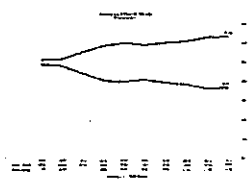
Table of Contents and Summary

04-05	475,215,605$	44.4%	55.6%
05-06	507,781,830$	41.0%	59.0%
06-07	478,640,476$	40.0%	60.1%
07-08	459,202,630$	41.1%	58.9%
08-09	459,324,903$	39.6%	60.5%
09-10	456,566,882$	38.8%	61.2%
10-11	428,036,787$	36.7%	63.3%
11-12	416,870,962$	36.7%	63.3%

As total fees in the system grew, so did the proportion going to the defense bar. Then, as fees proportionally declined for claimant attorneys, overall total attorney fee expenses declined, but the ratio going to the defense bar remained.

Here's a neat graph that consultant Bill Cobb did based on these numbers that more easilydisplays the disparity in this costs item:



Chief Deputy David Langham told WorkCompCentral Monday that payments to claimants' attorneys have declined by 42.05% during the past nine years, while defense

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The following is a post by David DePaolo on linkedin

Tuesday, November 27, 2012

Where Claimant Attorneys Go, So Too Will Defense

Whether it's good or bad, the bottom line is that when a state wants to really control medical and indemnity costs in its workers' compensation system, the state will limit the participation of attorneys, and the way to do that is to limit the fees paid to attorneys representing injured workers.

The State of Florida has proven this point succinctly, as reflected in the state Office of Judges of Compensation Claims latest annual report.

Florida in 2003 passed landmark legislation to reel in its workers' compensation costs, a system that had been spiraling out of control with double digit rates of inflation well ahead of the pace of most other states. When challenged, the provisions of the reform legislation limiting claimant attorney fees was edited by the legislature by simply excising the word "reasonable" from the attorney fee provisions, in response to the Supreme Court's interpretation of the statute.

Since then, injured workers' petitions for benefits have dramatically declined to 61,354 petitions filed during fiscal year 2011-2012 - a 5.1% decrease over the previous fiscal year. This compares to 127,611 petitions for benefits filed during fiscal year 2003-2004.

In addition, mediations declined to 16,881 in fiscal year 2011-2012 - a 5.7% reduction over the previous fiscal year.

This same phenomenon was experienced in Texas as well, where the big reform bill in that state, HB 7, severely constricted attorney fees. Lawyers went elsewhere for income and claimants seeking adjudication over benefit disputes declined dramatically.

However, if lawyers just change sides then their income isn't so drastically affected.

Here is the raw data of total attorney fee expenses in the Florida system since 2001, and proportion of those fees going to claimant lawyers and defense lawyers:

Fiscal Year	Fees	Applicant	Defense
02-03	430,705,423$	48.9%	51.1%
03-04	446,472,919$	48.2%	51.8%

APPENDIX ITEM 14

it's mind boggling. It's like a 60 percent drop from '03 to '012 -- uh, in petitions, slash, claims. Um.

Q Is that evidence of the Keeto effect and the chilling effect of fee caps?

A It memorializes and evidences the Keeto effect that the -- the -- the -- from the moment these fee caps were -- uh, attempted to be put into place in '03 and then replaced in '09 -- uh, claimants are unable to successfully secure attorneys and bring claims, especially for the Keeto effect, smaller cases. They -- if you have an unpaid prescription, an unpaid medical bill, an unpaid MRI -- uh, and un (Phonetic) -- a ss (Phonetic) -- uh, your physical therapy wasn't paid, you're helpless. There's nothing you can do. No one will take that case.

Q And in this present case -- uh, do you see evidence of the Keeto effect?

A Uh, I do see evidence of the Keeto effect. And I would -- am positive that if I or you -- uh, were ever presented with this case again, given these -- the 90 hours of litigation or more, 90 compensable hours -- uh, you would never take this case again if the Court were to find that -- well that's the defense's right to -- to just keep putting up delays and barriers, and deny and delay, and deny and delay, because there's no consequence to it. That is the Keeto effect. So you did --

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your time since my review, correct? You --

Q Right.

A -- went with the April.

Q Right. We cut off --

A Okay.

Q -- at April -- uh, 22nd.

A Okay. So, with that in mind that before we cut off at April 22nd, I was looking at the entire time, and now I'm looking at about 95 percent of that time -- um -- uh, the -- the -- uh, there was extensive -- um, litigation on an extremely limited issue -- um, making this case -- uh, exceptional and unusual, not with respect to the issue claimed, pain management, but with respect to the time and labor required to get that -- uh, claim through,

Um, the motions, depositions -- um, defenses alleged misrepresentation, et cetera, et cetera -- um, make it -- uh, an exceptional and unusual case requiring an extensive amount of -- uh, claimant counsel -- uh, involvement with significant skill.

Q Were you aware -- um, that there was a motion to dismiss -- uh --

A Yeah, for lack of an attachment if I'm correct. Um.

Q And were you aware that was in an evidentiary hearing?

A An evidentiary hearing which was denied. The

APPENDIX ITEM 16

your time since my review, correct? You --

Q Right.

A -- went with the April.

Q Right. We cut off --

A Okay.

Q -- at April -- uh, 22nd.

A Okay. So, with that in mind that before we cut off at April 22nd, I was looking at the entire time, and now I'm looking at about 95 percent of that time -- um -- uh, the -- the -- uh, there was extensive -- um, litigation on an extremely limited issue -- um, making this case -- uh, exceptional and unusual, not with respect to the issue claimed, pain management, but with respect to the time and labor required to get that -- uh, claim through,

Um, the motions, depositions -- um, defenses alleged misrepresentation, et cetera, et cetera -- um, make it -- uh, an exceptional and unusual case requiring an extensive amount of -- uh, claimant counsel -- uh, involvement with significant skill.

Q Were you aware -- um, that there was a motion to dismiss -- uh --

A Yeah, for lack of an attachment if I'm correct. Um.

Q And were you aware that was in an evidentiary hearing?

A An evidentiary hearing which was denied. The

defense motion to dismiss was denied. Um, the claimant was not seeking any new or alternate type of care, but was seeking the same care that they had already been receiving, but the care had stopped.

Q Are you aware that led to a mediation and pretrial and deposition of Dr. Patel and the Claimant being required to get an IME to prove up pain management?

A Uh, yeah, as well as, what, a conference with the -- I mean there was -- there was significant time in that -- um, even after the motion was denied. Uh --

Q Did you review the pretrial -- uh, that was produced on the issue?

A Uh, yes. That was -- that was -- that -- I think evidences the significant skill and time that was required making this case exceptional and unusual -- uh, based on multiple -- uh -- uh, obstacles and delays put up in the pretrial on behalf of the Employer/Carrier.

Q And just -- uh, briefly, go through -- uh, what some of those might have been.

A Well -- um, you can streamline litigation very simply in workers' compensation. It's designed to do that. Um, however, if you wish to -- uh, delay the claimant's benefits and -- uh, what I call the Keeto effect of -- uh, all -- making a claimant almost helpless -- uh, unless they can find an attorney to take a small case on a limited issue, you

can do things like -- um, say we will not handle medicals administratively. You're going to have to do extra work to get that in. Um, we won't stipulate in authorized treating medical records, even though the statute says you shall. Um, we won't stipulate in IME reports because we can make you go take a deposition. Um, things like that.

Q Were those on the pretrial that you reviewed on the authorization of pain management in this case?

A And my recollection is they would not agree to handle medicals administratively. They objected to the motions to admit authorized treating physician records, which -- um, I don't even know how you can do that, unless you have some concern about that's not their record, just to say we object.

Um, I think -- uh, there was also an allegation that the Claimant had made a misrepresentation for the purpose of obtaining -- uh, benefits or invoked the misrepresentation allegation, which -- um, has with it criminal consequences, which brings -- uh, into even more so -- um, due process -- uh, rights, because -- uh --

Q Well, and -- and just to clarify, they reserved the right to amend and -- after testimony of Dr. Patel and asserted a fraud defense -- uh, in paragraph four of that pretrial under defenses.

A Well, you don't put that on a pretrial and then do