

# Florida's Workers Compensation Law: The Pendulum Swings

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FLORIDA WORKERS COMPENSATION LAW:  
THE PENDULUM SWINGS

by

Ursula Hirsch

A thesis submitted in partial fulfillment of the requirements  
for the Honors in the Major Program in Legal Studies  
in the College of Health and Public Affairs  
and in The Burnett Honors College  
at the University of Central Florida  
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Thesis Chair: Dr. Abby Milon

## **ABSTRACT**

The intent of this paper is to discuss how the recent court rulings on the current workers compensation statutes will impact the rules to Florida's workers compensation laws.

Workers Compensation system is a social justice system that protects both the employer and employee. Employees that are injured while in the course and scope of their employment give up the right to sue, making workers compensation an exclusive remedy. In exchange for giving up that right, the injured worker receives statutory benefits in a no-fault system.

This paper covers the legislative changes over the years that have impacted the constitutionality of the system and discusses how these changes have failed to uphold the legislative intent and design of the entire system. It covers the decisions rendered by the Florida Supreme Court and discusses the implications of those decisions.

## **DEDICATION**

For employees who are injured on the job and are fighting for benefits and the attorneys that represent them.

For my mentors, James Parrish, for helping me understand the workers compensation system. Abby Milon, Robert Wood, and Kathy Cook for guiding me through this process and answering all of my questions.

And most importantly the people in my circle that support me in every endeavor I put my mind to. Guy Mecabe for keeping me strong and motivated through this process and also for listening to me talk about workers comp. To my dad, Richard Hirsch, for always having a friendly ear and giving me the courage to move ahead. To my mom, Felicity MacDonald, for all the support you give me each and every day. And lastly, my children. Andre and Adrian– without you, I would not be who I am today; you are my motivation to be the best I can be.

## **ACKNOWLEDGMENTS**

I would like to express my deepest gratitude to all those who made my thesis possible. This thesis could not have been completed with help from Dr. Parrish. His insight, time, knowledge and commitment to me during this time has been glue that held it all together. Without him, I would not have been able to gain the understanding that I have today.

Thank you to Geoff Bichler of Bichler, Kelley, Oliver, Longo & Fox, PLLC, for giving me insight into the workers compensation world and steering me in the right direction for this thesis. Thank you Deputy Chief Judge David Langham for spending some time talking with me and answering my questions so quickly and thoroughly. Your knowledge was invaluable.

I appreciate the help of my thesis committee Dr. Abby Milon and Dr. Robert Wood, who made extra time to guide me and help get this thesis completed.

To all of my friends, teachers, and family, thank you for everything you have done for me over these past four years at the University of Central Florida.

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## **BACKGROUND**

Martin Ginsburg, the late husband of United States Supreme Court Justice, Ruth Bader Ginsburg once said: “The true symbol of America is not the bald eagle, it is the pendulum; when the pendulum swings too far one way, it will come back.”<sup>1</sup> That is what has happened over the years with Florida’s Workers Compensation laws. The laws have swung so far in the direction away from the claimant, that the Florida Supreme Court and the First District Court of Appeals have ruled sections of the act unconstitutional. In 2016, there were three cases, all decided within two months of each of other that will impact the rules to the current Florida Workers Compensation statutes.

### Introduction

The most recent overhaul of the Florida worker’ compensation came during the 2003 legislative session. There were many changes to the system, but some changes put the social legislation at risk and threatens to jeopardize what is known as the “grand bargain.” The major reform that the workers compensation laws underwent in 2003 are the substantive and procedural laws that are currently implemented. The significant changes that limited benefits an injured employee received and the changes to the Attorney fee award structures, capped permanent total disability benefits that now cease at age 75, new medical co-payment provisions, and the now, inadequate disability compensation. These changes were challenged and found unconstitutional in two Florida Supreme Court cases and one Florida District Court of Appeal case, all within two

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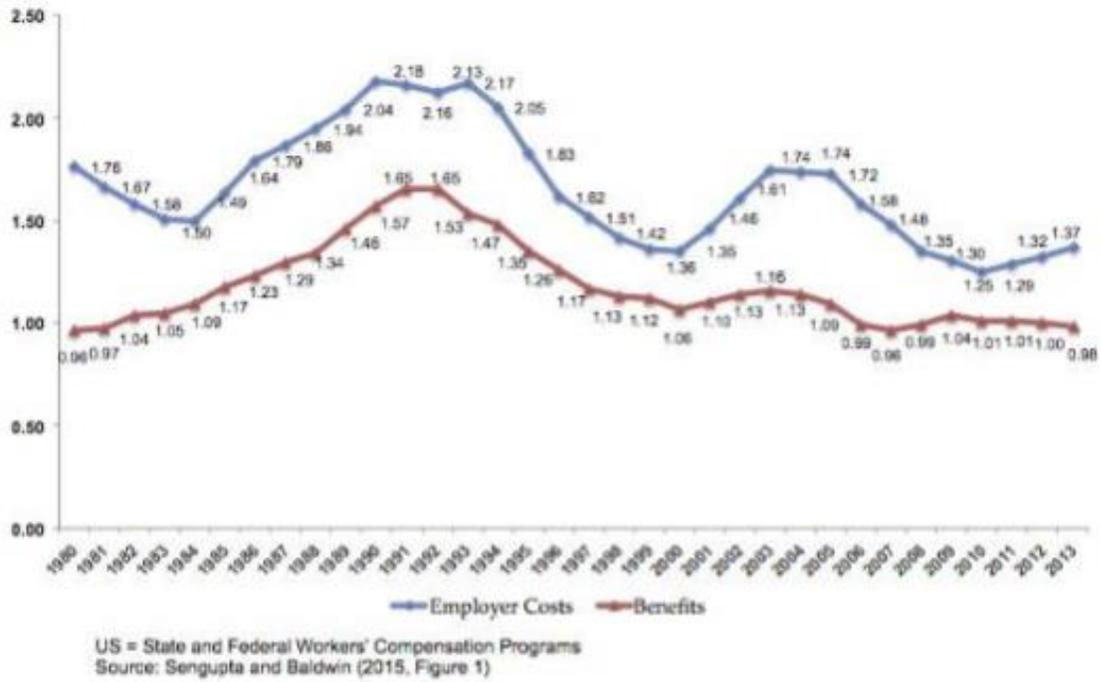
<sup>1</sup> Gluck, A. (2013). A Conversation with Justice Ruth Bader Ginsburg. Retrieved April, 2017, from [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5910&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5910&context=fss_papers)

months of each other in 2016. With pieces of the Workers Compensation Act ruled unconstitutional, Florida law is in need of reform. The question is whether the legislature will just fix the statutes under contention or will they overhaul the system completely? The current legislation offers a decline in benefits and payments that has left the injured worker without recourse in the court system, and combined with the infringement of the right to access courts and seek to contract with counsel, there is no longer a bargain for the injured worker or protection for the employer. The decline in benefits and rise in premium costs is documented in the 2016/2017 Annual Report of the Office of the Judges of Compensation Claims (OJCC). The graph below illustrates that since the 2003 legislation, benefits have been on a steady decline, while the insurance premiums paid by the employer have increased. So, the injured worker isn't receiving the benefits promised, the employer is not adequately covered, and premium costs are rising.<sup>2</sup>

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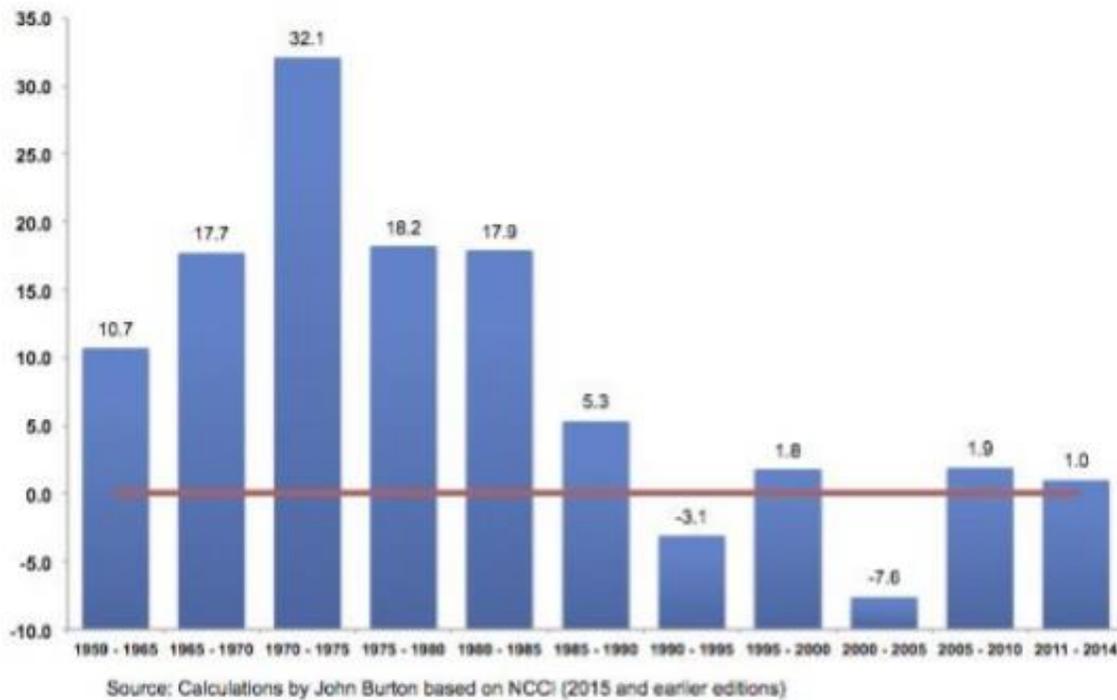
<sup>2</sup> Langham, D. (n.d.). *2016-17 Interim OJCC Annual Report* (Rep. No. 2016-17 Interim OJCC Annual Report).

**Figure 1: Workers Compensation Benefits and Costs Per \$100 of Covered Wages in the US, 1980-2013**



Over the years, the amount of benefits received by the injured worker has declined drastically with each legislative change to the system. In the graph below, it is clear that the statutory benefits are declining.

**Figure 2: Workers Compensation Statutory Benefits Changes Percentages, 1959-2014<sup>3</sup>**



The modern system of workers compensation is much more complex than when it was first founded. All states have now adopted some type of workers compensations laws and regulations, which provide relief to both the employee and employer. The Workers Compensation system was established over 100 years ago and is a social justice system that protects both the employer and employee. Employees that are injured while in the course and scope of their employment give up the right to sue, making workers compensation an exclusive remedy and the employer/carrier (E/C) gives up the ability to use the so-called “trilogy of defenses.” In exchange for giving up that right, the injured worker receives statutory benefits in a

<sup>3</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant ... Retrieved August 31, 2016, from <http://workerscompresources.com/wp-content/uploads/2012/11/FL-Conference-Presentation-Text-V06.pdf>

no-fault system. Over the years, there have been many legislation changes and challenges to this “grand bargain.”

Is the vital social justice system of workers compensation in jeopardy? A look at Florida’s changes to workers compensation laws over the years shows the failure of the changing laws to meet the intent of the social legislation and justice as well as finding an economic balance between the injured, the employer and the insurance carrier. The legislative Intent for workers compensation states that their goal is “quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer”<sup>4</sup>. The purpose of this paper is to discuss how the reform in 2003 has jeopardized the grand bargain, and how the recent court rulings impact the rules on workers compensation in Florida.

### Procedures

The workers compensation system is designed to provide wage replacement and medical treatment to an injured worker. The intended goal is to get an injured employee back to work<sup>5</sup>. The protections for the employer are that the employee waives his/her right to sue for negligence of any kind. Facially the legislation meets that goal, however, when applied, constitutional rights have been violated. In 2016, the Florida Supreme Court found that some the Florida’s workers compensation statutes violated constitutional rights of Florida citizens, and the First District Court of Appeal also ruled a portion of the rules unconstitutional.

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<sup>4</sup> Legislative Intent – See §440.015 Fla. Stat

<sup>5</sup> Id

The three landmark cases that ruled portions of the statutes unconstitutional were:

*Castellanos v. Next Door Company*, 192 So.3d 431 (2016)

*Westphal v. City of St. Petersburg*, 194 So.3d 311 (2016)

*Miles vs. City of Edgewater Police Department*, Case 1D15-0165 (Fla. 1st DCA 2016)

Many cases helped refine the arguments related to the above Landmark Cases:

*Murray v. Mariner Health*, 994 So. 2d 1051, 1057-58 (Fla. 2008)

*Ohio Cas. Grp v. Parrish*, 350 So. 2d 466 (1977)

*United Mine Workers of America v. Illinois State Bar Association*, 389 US 217 (1967)

*Lee Engineering & Construction Co. v. Fellows*, 209 So. 2d 454, 458 (Fla.1968)

*Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)

The main statutes under contention:

§440.34 Fla. Stat – Attorney’s Fees; Costs

§440.15 Fla. Stat – Compensation for Disability

§440.11 Fla. Stat – Exclusiveness of Liability

A glossary of terms has been provided (See Appendix A), as well as a flow chart of the dispute resolution system set forth by the Department of Finance. (See Appendix B).<sup>6</sup>

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<sup>6</sup> Harger, L. (2003). Workers Compensation: A Brief History. Florida Division of Workers Compensation (page 24)

## HISTORY OF WORKERS COMPENSATION

### United States

At common law, an injured employee's only remedy available for work-related injuries was through the court system by filing a negligence suit to receive redress and compensation. Most of the time, the injured worker was unsuccessful due to the established legal defenses to employer negligence suits and because the burden of proof fell on the injured worker. The established legal defenses were known as the "unholy trinity" and were used by the employer to avoid liability. The trinity included: (1) contributory negligence, (2) the fellow servant rule and (3) the "assumption of risk."<sup>7</sup> All of these defenses were established through case law as early as the 1830's.

Contributory negligence provides that if the worker was even partially responsible for his/her injuries, then the employer would not be held at fault. This was set out in the Supreme Court case of *Martin vs. The Wabash Railroad*, 321 Mo.1107 (Mo 1930).<sup>8</sup> In that case, a conductor fell off his train because of a loose handrail. However, he did not receive benefits for his injuries because it was part of his job duties to inspect the train. So, by not inspecting the train, he contributed to his own injuries and was barred from recovery.

The fellow servant rule provides that if another employee's negligence contributed to the injuries, then the employer was not at fault. This precedent was set in Britain under *Priestly v. Fowler*, 150 ER 1030, 1837, and adopted a few years later in the United States by *Farwell v.*

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<sup>7</sup> Guyton, G. P. (1999). A Brief History of Workers Compensation.

<sup>8</sup> Id

*Boston & Worcester R.R. Corp*, 45 Mass. 49 (Mass. 1842),<sup>9</sup> In the *Farwell* case, a railroad employee was injured after a coworker left a switch in the wrong position. Since his employer was not negligent and it was found that the coworker was a major contributing cause, Farwell was unable to collect benefits.

The assumption of risk doctrine held that employees should know of the hazards of any particular job when they begin working. So, by agreeing to work in a position they should understand the risks associated with that position and assume the risks associated therein. However, employers worked around this system by making a new employee sign a contract that stated that they understood the risks associated with their job functions and then waived their right to sue if they were injured. These contracts became known as the "workers right to die," or "death contracts."<sup>10</sup>

In an effort to deal with the lack of fairness of the common law approach, Congress enacted statutes known as the Employer Liability Acts of 1906. These statutes removed or limited the employers' ability to use the "unholy trinity" of legal defenses<sup>11</sup>. Even with the enactment of the statutes, many employees still did not receive benefits. The court system was a battlefield for the injured worker because he still held the burden of proof in determining that the injury arose from the employer's negligence. A study by Poser (1972) found that between 1875 and 1905 there was a tremendous growth in litigation over workplace injuries and that employees were increasingly recovering damages in negligence suits<sup>12</sup>. Essentially, some injured workers

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<sup>9</sup> Id

<sup>10</sup> Id

<sup>11</sup> Id

<sup>12</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant

recovered nothing, while others recovered large awards. Both sides of the spectrum left either the employee or the employer dissatisfied with the outcome.

The first workers compensation laws were not enacted until the 1900's. Maryland, Massachusetts, Montana and New York were the first states to implement workers compensation laws between 1902 and 1910. However, all of these laws were struck down and ruled unconstitutional as violating "due process."<sup>13</sup> On March 24 1911, the New York Court of Appeals declared New York's compulsory workers compensation law unconstitutional. The next day, one hundred and forty-six (146) workers were killed in a fire at Triangle Shirt Waist Company in New York City. Those women died because of the working conditions, which included employees that were locked on the floor, and were unable to escape the fire. Some chose to jump from several stories up to get away from the flames and fire. But, since there was no workers compensation system in place, the family members were forced to the courts to attempt to collect benefits. The civil case only awarded the families of victims \$75.00 in damages. This incident caused the public to fight for safer working conditions and for better insurance for the injured or deceased worker.<sup>14</sup> In 1913, New York finally enacted a workers compensation law that would withstand constitutional challenges. In 1911, Wisconsin became the first state in the country to adopt a true "workman's" compensation law. Called the "Great

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<sup>13</sup> Harger, L. (2003). Workers Compensation: A Brief History. Florida Division of Workers Compensation.

<sup>14</sup> Kosak, H. (n.d.). Sharing Stories Inspiring Change. Retrieved April 19, 2017, from <https://jwa.org/encyclopedia/article/triangle-shirtwaist-fire>

Trade Off"; it required employers to provide coverage while employees gave up the right to sue for damages<sup>15</sup>.

These laws were created to overcome the failures of the negligence suit approach and the employer liability acts. All workers compensation statutes incorporate the “workers compensation principle” which has two prongs: (1) Workers compensation is a no-fault system, and (2) Statutory benefits provided by the program are the employer’s only liability to the employee for the workplace injury.<sup>16</sup> These regulations make workers compensation the exclusive remedy for an injured worker.

This grand bargain is an understanding between the employer and the employee, that if an employee is injured while in the course and scope of his or her employment, that no matter the circumstances and who is at fault, the employer will provide benefits in the form of medical payments and compensation for lost work. In return, the employee waives the right to bring a negligence cause of action through the court system, potentially winning large settlements, and the employer (E/C) gives up the right to use the “unholy trilog” of defenses.

### Florida

Though the first workers compensation laws in the United States were enacted in 1911, Florida trailed behind without implementation until 1935. Florida’s workmen’s compensation legislation was delayed because Florida had a smaller work force than some of the other states, almost no manufacturing and industrial jobs and had no major problems until the 1930’s during

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<sup>15</sup> Harger, L. (2003). Workers Compensation: A Brief History. Florida Division of Workers Compensation

<sup>16</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant

the “Great Depression”. In 1935, Florida launched a campaign to attract more northern industries to the state. Public officials recognized the need for social legislation such as workmen’s compensation to protect both employees and employers, and to help bring businesses to Florida. Because of this, House Bill 29 was signed in May of 1935. Once the new act was effective, it created the Florida Industrial Commission (FIC). The commission was responsible for establishing the provisions of the workmen’s compensations law, making studies and investigations with respect to safety provisions, and the causes of injuries during employment. They were authorized to promulgate rules and regulations in dealing with workmen’s compensation. The cost of administrating the law was funded by a tax on workmen’s compensation insurance premiums and self-insured individuals. To this day, this is how the administration of the laws is still funded<sup>17</sup>. Between 1935 and 1978 only a few major changes were made to Florida’s workman’s compensation system. In 1978, the system received its first major overhaul. Prior to the 1978 changes, the system was a fixed benefit system. Employees were compensated on the basis of the severity and type of injury, which was related to a fixed schedule of benefits. If an employee was able to return to work with a permanent impairment, (i.e., loss of a finger) he/she received lump sum of benefits based on the rating of the impairment, and those who were permanently disabled received a schedule of benefits. Florida’s old system of scheduled injuries, impairment ratings, and loss of wage earning capacity was a failure<sup>18</sup>, so the system was transformed into a “wage-loss” concept. This concept required the

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<sup>17</sup> Harger, L. (2003). Workers Compensation: A Brief History. Florida Division of Workers Compensation

<sup>18</sup> Sadowski, W., Herzog, J., Butler, R. T., & Gokel, R. L. (n.d.). The 1979 Florida Workers Compensation Reform: Back to Basics. Retrieved March, 2017, from <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=2009&context=lr>

employee to prove entitlement to benefits by performing an exhaustive job search if not working<sup>19</sup>.

This reform reduced premiums twenty-three percent (23%) for employers, but by 1980, this model proved not to be the solution to lowering costs and premiums. Between 1988-1993, the legislature passed major changes to the benefit structure, The Bureau of Workers Compensation Fraud was established in the Department of Insurance to combat fraud, safety divisions were implemented to ensure safety programs were being followed, and the Workers Compensation Drug Free Workplace Program was added to the law.<sup>20</sup> The wage-loss concept was changed during the 1993 reform and was replaced with impairment income and supplemental benefits. The main focus of the 1993 Reform Act was about reemployment, getting the injured worker back to work as soon as possible and reducing costs and increasing productivity<sup>21</sup>. In 2003, Florida passed new legislation and the system once again underwent major reform.

#### Florida's Current Workers Compensation

Presently, in Florida, the Department of Financial Services (DFS) regulates The Division of Workers Compensation (DWC). The Office of the Judges of Compensation Claims (OJCC) is responsible for adjudication of disputes over workers compensation benefits. The Office of Insurance Regulation (OIR) regulates the rates for Workers Compensation. The Department of

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<sup>19</sup> Harger, L. (2003). Workers Compensation: A Brief History. Florida Division of Workers Compensation

<sup>20</sup> Id

<sup>21</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant

Financial Services is the primary regulator for ensuring employees receives the proper benefits under this coverage. Within the DFS is the Bureau of Employee Assistance Office (EAO) that will assist injured workers by educating and informing them of their rights and responsibilities as an injured worker.<sup>22</sup> Since many workers compensation benefits are handled without litigation, not all workers compensation claims are reported to the OJCC. However, when there is a dispute, and a petition is filed, the claimant and E/C are required to attend mediation. Either the state or a private mediator handles mediation. If a private mediator is used, the E/C is responsible for the payment of the mediator. If parties agree on benefits during mediation, the case is closed, but if no resolution can be reached, the mediator declares an impasse and then the claim is heard before a workers compensation judge. The JCC will efficiently and impartially decide those disputes<sup>23</sup>. If a claimant or E/C does not like the outcome from the JCC, it can be appealed. All workers compensation appeals are sent to the Florida First District Court of Appeals (1<sup>st</sup> DCA), which is located in Tallahassee. So even if a case was litigated at the JCC in Miami, the appeal will be heard in Tallahassee. From there, the Supreme Court of Florida hears any additional appeals on certified questions by the First District Court of Appeal or by a writ of certiorari by a party.

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<sup>22</sup> About Us - FLJCC. (n.d.). Retrieved April 19, 2017, from <https://www.fljcc.org/JCC/AboutUs.asp>

<sup>23</sup> <https://www.jcc.state.fl.us/jcc/>

## STATUTES UNDER CONTENTION

### §440.34 Fla. Stat – Attorney’s Fees; Costs

On April 28th, 2016, The Florida Supreme Court issued a decision in *Castellanos v. Next Door Company*, 192 So.3d 431 (2016), and held that the “unyielding formulaic fee schedule” for Attorney’s Fees was a violation of due process under both the Florida and United States Constitution. See art. I, § 9, Fla. Const.; U.S. Const. amend. XIV, § 1.

### §440.15 Fla. Stat – Compensation for Disability

On June 9th, 2016, the Florida Supreme Court issued a decision in *Westphal vs. City of St. Petersburg*, 194 So.3d 311 (2016) holding that §440.15 Fla. Stat. was unconstitutional under article I, section 21, of the Florida Constitution, as a denial of the right of access to courts because of the gap created after 104 weeks of TTD if the claimant has not reached MMI.

### §440.11 Fla. Stat – Exclusiveness of Liability

On April 20th, 2016, The First District Court o Appeal issued a decision in *Miles vs. City of Edgewater Police Department*, Case 1D15-0165 (Fla. 1st DCA 2016) holding that the restrictions in F.S. 440.34 and F.S. 440.105 were violations of both the First Amendment and the right to form contracts. This case addressed both Exclusiveness of Liability and the Attorney’s Fees.

## CASES

### Castellanos v. Next Door Company

192 So.3d 431 (2016)

In this case, Castellanos was injured during the scope of his employment. His claims were denied and with the assistance of an attorney, Castellanos prevailed in his workers compensation claim. However, because of the statutory fee schedule set out in F.S. 440.34, his attorney only received \$1.53 per hour for the 107.2 hours he worked on the case. The Judge of Compensation Claims (JCC) reviewed the hours and said that they were “reasonable and necessary” in order to litigate the complex case. On October 23, 2008, the Florida Supreme court ruled in *Murray v. Mariner Health*, 994 So. 2d 1051, 1057-58 (Fla. 2008), that the right of a claimant to obtain a reasonable attorney’s fee when successful in securing benefits has been considered a critical feature of the workers compensation law since 1941. This case helped pave the way for the ruling in *Castellanos*, as the legislature removed the word “reasonable” from the statutes in 2009, leaving a schedule only to determine the amount paid to the claimant’s attorney, without reference to reasonableness. This removed the judge’s discretion in determining what was reasonable. The reason Attorneys fees are so important is to “discourage the carrier from unnecessarily resisting claims” and “encourages attorneys to undertake representation in non-frivolous claims, “ realizing that a reasonable fee will be paid for their labor”. *Ohio Cas. Grp. v. Parrish*, 350 So. 2d 466, 470 (Fla. 1977). The court in *Ohio Cas Grp.* stated, “the workers compensation system has become increasingly complex to the detriment of the claimant, who depends on the assistance of a competent attorney to navigate the thicket.” In *Castellanos*, the Court confirmed that the system had become increasingly complex and difficult, if not impossible for an injured worker to successfully navigate without the assistance of an attorney. The Supreme Court of Florida gave several reasons as to why a claimant needed to secure the services of an attorney. (1) The elimination of the provision that the workers compensation law

be liberally construed in favor of the injured worker<sup>24</sup>; (2) reductions in the duration of temporary benefits<sup>25</sup>; (3) an extensive fraud and penalty provision<sup>26</sup>; (4) a heightened standard of “major contributing cause” that applies in a majority of cases rather than the less stringent “proximate cause” standard in civil cases<sup>27</sup>; (5) a heightened burden of proof of “clear and convincing evidence” in some types of cases (psychiatric cases)<sup>28</sup>; (6) the elimination of the “opt out” provision<sup>29</sup>; and (7) the addition of an offer of settlement provision that allows only the employer, and not the claimant, to make an offer to settle<sup>30</sup>. The majority opinion states that it is undeniable that without the right to an attorney with a reasonable fee, the workers compensation law can no longer assure the quick and efficient delivery of disability and medical benefits to an injured worker,” as is the stated legislative intent in §440.015, Fla. Stat. (2009).

During the 2003 legislation, §440.34 was amended:

A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved as reasonable by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first \$5,000 of the amount of the benefits secured, 15 percent of the next \$5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years.

The JCC was only allowed to award fees based on the fee schedule and allowed no discretion to be used by the Judge. In the *Murray* case, Murray was injured on the job and the E/C denied

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<sup>24</sup> see § 440.015, Fla. Stat.

<sup>25</sup> see § 440.15(2)(a), Fla. Stat.

<sup>26</sup> see § 440.105, Fla. Stat.

<sup>27</sup> see § 440.09(1), Fla. Stat.

<sup>28</sup> see §§ 440.02(1), 440.09(1), Fla. Stat.

<sup>29</sup> see §§ 440.015, 440.03, Fla. Stat.

<sup>30</sup> see § 440.34(2), Fla. Stat.

benefits. The JCC held that her claims were compensable and awarded \$3,244.21 in benefits. At a hearing on the attorney's fee award, the claimant's attorney testified that the usual rate of pay for attorney's fees in cases like the one presented was \$200.00 per hour. However, since the statutory provisions were so strict, they were only awarded \$8.11 per hour for the almost 80 hours of work. The E/C paid their defense attorney \$16,050 for 135 hours of work. The First District Court of Appeals affirmed the award of only \$684.84. The Florida Supreme Court however, determined that since the Workers Compensation statute does not define a reasonable attorney fee, ambiguity resulted. The Court reasoned that "when a statute is unclear or ambiguous as to its meaning, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent" "Where two statutory provisions are in conflict, the specific provision controls the general provision" Further, "a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provisions. This decision implied that "hourly fees" was based on the logic that the word "reasonable" in that section could support no other conclusion. In May of 2009, Florida Governor Charlie Christ signed into law HB 903, providing that the fee awarded by the JCC cannot exceed the scheduled fees set forth in §440.34, and the legislature removed the word "reasonable" from the statute.

The statute currently reads:

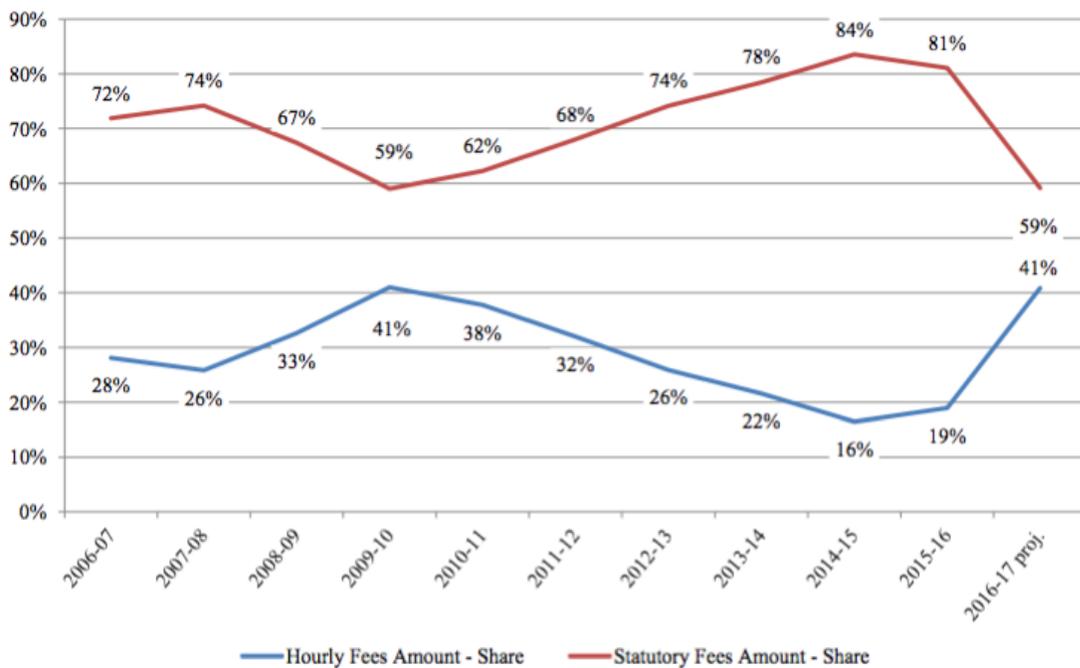
A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first \$5,000 of the amount of the benefits secured, 15 percent of the next \$5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the

benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years ...

The JCC is required by law to approve all attorney fees paid by or on behalf of an injured worker<sup>31</sup>. However, they are not required to approve the fees for the E/C and the defense representation. Since the 2003 legislative changes one can see the distribution in Hourly Fees and Statutory Fees awarded by the JCC.

**Figure 3: Percentage of Statutory Fees and Hourly Fees Paid<sup>32</sup>**

The percentage contribution of both “statutory” and “hourly” attorney fees is depicted in this graph:



In the graph above, hourly fees started to increase from 2006 when *Murray* was decided until

<sup>31</sup> see §440.34 Fla. Stat

<sup>32</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant ... Retrieved August 31, 2016, from <http://workerscompresources.com/wp-content/uploads/2012/11/FL-Conference-Presentation-Text-V06.pdf>

2009 when they dropped substantially because of the passing of HB 903 where the word reasonable was removed from the statute. The increase in 2016 is due to the ruling in *Castellanos*. The difference between *Murray* and *Castellanos* is that *Murray* was decided on the grounds of statutory interpretation. It did not invalidate sections of the act on constitutional grounds, but it interpreted the statute to include “reasonable” when determining the amount of the fee to be awarded to the claimant’s attorney<sup>33</sup>. The effect of the removal of the word “reasonable” from the statute combined with the denial of judicial discretion only put a Band-Aid on the issue of unfair fees awarded to attorneys, the right to contract, and access to the court. *Castellanos*, however, raised those two constitutional challenges, which violated the Florida and United States Constitution’s due process laws. The Supreme Court in *Castellanos* held that considering the right of a claimant to obtain a reasonable fee has been a critical feature in the workers compensation law.<sup>34</sup> The mandatory fee schedule set out in §440.34 Fla. Stat., creates an irrefutable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney and is unconstitutional and a violation of due process. A reasonable attorneys fee has always been the linchpin to the constitutionality of the workers compensation law.

Below is a table that clearly shows the total fees paid to attorneys over the course of thirteen (13) years. The data is clear in illustrating the decline in Claimants attorney fees percentages over the year.

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<sup>33</sup> see §440.34 Fla. Stat

<sup>34</sup> *Castellano* at 25

Fiscal Year	Aggregate Fees	Claimant %	Defense %
2002-03	\$427,359,212	49.29%	50.71%
2003-04	\$441,907,794	48.73%	51.27%
2004-05	\$470,178,488	44.91%	55.09%
2005-06	\$498,541,260	41.80%	58.20%
2006-07	\$468,584,023	40.80%	59.20%
2007-08	\$448,862,202	42.04%	57.96%
2008-09	\$450,941,100	40.28%	59.72%
2009-10	\$446,653,869	39.63%	60.37%
2010-11	\$416,404,259	37.72%	62.28%
2011-12	\$395,294,706	38.67%	61.33%
2012-13	\$392,784,121	38.67%	61.33%
2013-14	\$379,222,338	37.41%	62.59%
2014-15	\$370,772,783	36.73%	63.27%
2015-16	\$378,573,902	36.05%	63.95%

**Figure 4: Aggregate Fees Paid<sup>35</sup>**

Miles vs. City of Edgewater Police Department

Case 1D15-0165 (Fla. 1st DCA 2016)

This case was decided by the First District Court of Appeals on April 20, 2016, and was not appealed to the Supreme Court of Florida. Miles was a law enforcement officer whose attorney filed two claims in 2013 alleging a chemical exposure during an investigation that resulted in disability<sup>36</sup>. The E/C disputed the causation of the claimant's injuries, and alleged that they were from pre-existing conditions, and not due to exposure of chemicals on the job.

<sup>35</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant ... Retrieved August 31, 2016, from <http://workerscompresources.com/wp-content/uploads/2012/11/FL-Conference-Presentation-Text-V06.pdf>

<sup>36</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant

Because it is difficult, costly and time consuming to establish causation especially on exposure cases, Officer Miles was unable to secure an attorney who would accept the attorney's fees that are outlined in §440.34 of the Florida Statutes. However, Officer Miles, was able to come up with a solution and two agreements concerning attorney's fees were signed: one between the law firm representing Officer Miles and the Fraternal Order of Police (FOP) in which the FOP agreed to pay a flat fee of \$1,500, and one between the law firm and Officer Miles in which she agreed to pay an hourly fee for all attorney time expended beyond 15 hours.<sup>37</sup> The Judge of Compensation Claims (JCC) denied the claimant's motion to approve the two attorney's fees agreements because it conflicted with the schedule of fees in §440.34. So, the claimant attorney withdrew and the claimant proceeded pro se. Not surprisingly the JCC ruled against the claimant, because she did not meet the burden of proof that the injuries from the exposure were job related. She also introduced affidavits from six (6) additional claimant attorneys, who expressed that they would be unable to represent the claimant based on the burden of proof and the difficulty of exposure cases being linked to causation and the inadequacy of the statutory fee structure. On appeal, the appellate court held that both §440.34 and §440.105, which provides that an attorney who receives a fee commits a first-degree misdemeanor unless the fee is approved by a JCC, were unconstitutional because they violated the claimant's First Amendment rights under the United States Constitution. The statute clearly reads:

440.015 (3)(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

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<sup>37</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant

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.

The appellate court in *Miles* held that the two sections, §440.34 and §440.105, “are unconstitutional violations of a claimant’s rights to free speech, free association, and petition” and “those provisions also represent unconstitutional violations of a claimant’s right to form contracts.” The *Miles* court held “that the proper remedy is to allow an injured worker and an attorney to enter into a fee agreement approved by the JCC, notwithstanding the statutory restrictions.” The only limitation to applicant’s attorneys fee is that there is “a JCC’s finding that the fee is reasonable.”

§440.105 makes it a crime for an attorney to accept a fee that is not approved by a JCC, and §440.34 prohibits the JCC from approving a fee that is not tied to the amount of a benefit secured; the two statutes together operated as an unconstitutional infringement on the claimant’s right to hire an attorney.<sup>38</sup> The appellate court stated “that the statutes actually operated to discourage attorneys from representing her, thus potentially placing the burden for any allegedly compensable injury or condition, which might normally be borne by the E/C, on the public as a whole, if the claimant is forced to access governmental benefits. Thus, the statutes cannot be reasonably read to prevent a public harm.” The claimant, a non-lawyer, required legal counsel to pursue her claim, and without counsel she would most likely fail in her attempt to collect benefits, The First District Court of Appeal in another workers compensation case stated that especially in a “lengthy and expensive contest” with an E/C, a claimant proceeding “without the aid of competent counsel” would be as “helpless as a turtle on its back.” *Davis v. Keeto, Inc.*, 463 So. 2d 368, 371 (Fla. 1st DCA 1985). These statutes are unconstitutional, because they impermissibly infringe on a claimant’s rights to free speech and to seek redress of grievances. Additionally, any fee agreement “must nonetheless, like all fees for Florida attorneys, comport

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<sup>38</sup> Langham, D. (n.d.). Fla. Stat. 440.34 (Florida Attorney Fees) Unconstitutional. Retrieved April 19, 2017, from <http://www.workerscompensation.com/compnewsnetwork/workers-comp-blogwire/23742-fla-stat-440-34-florida-attorney-fees-unconstitutional.html>

with the factors set forth in *Lee Engineering & Construction Co. v. Fellows*, 209 So. 2d 454, 458 (Fla.1968), and codified in the Rules Regulating the Florida Bar at rule 4– 1.5(b).” *Jacobson*, 113 So. 3d at 1052. Consequently, we hold that no attorney accepting fees in this situation may be prosecuted under §440.105(3)(c), Florida Statutes”.

Included in the First Amendment’s fundamental guarantee of freedom of speech, association, and to petition for redress of grievances, is the right to hire and consult an attorney. *In United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967), the United States Supreme Court held that “the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments” gave the union “the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.” Since First Amendment rights are fundamental rights, the appellate court applied strict scrutiny to §440.34 regarding its effect on these rights when taken in conjunction with §440.15. “To survive strict scrutiny, a law ‘[a] must be necessary to promote a compelling governmental interest and [b] must be narrowly tailored to advance that interest,’ and ‘[c] accomplishes its goal through the use of the least intrusive means.’”

Applying this test here, §§440.105(3)(c) and 440.34 fail, because “ [t]here is no significant governmental interest being served, because there is no “benefit secured” associated with the fees at issue in this case and, thus, no need to protect such from depletion. Moreover, the legislation is not content-neutral. “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 1989)]. The fee restrictions at issue here are not content-neutral, both because they are limited to work done on workers compensation issues as opposed to other areas of law, and because they are imposed only on claimants arguing [entitlement to benefits], rather than on both parties’ arguments...”

The *Miles* decision is a landscape changer, because it now allows for a claimant to find

representation without benefits being secured first.

Westphal v. City of St. Petersburg

194 So.3d 311 (2016)

In September 2013, the First District Court of Appeal, in an attempt to find §440.15(2)(a) constitutional, indicated that the claimant is “deemed” to be at Maximum Medical Improvement (MMI) at the conclusion of 104 weeks of temporary benefits, and can then seek permanent total disability benefits. The appellate court certified the question to the Florida Supreme Court which rejected its notion that the worker is “deemed” to be at MMI at the conclusion of 104 weeks. The First District Court of Appeal did make note that the 104 limitations on TTD is the lowest in the United States. §440.15(2)(a), Florida Statutes enacted in 2009, cuts off disability benefits for a totally disabled worker after 104 weeks or sooner if the worker reaches the date of maximum medical improvement (MMI) before 104 weeks. The statute also provides that<sup>39</sup> permanent total disability benefits (TPD) cannot be awarded until the worker reaches the date of MMI. So, if an injured worker is not yet at MMI and the 104 weeks has passed, the worker is unable to obtain benefits until he/she reaches MMI. In this case, Westphal was still totally disabled after 104 weeks but had not yet reached the date of MMI, so the statute required all total disability benefits to cease. The Florida Supreme Court concluded “that the 104- week limitation on temporary total disability benefits results in a statutory gap in benefits in violation of the constitutional right of

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<sup>39</sup> Burton, J. F. (2016, August). National Developments in Workers Compensation Relevant

access to courts.”<sup>40</sup> The Court concluded that the statute was plainly written and did not permit the Court to resort to rules of statutory construction. “Instead, we must give the statute its plain and obvious meaning, which provides that:

“[o]nce the employee reaches the maximum number of weeks allowed [104 weeks], or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured workers permanent impairment shall be determined.” § 440.15(2)(a), Fla. Stat.

By applying the statute’s plain meaning, the Supreme Court concluded that the 104-week limitation on TTD resulted in a statutory gap, in violation of the constitutional right of access to court. The Florida Supreme Court held that §440.15(2)(A) was unconstitutional, because it deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time – thereby creating a system of redress that no longer functions as a reasonable alternative to tort litigation. By ruling this section unconstitutional, it was stated the prior 260-week limitation withstood constitutional muster in *Martinez vs. Scanlan*, 582 So. 2d 1167 (1991) and did not rule the entire workers compensation system invalid. Instead the decision reinstated the 260-week limitation. In fact, this Court in *Kluger* specifically discussed the alternative remedy of workers compensation, explaining that

“[w]orkmen’s compensation abolished the right to sue one’s employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury.” *Kluger*, 281 So. 2d at 4 (emphasis added).

In other words, as *Kluger* held, workers compensation constitutes a “reasonable alternative” to tort litigation— and therefore does not violate the access to courts provision—so long as it provides adequate and sufficient safeguards for the injured employee.

In 1969, this Court noted “[t]he date of maximum medical improvement marks the end of

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<sup>40</sup> Id

temporary disability and the beginning of permanent disability.” *Corral v. McCrory Corp.*, 228 So. 2d 900, 903 (Fla. 1969). At that time, §440.15(2) provided for the payment of temporary total disability benefits for a duration not to exceed 350 weeks. § 440.15(2), Fla. Stat. (1967). In 1979, the Legislature added the term “date of maximum medical improvement” to the statute, defining it consistently with this Court’s prior 1969 construction in *Corral* and requiring that the date be “based upon reasonable medical probability.” § 440.02(22), Fla. Stat. (1979). That statutory definition has remained unchanged to this day. In 1990, the Legislature reduced the duration of temporary total disability benefits from 350 weeks to 260 weeks. § 440.15(2), Fla. Stat. (1990). Then, just four years later, and as part of an extensive statutory overhaul, the Legislature further reduced the duration of temporary total disability benefits from 260 weeks to 104 weeks.<sup>41</sup>

Under the plain language of this provision, temporary total disability benefits are payable for no more than 104 weeks, after which the workers permanent impairment rating must be determined. “The permanent impairment rating is used to pay ‘impairment income benefits,’ ” as distinguished from permanent total disability benefits, “commencing on ‘the day after the employee reaches [maximum medical improvement] or after the expiration of temporary benefits, whichever occurs earlier,’ and continuing for a period determined by the employee’s percentage of impairment.”<sup>42</sup> [L] [SEP]

As applied to *Westphal*, the current workers compensation statutory scheme did not just reduce the amount of benefits he would receive, which was the issue addressed in *Martinez*, but in fact completely cut off his ability to receive any disability benefits at all. Over the years, there has been continuous diminution of benefits and other changes in the law. For example, during the same period of time in which the Legislature reduced the provision of disability benefits, the

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<sup>41</sup> § 440.15(2)(a), Fla. Stat. (1994). f

<sup>42</sup> *Hadley*, 78 So. 3d at 624 (quoting § 440.15(3)(g), Fla. Stat.).

Legislature also gave employers and insurance carriers the virtually unfettered right to select treating physicians in workers compensation cases.<sup>43</sup> Further, the right of the employee and the employer to “opt out” of the workers compensation law, and preserve their tort remedies, was repealed.<sup>44</sup> Other changes have included a heightened standard that the compensable injury be the “major contributing cause” of a workers disability and need for treatment, and a requirement that the injured worker pay a medical copayment after reaching maximum medical improvement<sup>45</sup>.

Even though the 260 week limit on TTD benefits has withstood constitutional muster, in a separate concurring opinion, stated that §440.15 is “hopelessly broken and cannot be constitutionally salvaged. Where totally disabled workers can be routinely denied benefits for an indefinite period of time, and have no alternative remedy to seek compensation for their injuries, something is drastically, fundamentally, and constitutionally wrong with the statutory scheme. See *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)”<sup>46</sup>

## **THE GRAND BARGAIN**

The constitutional challenges that were won by the claimant in 2016 are unprecedented changes for the current workers compensation system and moves the pendulum back toward the claimant. Currently, the judiciary is reviewing and fixing the issues through precedent and statutory construction and falling back on previous years legislation. Until now, the “grand bargain” was on the precipice and at an extreme risk of not being able to function as a social legislation that protects all parties involved. In *Westphal*, Justice Lewis stated in his concurring opinion that “the majority decision leaves Florida workers in an only marginally better position

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<sup>43</sup> See § 440.13(2)(f), Fla. Stat. (2009); see also *Butler v. Bay Ctr./Chubb Ins. Co.*, 947 So. 2d 570, 572-73 (Fla. 1st DCA 2006).

<sup>44</sup> §§ 440.015, 440.03, Fla. Stat. (2009)

<sup>45</sup> See §§ 440.09(1), 440.13(14)(c), Fla. Stat. (2009).

<sup>46</sup> See *Westphal vs. City of St. Petersburg*

than they were in prior to this matter by failing to address and remove the inadequate alternative remedy, thereby leaving the Workers Compensation scheme unconstitutional and in need of major reform... such a system is fundamentally unconstitutional and in need of legislative—not judicial—reform. From these statements, one gains an appreciation for the judicial attempts to save the Workers Compensation statute from total disaster. Florida needs a valid Workers Compensation program, but the charade is over. Enough is enough, and Florida workers deserve better.” “In lieu of continuing to uphold the Workers Compensation law with rewrites, judicial patches, and flawed analyses, Chapter 440 should be invalidated where defective and the Legislature required to provide a valid, comprehensive program. This is necessary to address the current situation of less benefits being covered by workers compensation without the ability of a claimant to sue in tort litigation. It is clear that the potential reduction in benefits outweighs the loss of a claimant giving up the right to sue. If the attorney fees are removed, there is no disincentive to keep the E/C from denying it [claims from injured workers]”<sup>47</sup>

In an interview with Geoff Bichler of Bichler, Kelley, Oliver, Longo & Fox, PLLC, Tampa, Florida, who represented the claimants in both the *Miles* and *Westphal* appellate cases, he indicated that the Grand Bargain could also be referred to as the “Grand Illusion”. He pointed out that “One such example in Florida was the case of *Florida Fish & Fresh Water Fish Commission v. Driggers*, 65 So.2d 723 (Fla. 1953) where the Florida Supreme Court stated:

“One purpose of the Workmen’s Compensation Act, among other purposes, is to make available promptly medical attention, hospitalization, and compensation commensurate with the injury sustained in the course of employment; to place on the industry served and not on society the burden of providing for injured or killed workmen and their families. *Keene Roofing Co. v. Whitehead*, Fla., 43 So. 2d 464; *Weathers v. Cauthen*, 152 Fla. 420, 12 So. 2d 294 . . . Such Acts are mutually advantageous to both workmen and employers, and have a stabilizing influence on business and the general economy.”

This rationale offered in the past to support workers compensation acts in the face of

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<sup>47</sup> Id

constitutional challenges, are laughably outdated and no longer relevant. The purported mutual advantages mentioned by the Florida Supreme Court in 1953 have been so significantly eviscerated that the Grand Bargain has become a “Grand Illusion” for many injured workers. While this is a national problem, Florida provides instructive examples of how benefits have been reduced while immunity has been enhanced.

As Justice Lewis states, the Grand Bargain is in jeopardy. To resolve the issues raised in *Castallanos*, *Miles* and *Westphal* by only statutory changes in §440.34 and §440.15, Florida Statutes, leaves the remainder of the current legislation a fertile playground for constitutional challenges. Some of these challenges are already working their way through the appellate process and others may come in the form of actions seeking declaratory relief where massive records will be built to challenge the not only specific statutory provisions, but the entire statutory and regulatory scheme. The outcomes of such challenges are impossible to predict, but the dreaded uncertainty related to such cases can, and should, be eliminated with a comprehensive and enlightened approach to revising the Act in the coming session.”<sup>48</sup>

## **2017 LEGISLATIVE SESSION**

In response to the Florida Supreme Court decisions in *Castallons* and *Westphal*, the insurance companies drove up workers compensation rates for business; that increase triggered business groups to try to push legislation through to lower insurance costs. The driving force behind the increase in costs was the decisions regarding the attorney fee award structures. The legislative session wanted to reform the workers compensation system and the attorney award

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<sup>48</sup> Id

fee structures through two bills: House Bill 7085 and Senate Bill 1582. So, instead of a complete overhaul, the legislature looked at amending the current system.

House Bill 7085 sought to revise provisions relating to retainer agreements & awarding attorney fees. Among other topics which included: Requiring the Governor, or CFO in certain circumstances, to appoint member to fill vacancy on panel that establishes workers' compensation schedules within specified timeframe; requiring a panel to annually adopt statewide schedules of maximum reimbursement allowances; extending timeframes in which employees may receive certain workers' compensation benefits and in which the E/C must notify treating doctor of certain requirements.<sup>49</sup>

Senate Bill 1582 addressed "Revising a prohibition against receiving certain fees", along with consideration, or gratuities under certain circumstances; requiring carriers to authorize or deny, rather than respond to, certain requests for authorization within a specified timeframe; providing that specified cancers of firefighters are deemed occupational diseases arising out of work performed in the course and scope of employment; revising conditions under which the Office of the Judges of Compensation Claims must dismiss petitions for benefits.<sup>50</sup>

The Senate and House were unable to agree to terms and the debate went through the final days of the session. The House started with a cap of \$150 an hour on attorney fees with approval by a JCC. The Senate version of the bill capped attorney fees at \$250 an hour. On the last day, the Senate voted not to lower the cap in its bill, but the House still tried later to

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<sup>49</sup> <https://www.flsenate.gov/Session/Bill/2017/7085>

<sup>50</sup> <https://www.flsenate.gov/Session/Bill/2017/01582>

compromise with the \$180 cap.<sup>51</sup> Business groups begged for the Legislature to act, but lawmakers ended the 2017 session without reaching a compromise on a workers' compensation bill. During the regular 2018 legislative session, the House and Senate saw 3,052 bills and they were able to pass only 288<sup>52</sup>; none of which were related to workers compensation. Now, heading into an election year and with the Legislature trapped with hurricane recovery demanding their attention, the hopes of reform next year are dwindling. As of November 2017, the House and Senate have introduced more than 1,800 bills, none relating to the currently broken workers compensation system in Florida<sup>53</sup>. So, for now, we have to rely on judicial reform to keep the grand bargain in tact, and to decide the next wave of constitutional challenges our broken system will provide.

## CONCLUSION

The changes needed in Florida Workers Compensation system are the responsibility of the Legislature. The Legislature needs to remain circumspect in regards to their enactment of statutes that when applied, limits the rights and awards that an injured worker is entitled to. As the recent court rulings have shown, the Florida Workers Compensation system is in dire need of modifications. Even though these changes were addressed in the 2017 legislative session, lawmakers failed to amend, or change the system as it stands. So for now, the judiciary has patched the laws to maintain constitutionality. It is dangerous to remove E/C fees altogether. As *Castallanos* points out this will once again jeopardize the Grand Bargain, since the E/C paid fees

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<sup>51</sup> O'Conner, Amy (May 8, 2017), Florida Fails to Pass Workers' Compensation Reform, Retrieved November 24, 2017 from

<https://www.insurancejournal.com/news/southeast/2017/05/08/450191.htm>

<sup>52</sup> <https://legiscan.com/FL> Retrieved November 29, 2017

<sup>53</sup> Id

are the linchpin holding the workers compensation system together, and will surely be the subject of another constitutional challenge if capped at an hourly rate or removed altogether. Additionally, there are some procedural changes that could be made to strengthen the workers compensation system.

### Recommendation

The EAO is already a regulated authority under the current workers compensation statutes so oversight and regulation need not be created, just expanded. The EAO has a mission “To actively ensure the self-execution of the workers compensation system by educating system participants of their rights and responsibilities; by leveraging data to deliver exceptional value; and by holding participants accountable for fulfilling their obligations.”<sup>54</sup>

Expanding the EAO and making small improvements in the process prior to litigation through a proactive approach may lead to a large reduction in litigated claims and would help the EAO fulfill its mission. If the EAO were to expand its scope with the use of paralegals to assist with the claimants and the E/C early in the process (before the petition for benefits (PFB) is filed, a newly created division within the EAO can require that all claimants of reported workers compensation claims be contacted to ensure that their needs are being addressed and they are satisfied with the progression of their medical care and benefits received. By being proactive in this regard, the paralegals can attempt to address conflicts by contacting the E/C and assist the

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<sup>54</sup> About the Division (n.d.). Retrieved April 19, 2017, from <http://www.myfloridacfo.com/Division/WC/contactUs.htm>

claimant in gathering documents to help ensure payment of benefits. The paralegal would be the bridge between the claimant and the adjuster and overlook the “transaction” and “exchange” of information. If no agreement on benefits can be reached with the assistance of a paralegal, then the case could move forward with the filing of a petition by the claimant.

Florida’s higher educational institutions offer both paralegal and legal studies programs at two and four year institutions, and is home to eleven ABA accredited law schools located throughout the state and within the jurisdiction of an EAO office, so there would be law school interns or paralegals available to fulfill these job requirements and who can be trained to handle such disputes in a professional, caring way. If qualified paralegals/interns are permitted to assist in this way prior to a PFB it will help with workers compensation being a “self -executing system.” Deputy Chief Judge of Workers Compensation Claims, David Langham during an interview regarding this stated that “ If a state agency decided to allow “certified representatives” of some kind, that would likely make this possible. It would require some level of regulation, accrediting, monitoring, etc. The parameters might allow anyone with certain qualifications to represent within certain parameters of issues... There are systems that already have this. In Social Security proceedings non-lawyers can represent people and often do so effectively... We have seen the Florida Supreme Court conclude that non-lawyers can be the mediator.”

So how will Florida workers fare in this? The legislature has two options. (1) Riposte to the rulings by regressing back to the rules and regulations that jeopardized the “Grand Bargain”, hurting not only the injured worker but the employer and the local economy as well. Or (2) with due diligence, gently repair and rebuild the system by looking at the constitutional challenges

that are being raised, and anticipating applied challenges in the future. The latter option would better serve the people of the State of Florida.

## **APPENDIX A: GLOSSARY OF TERMS**

Claimant: The employee that was injured and is now receiving, or trying to receive, workers compensation benefits

E/C: Employer/Carrier

TTD: temporary total disability—this is that period of time following an injury on the job that the claimant is recovering from the injury and cannot work at all.

TPD: this is temporary partial disability, which is that period of time that the claimant has recovered sufficiently to return to work with restrictions.

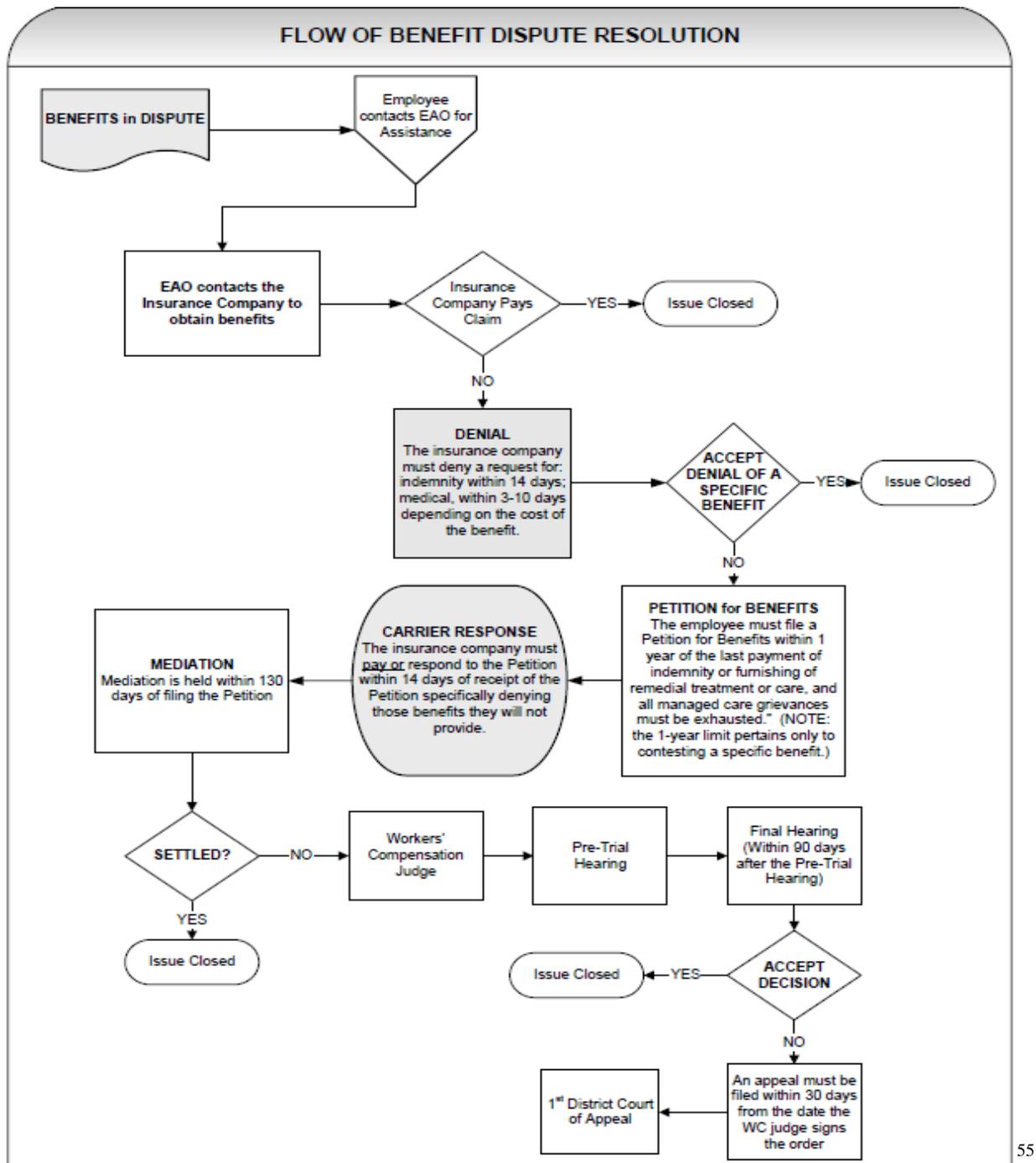
MMI: Maximum medical improvement---this is a medical/legal term determined by a doctor and is an important date in the payment system. Any further payment to a claimant after MMI is dependent on the claimant having a permanent impairment.

PPD: Permanent partial benefits are paid after MMI when the claimant reaches MMI and has an impairment rating. He is paid a certain number of weeks depending on the rating. Under the old law the JCC (Judge of compensation claims) could increase the impairment benefits based on the effect it has on the claimants ability to work.

IB's: This is Impairment benefits and represents a percentage of benefits owed to the claimant after he reaches MMI and has an impairment rating. It is a little different than PPD and if the claimant goes back to work his IB benefit is reduced by 50%.

PFB: Petition for Benefits

## **APPENDIX B: FLOWCHART OF DISPUT RESOLUTION**



**Figure 5: Flow Chart for Dispute Resolution**

<sup>55</sup> WORKERS COMPENSATION System Guide. (2017, February). Retrieved February, 2017, from <http://www.myfloridacfo.com/Division/WC/pdf/WC-System-Guide.pdf> (page 24)

## **APPENDIX C: LEGISLATIVE INTENT**

It is the intent of the Legislature that the Workers Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the workers return to gainful reemployment at a reasonable cost to the employer. It is the specific intent of the Legislature that workers compensation cases shall be decided on their merits. The workers compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike. In addition, it is the intent of the Legislature that the facts in a workers compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Additionally, the Legislature hereby declares that disputes concerning the facts in workers compensation cases are not to be given a broad liberal construction in favor of the employee on the one hand or of the employer on the other hand, and the laws pertaining to workers compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either employee or employer. It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The department, agency, the Office of Insurance Regulation, and the Division of Administrative Hearings shall administer the Workers Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments.

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