IN THE DISTRICT COURT OF APPEALS
FOR THE FIRST DISTRICT
STATE OF FLORIDA

Martha Miles,

Claimant/Appellant,

v.

City of Edgewater Police Department/Preferred Government Claims Solutions

Appellees/Employer/Carrier.

_____/

DCA Case No: 1DCA-15-0165

LT Case No : 11-025158WWA

D/A: 8/3/2011, 11/29/2011

APPEAL FROM DIVISION OF ADMINISTRATIVE HEARINGS,

OFFICE OF THE JUDGE OF COMPENSATION CLAIMS

TAMPA DISTRICT, JCC HONORABLE MARK M. MASSEY

OJCC #: 11-025158WWA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT AND INDEX OF ABBREVIATIONS

This is a workers' compensation appeal of a Final Order of Judge of Compensation Claims Mark Massey which denied the Claimant's right to hire counsel and then denied her entire care after she was forced to attend her Final Hearing unrepresented.

In this Brief, Appellant will use the following terms and abbreviations:

Appellant will also be referred to as Officer Miles or the "Claimant."

Appellees will also be referred to as Employer/Carrier or "E/C."

The Lower Tribunal will also be referred to Judge Massey or the "JCC."

Petition for Benefits will be referred to as "PFB."

The Florida Workers' Compensation Act/Chapter 440 and the legislative changes passed in 2003 will be referred to as the "Act."

In light of the new electronic record, which has dispensed with the need for multiple paper book volumes in favor of one consolidated electronic volume, Appellant will make record cites as follows: (Record. page number) e.g.- (R. 10). Per this Court's instructions, the Supplemental Record will be cited as follows: (SR. 1 (PDF 4)).

STATEMENT OF THE CASE AND FACTS

Appellant in this workers' compensation case is a career law enforcement officer employed by the City of Edgewater Police Department and is a member of the Fraternal Order of Police, Lodge 40, a fraternal, non-profit organization/union. (SR. 154 (PDF 157)) During the course and scope of her employment, she was exposed to highly volatile, toxic chemicals used to make illegal crystal methamphetamine or "meth," at criminal meth labs on two separate occasions: August 3, 2011 and November 29, 2011. (R.31-59, 195-99)

As a result of the exposure incidents, Officer Miles hired attorney Longo, who filed Petitions for Benefits on October 31, 2011 and January 30, 2012 for each date of accident. (R.11-16) The E/C filed Responses and Notices of Denial on November 3, 2011 and March 29, 2012, refusing to provide any benefits related to the exposure incidents. The E/C alleged, inter alia, that:

1. The present condition of the injured worker is not the result of an injury by accident arising out of and in the course and scope of employment.
2. The claimant's complaints are due to non work related condition or disease.
3. The condition of the employee is due to natural causes unrelated to her employment.
4. The accident did not arise out of employment because the work performed in the course and scope of the employment was not the major contributing cause of the injured workers injuries.

(SR. 135-137(PDF 138-140))

Despite the self-executing nature of the Workers' Compensation Act, the E/C denied the claims without any medical evidence and did

not even send Officer Miles for a medical evaluation before choosing to deny the exposure claims. The E/C's adjuster made such determination on her own and not based on any medical evidence.[1] As such, Officer Miles never even had the opportunity to see a physician to determine whether her condition was work related. Thereafter, on November 5, 2012, the Petitions were voluntarily withdrawn in both cases and her counsel was granted leave to withdraw as counsel of record. (SR. 163-137, 185 (PDF 166, 188))

Based on the Claimant's voluntary dismissal of the PFBs, the E/C filed a Motion to Tax Costs (SR. 164-168 (PDF 167-170). The E/C alleged $3,860.82 in costs that they were entitled to recover based on the defense of this action. (SR. 164-168 (PDF 167-170). A hearing on the Motion to Tax Costs was scheduled for August 14, 2013 by the JCC. (SR. 160 (PDF 163) However, prior to the scheduled hearing, the Fraternal Order of Police, Lodge 40, Officer Miles' Union, retained Bichler, Kelly, Oliver & Longo, (the "firm") under an agreement wherein the firm would represent Officer Miles, a member of the Union, in processing her workers' compensation claim in exchange for a payment in the amount of $1,500. The payment was specifically limited to the first ten (10) hours of legal work the firm expended in litigating her workers' compensation claim on the merits and to represent her at the hearing on the Motion to Tax

[1] The E/C's actions were completely contrary to F.S. §440.09(1)(a), which requires that major contributing cause be a medical determination only.

Costs. (SR. 201-204 (PDF 204-208)) Said agreement also reflected that Officer Miles understood that in order to pursue her claims to conclusion, the $1,500.00 paid by the FOP would not be sufficient compensation for her attorneys if more than 15 hours are expended. Thus, she agreed to pay her attorneys at a rate of $150.00 per hour for all time expended beyond 15 hours. (SR. 201-204 (PDF 204-208))

Once the firm appeared on behalf of Officer Miles, PFBs for both dates of accident were re-filed, which were again denied by the E/C. (R.17-22) Subsequently, on January 31, 2014, her Counsel filed a Motion to Approve Attorney's Fees seeking payment for work performed. (SR.1-6(PDF 4-10)) The Motion alleged that injuries caused by chemical agents related to the production of meth used in the production of illicit drugs are heavily litigated claims which require numerous hours of preparation for litigation, including medical tests, environmental tests, expert witnesses, physical examinations and medical and legal research. (SR.1-6(PDF 4-10)) The Motion further stated that because of the extensive preparation for litigation in the case, "it would not be economically feasible for the undersigned to continue on a purely contingent basis with fee restrictions as contained in Florida Statute §440.34." *Id*. The attorney certified that if the JCC denies the retainer fee, the firm would have no choice but to withdraw. (SR.1-6(PDF 4-10))

An evidentiary hearing on the Motion to Approve Attorney's Fees was held before the JCC. (R. 89-149) At the hearing, counsel

for Officer Miles, referenced the time intensive nature of pursuing an exposure claim under the Workers' Compensation Act and asserted that "it is economically not feasible to continue to represent the Petitioner without being paid for it.[2]" (R. 105) Based on the fee restrictions contained in Chapter 440 and the contingency of the fee, she represented that, "is unreasonable to ask an attorney to basically work for free." (R. 105)

After hearing argument, the JCC denied the retainer agreement fee arrangement for $1,500 as well as the hourly attorney's fee arrangement for prosecuting the claim on its merits as contrary to the Workers' Compensation Act as it currently exists. (R. 139) The JCC properly acknowledged his limited powers and ruled that:

> It is not the province of a JCC to decide whether the law is fair or reasonable. Rather, it is the job of the JCC to apply the law as it exists. I find that the law as it currently exists does not allow for non-contingent, claimant-paid hourly fees for prosecution of a claim on the merits.

(R. 65)

As a result of the JCC's denial of the retainer agreement and the hourly fee arrangement, Claimant's Counsel again filed a Motion to Withdraw and Impress Lien based on the economic unfeasibility argument as presented at the hearing. (R. 60-66)(SR. 24-28(PDF 27-

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[2]Note that although the JCC did not place Officer Miles' attorney under oath, her allegations in court have the same effect as sworn testimony. See *Morrison Mgmt. Specialists/Xchanging Integrated Servs. Group, Inc. v. Pierre*, 77 So.3d 662, 666 (Fla. 1st DCA 2011) ("because the attorneys are officers of the court, their representations to the JCC were akin to sworn testimony...")

30)) The Amended Motion also alleged that ethical "conflict of interest" issue prevented continued representation as the attorney would not be "in a position to fund this claim or to allocate the time necessary to zealously prosecute this difficult claim on behalf of the Claimant." (SR. 25-26(PDF 28-29))

The JCC, on August 8, 2014, granted the Motion to Withdraw leaving Officer Miles without counsel. (R. 69-73) A status hearing was subsequently held by the JCC with Officer Miles pro se and the E/C's attorney present.(R. 150-161) At the hearing, the JCC advised Officer Miles that "workers' compensation is a very complicated area..." and "it takes legal training and experience to be able to properly prosecute a workers' compensation claim...." (R. 152) Caught in a proverbial "Catch-22" of needing an attorney and having the means to pay for one, but not being able to hire an attorney because no attorney would take a case on a contingent guideline fee only, Officer Miles expressed her frustration:

> Well, considering the fact that nobody is going to be allowed to be paid by statute regulations, I can't pay anyone. Just like they've always said, you get what you pay for. And I'm not going to be able to find anyone. I want Bichler, Kelly & Oliver to represent me, and I can't pay them. This is the most frustrating thing on the planet to me.
>
> I deal with criminal law all of the time, and everybody that I see walks in the courtroom with an attorney, and I am now in a position where I have to walk into court against an insurance company, and I am not going to have anybody to represent me. I don't know who works for free, Judge. I don't know what to do.

(R. 152-153)

After having been advised by the JCC that she would be bound by the rules of evidence and rules of procedure just as if she were represented and that she would have to prove each and every element of her case, but without counsel, Officer Miles commented:

> I don't even know where to begin to ask any questions. This is not anything that I am even remotely familiar with. I deal with walking into courts and sitting down in front of the courtroom and the attorneys ask me questions about my involvement. I have never been in a position where I have had to represent myself.

(R. 156)

Thereafter, a hearing was held on the merits of her PFB on November 13, 2014 with Officer Miles on a *pro se* basis due to her inability to procure legal counsel willing to prosecute her claim on the merits for a contingent attorney's fee at the statutory rate and only payable should benefits be awarded. (R. 163-211) Officer Miles again advised the JCC that she had been unable to find counsel willing to take her case. (R. 166) She presented the JCC with the sworn affidavits of several attorneys who specialize in workers' compensation. (R. 171) Officer Miles also attempted to call a witness in support of her ore tenus motion for attorney's fees as well as have the Judge take judicial notice of the aforementioned affidavits. (R. 173-174) The experienced defense counsel objected to all the requests and the Judge denied Appellant's preliminary motions. (R. 170-72) This exchange exemplifies the extreme disadvantage of a pro se claimant attempting to prosecute her claim without the benefit of counsel,

especially in an exposure case.

The attorneys who submitted affidavits are Board Certified in workers' Compensation, all specialize in this area and have combined over 155 years of experience in workers' compensation law. (SR. 139-155(PDF 142-158)) The attorneys affirmed and swore that they had, "extensive knowledge of the nature and costs associated with prosecuting a toxic exposure claim including the retention of medical experts and requisite exposure testing." *Id.* They further affirmed that they had reviewed Officer Miles's case and they were aware that the E/C had denied her benefits. *Id.* Attorney Monte Shoemaker, who has more than 27 years of experience in representing workers' compensation claimants, averred that:

> Given the huge disparity between the expenses required to prove an exposure case like Ms. Miles' case and the de minimis attorney's fee allowed under Florida Statutes §440,34, I would not assume the professional responsibility for, or the potential professional liability associated with, Ms. Miles' case on a contingency basis. My decision to decline representation in any matter similar to Ms. Miles' case is particularly so reached, given the current and strictly enforced limitation on attorney's fees based on strict statutory percentages of the benefits secured for Ms. Miles, and only payable should workers' compensation benefits be awarded to Ms. Miles. Based on the restricted and limited attorney fees that are allowed and dictated by Chapter 440, Florida Statutes, and the award of which is contingent upon securing benefits, or the Court finding that the chemical exposure is compensable, it is simply not economically feasible to represent any employee injured by a chemical or toxic exposure, such as Ms. Miles was, without being paid on an hourly basis. Thus, unfortunately, I would have no choice but to decline representation of Ms. Miles.

(SR. 141-142(PDF 144-145))

Attorney Dennis D. Smejkal, who has more than 26 years of experience in workers' compensation, similarly averred that:

> Given the huge disparity between the expense of proving an exposure case and the de minimis attorney's fee allowed' under §440.34, the affiant would not be able to take this case on a contingency basis at the current statutory rate and only payable should benefits be awarded.

(SR. 143-144(PDF 146-147))

Lastly, Attorney George Cappy, who has more than 36 years of experience in representing workers' compensation claimants, similarly affirmed that he has extensive knowledge of the nature and costs associated with prosecuting a toxic exposure claim including the retention of medical experts and requisite and that he has reviewed the facts of the case at bar involving Ms. Miles, and that it is not feasible from an economic standpoint to represent the claimant in an exposure case such as Ms. Miles' without being paid on an hourly basis.(SR. 149-150(PDF 152-153)).

In spite of the difficulties with the case, the Fraternal Order of Police, of which Ms. Miles is a longtime union member, was willing to enter into a retainer agreement with the firm for an initial attorney's fee of $1,500, representing legal work already performed on both claims. Brian Gintz, the President of Lodge 40, Fraternal Order of Police, confirmed that Lodge 40 desired to pay the retainer fee on behalf of their member, Ms. Miles, notwithstanding any restrictions contained in Chapter 440, Florida Statutes and that it was the intention of Lodge 40 to pay the

retainer fee to the firm on behalf of Ms. Miles so that she may be represented by counsel in the pursuit of her workers' compensation cases and is not forced to represent herself against the insurance company and their attorneys. (SR. 153-155(PDF 156-158))

At the Final Hearing, counsel for the E/C, a board certified workers' compensation attorney with over 26 years of experience defended Appellant's claims. At the onset of the hearing, Officer Miles attempted to renew her Motion to Approve Attorney's Fees on an *ore tenus* basis, advising the JCC that she would not be able to proceed without legal counsel. (R. 169) As she stated:

> I would like for the Court to allow them (Bichler firm) to be able to represent me and I need to be able to pay them. I can't find anyone else to do it for me. No one else wants to put forth that type of effort without being compensated. Therefore, I need to be able to pay for representation.

(R. 169)

Without an experienced attorney handling her case, Officer Miles did not procure her own IME expert to support her claims, did not set or take any depositions, and she did not list any evidence or witnesses for the final hearing. More importantly, she did not know how. The result of a seasoned defense lawyer against an unrepresented Claimant was predictable– subsequent to the final hearing, the JCC entered a Final Compensation Order on December 11, 2014 denying and dismissing her two exposure claims. (R. 5-10) Although the JCC found Officer Miles to be credible, he opined that she did not provide any evidence to support her claims and no expert evidence or testimony in support of her burden of proof in

these two exposure cases, causing her claims to fail under existing law. (R. 9) Thereafter, she filed a timely Motion for Rehearing and to Vacate the Order. (R. 83-88) The Motions alleged reversible error committed by the JCC in not allowing her to present affidavits and live testimony as to her inability to retain legal counsel to represent her in pursuit of her exposure claims. (R. 87) She asserted that such evidence related to her constitutional rights. (R. 87) In an Order dated January 8, 2015, the JCC denied the Motions as untimely and on the merits. (R. 80-81) Based on Appellant's argument regarding her right to supplement the record, the JCC agreed and allowed the affidavits to be considered as "proffered exhibits" but declined to vacate his prior order. (R. 80) In denying the motions, the JCC stated that:

> No amount of evidence, in the form of affidavits or otherwise, would change the fact that the law as it currently exists, simply does not allow for the payment of non-contingent, hourly fees to a claimant's attorney by a claimant or anyone else on claimant's behalf. Further, the undersigned as a JCC has no authority to rule on constitutional issues such as those raised in claimant's motion.

(R. 80)

Officer Miles then timely followed her appeal on 1/8/15 in which she appealed the Final Compensation Order of 12/11/14, the Order denying Claimant's Motion to Approve Attorney's fees of 7/23/14 and the Order denying the Claimant's Motion for Rehearing and/or Motion to Vacate dated 1/8/15. (R. 4)

SUMMARY OF ARGUMENT

Appellant raises four issues on appeal. Because the undisputed testimony in the instant case establishes, without doubt or hesitation, that no attorney wants to take her case under the draconian "guideline" fee, the Claimant must go without representation. Thus, her fundamental rights to free speech are violated. The Claimant asserts that the First Amendment to the United States and Florida Constitutions, as well as binding precedent from the Supreme Court, prohibit the State from preventing the Claimant and/or her union from paying a reasonable fee to counsel to prosecute her case against the E/C. See United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217 (1967).

Next, Section 440.34, Fla. Stat. (2010) of the Act violates the Claimant's due process rights as it denies her access to an attorney. The opportunity to be represented by counsel in both civil and criminal proceedings is equated with due process. Section 440.34, Fla. Stat. (2010) does not bear a reasonable relation to a permissible legislative objective, and it is discriminatory, arbitrary and oppressive.

Further, Section 440.34, Fla. Stat. (2010) also violates the equal protection provisions of the Florida Constitution, as Appellant cannot freely contract with an attorney for payment of a reasonable hourly fee or for services or advice. The statute only

applies to claimants and is both created and applied in a capricious and arbitrary manner.

The statutory requirements for proving an exposure case under Section 440.02, Fla. Stat. (2010) result in benefits which are illusory and impossible to secure. The cumulative effect of the 10/01/03 Act and the "limited" medical benefits which it provides substantially reducing preexisting benefits to employees without providing any countervailing advantages, such that the workers' compensation statute is no longer a reasonable alternative to common-law remedies. Therefore, the Act violates the access to courts provision and is unconstitutional as applied.

Finally, the Legislature has unconstitutionally encroached on the Judicial Branch's power to administer Justice and regulate attorneys who are officers of the court. In eliminating "reasonable" attorney fees and mandating that fees be arbitrarily awarded solely on a statutory schedule, Florida Statute §440.34(1) is unconstitutional, both facially and as applied, as it violates the separation of powers by inherently and impermissibly placing attorneys representing injured workers in a conflict of interest prohibited by Florida Bar Rule 4-1.7. Further, the irrefutable guideline fee in §440.34 ignores this Court's past pronouncements on the pivotal role that attorneys, as officers of the court, play in ensuring the administration of justice in Florida courts, and ignores the critical importance that "reasonable" attorneys fees play in assuring a credible, fair and functioning justice system.

ARGUMENT:

STANDARD OF REVIEW

Appellant asserts that the same standard applies for all points of appeal. Whether a state statute is constitutional is a pure question of law subject to *de novo* review. *Caribbean Conservation Corp., Inc. v. Florida Fish & Wildlife Conservation Com'n*, 838 So. 2d 492 (Fla. 2003). Appellant here seeks a ruling that a state statute is unconstitutional both facially and as applied. The only way to bring such a challenge is to present proof to the JCC and then appeal to this Court. As recognized in *Anderson Columbia v. Brown*, which cited *Lee County v. Zemel*, 675 So. 2d 1378, 1381 (Fla. 2d DCA 1996), as applied constitutional claims must be raised on direct appeal of an administrative order rather than by filing a subsequent action in circuit court.

I. THE FIRST AMENDMENT GUARANTEE OF FREE SPEECH, FREEDOM OF ASSOCIATION, AND THE RIGHT TO PETITION PROHIBITS GOVERNMENT FROM INTERFERING WITH THE CONSULTATION OR RETENTION OF LEGAL COUNSEL, AND AS A RESULT, §440.105, SUBJECTING AN ATTORNEY TO CRIMINAL SANCTIONS FOR PROVIDING COMPENSATED LEGAL ASSISTANCE TO A CLAIMANT, AND §440.34 ARE UNCONSTITUTIONAL.

ARGUMENT ON THE MERITS

In the instant case, the Claimant desired to be represented in the pursuit of benefits under Chapter 440, i.e. her workers' compensation claim. The issue was the negative effect of the "guideline fee" under §440.34, Fla. Stat. (2010), which was totally contingent and amounts to only slightly over 10% of the value of

benefits secured.[3] The record established, without hesitation, that absent a deviation from the guideline fee, no attorney would represent her. In fact, her attorney refused to handle the case unless the JCC granted an exception to the guideline fee, which the JCC refused. (SR. 139-155(PDF 142-158)) Because the undisputed testimony established, without doubt or hesitation, that no attorney would take her case under the draconian "guideline" fee, the Claimant' fundamental rights to free speech were violated.

While the benefit of some temporary lost wages and medical treatment to the Claimant would be substantial to her personally, the monetary value of the lost wages plus five years of medical benefits sought in the PFB[4] would not be a significant amount, especially when reduced to the Workers' Compensation Fee Schedule. The affidavits showed that the guideline fee would not be sufficient or reasonable and would in fact create an ethical "conflict of interest" issue that precludes representation as the

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[3] Florida Statutes Section 440.34(1) and (3)(2010) mandates that an "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...."

Subsection (2) further limits this fee, providing: "For purposes of this section, the term 'benefits secured' does not include future medical benefits to be provided on any date more than 5 years after the date the claim is filed." Expressed mathematically in an easier format, the statutory "guideline fee" is 10% + $750 of the benefits provided.

[4] The PFBs sought payment of lost wage benefits (TT/TPD), compensability of disabling chemical exposure, and treatment with an otolaryngologist. (R. 11-22)

attorney would not be "in a position to fund this claim or to allocate the time necessary to zealously prosecute this difficult claim on behalf of the Claimant." (SR. 25-26(PDF 28-29)) In fact, th JCC made this exact finding of conflict. (R. 69) With the complexities associated with this case, even the best and most efficient legal team would need to spend well over 100 hours to bring the case to conclusion. Indeed, in the Amended Motion to Withdraw, Attorney Buonauro represented that she spent in excess of 68.15 hours and $1,141.94 in costs as of August 5, 2014, long before the Final Hearing ever occurred. (SR. 197-198(PDF 201-208)) If Officer Miles won $30,000 in total benefits (a generous estimate), this would result in a guideline fee of just $37.50 per hour, which was completely contingent. Further, the attorneys likely would expend costs which would exceed any fee which would be awarded. Under these circumstances, it is easy to understand why no less than four prospective attorneys advised the Claimant that it was not financially feasible to represent her using a guideline fee and all declined her case. (SR. 139-155(PDF 142-158)) With these facts, would any sane person take such a case?

The record firmly established that the instant case is complex and required substantial time and effort and substantial risk. Workers' compensation proceedings, which include sophisticated electronic filing requirements and subject litigants to evidentiary

and procedural rules, are difficult and complex.[5] In a proceeding such as the instant case, no lay person would stand a snow-ball's chance of prevailing and without counsel, would be left "as helpless as a turtle on its back." *Davis v. Keeto, Inc.*, 463 So.2d 368, 371 (Fla. 1st DCA 1985). The Final Order of the JCC and denial of all benefits is prima facie evidence of this contention.

FREEDOM OF SPEECH

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[6] U.S. Const., amend. I. Freedom of speech is, of course, "among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Burson v. Freeman*, 504 U.S. 191 (1992). Included in the First Amendment's fundamental guarantee of freedom of speech,

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[5] The complexity of the workers' compensation system was recognized by this Court in Bysczynski v. UPS/Liberty Mutual, 53 So. 3d 328 (Fla. 1st DCA 2010), where the court observed that, "This case illustrates the complex nature of Florida's current Workers' Compensation Law, and the myriad of thorny legal and medical issues which accompany even the most fundamental decisions regarding an injured worker's entitlement to, and a carrier's liability for, medical treatment."

[6] Similarly, Florida's Constitution provides that "[n]o law shall be passed to restrain or abridge the liberty of speech." Art. I, §4, Fla. Const. The Florida Supreme Court has held that the scope of the Florida Constitution's protection of freedom of speech is the same as that required under the First Amendment. *Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982). Thus Florida courts must apply the principles of freedom of speech announced in the decisions of the United States Supreme Court. *Id.* at 461.

association, and petition is the right to hire and consult an attorney.[7] *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

In cases such as *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964), *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), and *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971), the United States Supreme Court firmly recognized that the First Amendment prohibits the State from interfering with the rights of unions and its members to consult with and retain counsel of their choice in order to engage in collective activity and obtain meaningful access to the courts. Likewise, the Supreme Court has held that the State is prohibited from impeding an individual's ability to consult with legal counsel of his or her choice, regardless of the purpose for which counsel is sought. *See Bates*, 433 U.S. at 350 ("Underlying [our collective action cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups."); *Trainmen*, 377 U.S. at 7 ("*A State could not ... infringe in any way* the right of individuals and the public to be fairly represented in

[7]The right of association and to petition the government for a redress of grievances are inseparable from and thus subject to the same constitutional analysis as the right to free speech. *See Wayte v. United States*, 470 U.S. 598 (1985). The Florida Constitution provides a similar right: "The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances." Art. I, § 4, Fla. Const.

lawsuits...") In sum, the First Amendment protects an individual's right to consult with and retain an attorney on any legal matter.

In *Jacobson v. Southeast Pers. Leasing, Inc.*, 113 So. 3d 1042, 1045 (Fla. 1st DCA 2013), this Court was presented with a similar situation where a Claimant appealed the JCC's denying his motion to approve a retainer agreement between him and his counsel for an hourly retainer for legal services limited to representation in the defense to oppose the E/C's motion to tax costs.[8] This Court concluded that to the extent that Sections 440.34 and 440.105(3)(c), Fla. Stat. (2010), prohibit a claimant from retaining counsel to defend a motion to tax costs against him, those statutes infringe upon claimant's constitutional rights under the 1st Amendment. Accordingly, as applied, Sections 440.34 and 440.105(3), Fla. Stat.(2010) are unconstitutional. This Court held:

> Although Section 440.105(3)(c), Fla. Stat. (2010) prohibits such attorneys from receiving unapproved fees, Section 440.34, Fla. Stat. (2010) does not, under our holding today, preclude a JCC's approving a fee agreement when a claimant chooses to obtain legal representation to aid in defense against an E/C's motion to tax costs. Such a fee agreement must nonetheless, like all fees for Florida attorneys, comport 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, at 1052.

This Court recognized "that First Amendment rights are

[8] The undersigned attorney was counsel to Jacobson before the JCC in the cost proceedings and on appeal.

undoubtedly fundamental" and that "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." *Id*, at 1048; *State v. J.P.*, 907 So.2d 1101, 1109 (Fla.2004) Perhaps most importantly, as held by the Florida Supreme Court in *North Fla. Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612, 635 (Fla. 2003), under a strict scrutiny analysis, the legislation is presumptively unconstitutional and the **State must prove** that the legislation furthers a compelling State interest through the least intrusive means. See generally *In re T.W.*, 551 So.2d 1186 (Fla. 1989).

As it was with Mr. Jacobson, the speech at issue here with Officer Miles is her own words — given voice through her attorney — spoken or written before the court during litigation. *Jacobson*, at 1049. That right was taken from her when the JCC refused to approve her retainer agreement with her Union. In the instant case, the Claimant cannot obtain representation under the guideline fee, but even if she could it would not make the statutory restrictions prohibiting her from hiring an attorney on an hourly basis any less offensive to fundamental rights. (R. 20, 138, 174) Thus, §440.34 restricts the Claimant's First Amendment rights to free speech, free association, and petition for redress. *Jacobson*, at 1050. Further, §440.34, Fla. Stat. (2010) is not a permissible exercise

of the State's police power to restrict Claimant's First Amendment right to contract for legal services to prosecute her claim. *Id.*

The pejorative effect of a "guideline fee" is obvious- no similarly situated employee will be able to get an attorney to represent her.[9] The necessity of a Claimant having representation of counsel in a workers' compensation proceeding has long been recognized by the Florida Supreme Court. *See Lee Engineering*, (*supra*)("It is obvious that fees should not be so low that capable attorneys will not be attracted.") In *Rivers v. SCA Services*, 488 So.2d 873, 876 (Fla. 1st DCA 1986), this Court stated:

> Application of the provisions of Section 440.34(1), Fla. Stat. (2010) in a manner that promotes such a chilling affect on the Claimant's right to obtain legal services . . . is inconsistent with the benevolent purposes of the Workers' Compensation Act.

Sections 440.105(3)(c) and 440.34, Fla. Stat., (2010), as construed following the 2003 legislative amendments to Chapter 440, prohibit workers' compensation claimants from consulting with or retaining an attorney of their choice, at their own expense, for legal services rendered in connection with any proceedings under

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[9] In finding its version of the workers' compensation act unconstitutional due to burdensome fee restrictions, the New Mexico Supreme Court said "It severely impairs, if not eliminates, the ability of claimants to obtain the assistance of counsel, and as such impairs or eliminates any meaningful due process or access to the courts by an injured worker." The court held that such dissimilar treatment was a denial of equal protection, characterizing the one-sided attorney fee restriction as arbitrary and irrational. *Id.* at 243. *Corn v. New Mexico Educators Federal Credit Union*, 889 P. 2nd 234, 243 (N.M. CT of App 1995).

Chapter 440. The irreparable harm lies in the fact that an injured worker such as Miles cannot even pay an attorney for an hour of his time to get counsel regarding her rights and responsibilities under Chapter 440, and further, neither Officer Miles nor her Union can even pay an attorney for advice as to how she should handle her own claim on a pro se basis. As noted above, it is a misdemeanor of the first degree under §440.105(3)(c) for "any attorney ... to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by the JCC."[10] Section 440.34(1) prohibits the JCC from approving an agreement between a claimant and his or her attorney which provides for an attorney's fee in excess of the amount permitted by that provision.

Sections 440.34(1)&(2) provide that the JCC shall consider only those "benefits secured" in awarding a claimant's attorney's fee and that any attorney's fee approved by the JCC for benefits secured on behalf of a claimant may only be calculated based on a the "guideline." There is simply no allowance for the payment of freely negotiated, non contingent and reasonable hourly fee. Consequently, for claimants in the position of the Appellant, Sections 440.105(3)(c) and 440.34(1) abridge the right to free

[10] JCCs across the state have only applied this prohibition to claimant attorneys and not to employer or carrier attorneys. *Jacobson*, at 1049; *Altstatt v. Florida Dept. of Agriculture*, 1 So.3d 1285 (Fla. 1st DCA 2009).

speech, free association, and to petition government because they create a "no claimant lawyer zone" in these types of cases (i.e. where limited benefits and procedural complexity make purely contingent fees unworkable). Using the ruse of "protecting the injured worker," the legislature has effectively eliminated a large class of these workers from being able to hire counsel to represent them in there very cases where they need the representation most.

Statutes that abridge fundamental rights, such as the right to speech, association, and petition, are subject to a strict scrutiny standard of judicial review. See, e.g., *Reno v. Flores*, 507 U.S. 292 (1993). The statutes at issue in the present case fail to survive this exacting scrutiny, and are therefore unconstitutional as applied to claimants in the position of the Appellant; i.e. those who desire to consult with or retain an attorney for legal services rendered in connection with a Chapter 440 where the "guideline fee" is either unreasonably low or manifestly unfair to economically justify an attorney getting involved in the case.

To be sure, the State is permitted to enact some degree of regulation concerning the payment of attorney's fees in a workers' compensation case. As recognized in *Jacobson*, there are three "general" governmental interests served by the legislation:

1). the regulation of attorney's fees in general, *See Samaha v. State*, 389 So. 2d 639, 640 (Fla. 1980);
2). lowering the overall cost of the workers' compensation system, *See Acosta v. Kraco, Inc.*, 471 So. 2d 24 (Fla. 1985) (mentioning state interests of "reducing fringe benefits to reflect productivity declines associated with

age, . . . and reducing workers' compensation premiums"); and

3). protecting injured workers who are of relatively limited financial means, *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506, 510 (Fla. 1st DCA 2006).

Jacobson, 113 So. 3d at 1049.

Without question, each of the considerations above are "general governmental interests" as noted in *Jacobson*. However, the strict scrutiny test requires more than *an interest* or a *general interest.* It must be ***"a compelling governmental interest***." *See North Florida Women's Health*, 866 So. 2d at 635; *State v. J.P.*, 907 So.2d 1101, 1109 (Fla.2004). To the best of Appellant's knowledge, no court has ever labeled any of the above three stated interests as "**compelling**" ones. Indeed, these interests have previously been analyzed under the "rational basis" standard, where the test is simply whether **"any** realistic and rational set of facts may be conceived to support it." e.g., *Lundy*, at 510. In *Samaha v. State*, 389 So.2d 639, 640 (Fla. 1980), the court stated that "The legislature may limit the amount of fees that a claimant's attorney may charge because the state has a *legitimate interest* in regulating attorney's fees in workers' compensation cases." However, a "legitimate" interest is a far cry from one that is "compelling."[11] In *Jacobson*, this Court concluded that these

[11] Webster's Online Dictionary defines "Compelling" as "1. Evoking interest, attention, or admiration in a powerfully irresistible way. 2. Not able to be refuted; inspiring conviction." Legitimate is defined as "being exactly as purposed: neither spurious nor

statutes do not survive strict scrutiny because there is no "significant" governmental interest being served.[12] *Id*, at 1049. Because none of the these interests are "compelling," they cannot justify the existence of Section 440.34, Fla. Stat. (2010).

Further, while reducing *employer/carrier paid* fees to claimant's lawyers could, in theory, reduce costs to the system, restricting *claimant paid* fees does not reduce costs to the system by a penny. Either the claimant pays the fee out of funds already in her possession or out of benefits. Hence, the restriction of claimant paid fees bears no rational relationship to the goal of reducing costs to the system, and even if it did, it does not accomplish that goal through the use of the least intrusive means.

Lastly, Section 440.34 serves a "general" state interest in purportedly protecting the claimant from surrendering a significant portion of the limited benefits he has recovered. See, e.g., *Khoury*

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false or accordant with law or with established legal forms and requirements."

[12] Again, this Court was imprecise in its language... a "significant governmental interest" is not the test under strict scrutiny (for rights such as privacy and free speech). The right of privacy is a fundamental right which demands the **compelling** state interest standard; this test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a **compelling** state interest and accomplishes its goal through the use of the least intrusive means". See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Winn-Dixie Stores, Inc. v. State, 408 So.2d 211 (Fla. 1981) (Restrictions on first amendment rights must be supported by a compelling governmental interest and must be narrowly drawn to insure that there is no more infringement than is necessary.")

v. Carvel Homes, Inc., 403 So. 2d 1043 (Fla. 1st DCA 1981); *Samaha*, 389 at 640. However, because the system is so complex that claimants cannot get benefits without an attorney so there are no benefits to protect, which is exactly what happened to the Claimant in the instant case. As such, the statute bears no rational relationship to this purpose (i.e., it cannot even pass the less rigid rational basis test). No **compelling** state interest is constitutionally advanced by the operation of these statutory provisions where claimants, like the Appellant, are faced with the task of appearing in a legal proceeding to attempt to secure benefits for themselves. In such circumstances, these claimants are prohibited from even *consulting* with an attorney, let *alone retaining one* to represent them at the proceeding.[13]

The United States Supreme Court has consistently held that regulations which have the effect of precluding an aggrieved individual or group from consulting with or retaining an attorney are unconstitutional. For example, in *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), which is directly on point and controls the outcome of this case, the Court held that "the freedom of speech, assembly, and petition guaranteed by the First and

[13] Obviously this would not be a concern if the claimant were fortunate enough to find an attorney to provide legal services for free. The likelihood of this occurring are so minuscule as to not merit any consideration.

Fourteenth Amendments gives petitioner a Union, just like the Union in the instant case the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id*. The Court acknowledged that states have the right to regulate fees to protect high standards of legal ethics but said interest cannot trample fundamental rights. On this point, the Court stated:

> The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Schneider v. State*, 308 U. S. 147 (1939); *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

Mine Workers, at 222.

Noting that the First Amendment protects "vigorous advocacy," *See Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415 (1963), the Court has recognized the importance of the assistance of counsel to such individuals or groups: "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries..." *Trainmen*, 377 U.S. 1, 7 (1964). Further, the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or

political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Mine Workers, at* 223.

As a result of the 2003 amendments to Chapter 440, a workers' compensation claimant is precluded by operation of §440.105(3)(c) and 440.34(1) from consulting with or retaining an attorney of her choice, at her own expense, for legal advice or for services rendered in connection with a Chapter 440 proceeding when payment is not conditioned on a "benefit secured" (i.e., he cannot hire an attorney on an hourly basis) and cannot hire an attorney based on benefits secured if the percentage exceeds the guideline, even if that means that no attorney would take the case as the record established here. This regulation is not necessary to serve a compelling state interest, and even if it was, it is not narrowly drawn to achieve such an end. In the case at hand, Officer Miles faced an experienced counsel, who had no statutory limitations on how or what his client (the E/C) could pay their attorney. Indeed, the record reflects that counsel for the E/C billed his client at a rate of $135 per hour and para-legals billed at a rate of $75-80 per hour for their services. (SR. 181-184(PDF 184-188)) Contrast the E/C's unfettered right to pay its counsel and its para-legals to defend the case to the Claimant's non-existent rights, where neither the Claimant nor the Union could pay her lawyers and the Claimant cannot even pay for the services of her paralegal. See *Demedrano v. Labor Finders of Treasure Coast*, 8 So. 3d 498, 500 (Fla. 1st DCA 2009)("because paralegal time falls within the ambit

of attorney time, the attorney fee paid as a part of lump sum settlement is based on the fee schedule now mandated by the statute and includes paralegal time within the award of attorney time.")

Having no legal training, Officer Miles sought to retain counsel and pay him a reasonable fee along with the payment by her Union to also contribute $1,500 towards her representation. She was precluded from doing so by the JCC due to the operation of the fee regulations in question. (R. 60-66) Without doubt, she suffered an unconstitutional violation of her fundamental right to freedom of speech and right to privacy/contract.

Regarding Miles's right to contract, strict scrutiny applies as, "The right to contract for legal services emanates from the First Amendment." *Jacobson*, at 1050. The right to contract is subject to "reasonable restraint" under the police power of the State, the right being "the general rule" and its restraint "the exception to be exercised when necessary to secure the comfort, health, welfare, safety and prosperity of the people." *Id*, at 1051; *Golden v. McCarty*, 337 So.2d 388, 390 (Fla.1976) With respect to the application of §440.34, the regulation does not promote the health, safety, welfare, or morals of the public because it actually harms the public (claimants) instead of protecting them. Further, it is arbitrarily and capriciously applied.

Further, now that Officer Miles has been denied the right to a lawyer and lost her case as a result of that, she is obligated to pay costs to the E/C under Section 440.34(3), Fla. Stat. (2010). It

is an absurd result, if not Orwellian one, that she could legally contract with an attorney for a hourly fee to defend her in the cost proceedings under *Jacobson* (supra) and likewise can contract with an attorney to defend her in the enforcement of those cost proceedings in Circuit Court, but she cannot, due to the prohibitions in §440.34, contract with an attorney for a reasonable to help win her case and avoid that result in the first place.

II. §440.34 IS UNCONSTITUTIONAL AS IT IMPERMISSIBLY VIOLATES APPELLANT'S DUE PROCESS RIGHTS

Article I Section 9 of the Florida Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law....

In Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla.1974), the court held that the test used to determine whether a statute violates due process "is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." *Id*, at 15; *See also Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So.2d 1090 (Fla. 2005). Appellant respectfully submits §440.34 and §440.105, Fla. Stat. (2010) violate her procedural and substantive due process rights. By severely impairing, if not altogether eliminating, her ability to obtain the assistance of counsel, a claimant's due process rights to be heard and to present evidence in a meaningful way are eliminated. Section 440.34 is discriminatory and arbitrary, as these fee restrictions impair only claimants and not carriers.

The oppressive and discriminatory effect of a "guideline fee"

is obvious- no employee will ever be able to get an attorney to be able to represent her in these types of cases. It accords with logic and reason that absent *pro bono* work, lawyers are not expected to work for free or for *de minimius* compensation. "In the long run, as John Maynard Keynes once observed, we are all dead. In the short run, lawyers have offices to run, mortgages to pay, and children to educate." *United States Department of Labor v. Triplett*, 494 U.S. 715, 724-725 (1990). As this passage points out, the private practice of law is still a business. A lawyer who offers his time and the benefit of his experience should be able to receive reasonable compensation for his efforts.

The due process rights of injured workers to be heard at an evidentiary hearing includes more than simply being allowed to be present and speak. Also included is the right to introduce evidence at a meaningful time and in a meaningful manner and the opportunity to cross examine witness and to be heard on questions of law. *AT& T Wireless Services Inc. v. Castro*, 896 So.2d 828 (Fla.1st DCA 2005). Here, the testimony established without equivocation that the Claimant could not succeed without counsel. (R. 168-70) The JCC's own pronouncements support this undeniable conclusion.[14] (R. 152) The Claimant's opportunity to be represented by counsel in both civil and criminal proceedings is equated with due process.

[14]The JCC noted that, "workers' compensation is a very complicated area,".... and "it takes legal training and experience to be able to properly prosecute a workers' compensation claim."

Times Publishing Co. v. Burke, 375 So.2d 297(Fla. 2nd DCA 1979); *Sheinheit v. Cuenca*, 840 So.2d 1122 (Fla. 3d DCA 2003); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Without a doubt, individuals like Officer Miles have a right to counsel in cases. In Melton v. State, 56 So. 3d 868 (Fla. 1st DCA 2011), this Court, discussing the importance of the right to counsel of one's choice in non criminal proceedings, stated that:

> The Supreme Court has said that "[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Citizens able to secure private counsel are not required to face the hazards of litigation without representation by counsel whom they have chosen because of confidence in counsel's integrity, ability and sound judgment.

Melton, 56 So. 3d 871-73 (footnote & citations omitted)

The decision in Melton (and cases cited therein) firmly establish that Officer Miles has the absolute right to counsel in her workers' compensation case. However, in a very indirect and nefarious way, §440.34 and §440.105 eliminate her right to obtain counsel by removing her right to have her counsel be paid a reasonable fee for services. The legislature has effectively said, "Claimant's can hire lawyers, but the lawyers cannot be paid a reasonable fee for their work." Because the fee restrictions are one sided, with no corresponding limits on carriers, §440.34 is "discriminatory, arbitrary and oppressive." *Lasky*, at 15.

III. §440.34 IS UNCONSTITUTIONAL AS IT IMPERMISSIBLY VIOLATES APPELLANT'S EQUAL PROTECTION RIGHTS

The court in *Estate of McCall v. US*, 134 So. 3d 894 (Fla. 2014) stated that "Unless a suspect class or fundamental right protected by the Florida Constitution is implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge."

1. Strict Scrutiny

Appellant asserts that she was, as an injured worker, and as are all injured workers by their very definition, disabled.[15] The fundamental right of "a prohibition against discrimination against the disabled" ("no person shall be deprived of any right because of physical disability") was adopted in the 1998 amendments to the Florida Constitution, Art. I, Section 2. The Constitution created a protected class, the disabled, and required strict scrutiny of legislation affecting that class. See Commentary to 1974 and 1998 Amendments, 1974 Senate Joint Resolution 917, 1998 Constitution Revision Commission, Revision 9. The Florida Supreme Court has held that the constitutional test for any law which affects certain classifications (of persons) and fundamental rights must pass the strict scrutiny test. *De Ayala v. Florida Farm Bureau*, 543 So.2d

[15] For purposes of workers compensation, disability is defined by Section 440.02(13), Fla. Stat. (2010) as "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." Officer Miles met that definition by virtue of inability to return to work after her accident. (R. 200-02, 210)

204 (Fla. 1989) (the standard of review for the constitutionality of a statute that affects a suspect class in strict scrutiny). In the instant case, §440.34 affects a suspect class, disabled workers such as the Appellant and treats that class differently than persons with no disability (i.e., employers and carriers). Here, §440.34, which unquestionably intrudes into the Claimant's equal protection rights as a disabled person, is presumptively invalid. *See North Florida,* at 635. There is no proof that the legislation furthers a compelling State interest through the least intrusive means, rendering the legislation unconstitutional. *Id.*

2. RATIONAL BASIS

Analyzed under a rational basis standard, as enunciated in *McCall (supra)*, the dissimilarity in which Section 440.34, Fla. Stat. (2010) treats claimants vis-a-vis everyone else (E/Cs) is not rationally related to any legitimate state interest. As noted above, §440.34, Fla. Stat. (2010) has three legitimate interests: regulating attorneys' fees (e.g., *Samaha, supra*), protecting injured workers of limited financial means (e.g., *Lundy*, *supra*), and lowering cost of the worker's compensation system (e.g., *Acosta, supra)*. Sections 440.34 and 440.105(3) do not rationally relate to the first two objectives and instead result in an unconstitutional denial of equal protection because the legislature created irrational classifications which result in an arbitrary or capricious application of the law.[16] A statutory classification

[16] *See also Corn v. New Mexico Educators Fed. Credit Union*, 889 P. 2d 234, 243 (N.M. Ct. App. 1994), where the court addressed a

violates equal protection if it treats similarly situated people differently based on an illogical or arbitrary premise. See *McElrath v. Burley*, 707 So.2d 836 (Fla. 1st DCA 1998). A statutory classification must be based on a legitimate government interest and can neither be created nor applied in a capricious manner. *See Steigerwalt v. City of St. Petersburg*, 316 So.2d 554 (Fla. 1975).

Here, people like Officer Miles who want to pay a lawyer cannot get representation because the Legislature criminalized the act of a lawyer trading services for money, even where the client (or her Union) has both the funds and the desire to pay. The Legislature created two classifications: injured workers (citizens of the State of Florida) and the other class- employers and carriers (also citizens). The latter class may freely contract with lawyers to represent their interests, while the former is strictly prohibited from doing so under the threat of criminal prosecution of the lawyer.[17] The law permits no exception and no procedure to address the injured worker's capacity and desire to contract with a lawyer for services. The differential treatment is arbitrary.

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statute that restricted what claimants could pay their attorneys but provided no such restriction relating to carrier attorneys. The New Mexico Court held that such dissimilar treatment was a denial of equal protection, characterizing the one-sided attorney fee restriction as "so attenuated as to render the distinction arbitrary and irrational." *overruled on other grounds*, *Trujillo v. City of Albuquerque*, 965 P.2d 305 (N.M. 1998).

[17] See Rogner, William: "*Don Quixote's Charge – Why Kauffman Was Correctly Decided and Why the Restrictions on Workers' Compensation Attorney's Fees Are Unconstitutional Anyway.*" News & 440 Report, 2011 Volume XXXI, No. 2 Fall.

Many, if not most all, injured workers possess the intelligence and acumen to enter into a contract with a lawyer without being harmed. What claimants cannot do is navigate the procedurally and substantively complex workers' compensation system on their own.

Taking into account the undisputed complexity of the workers' compensation system (E.g., *Bysczynksi (supra*)) and the undisputed need for counsel to succeed, the fee restrictions are irrational as they relate to the intended purpose of protecting claimants. In addition, all lawyers swear to an oath of conduct and are subject to Bar Rules which obviate any concerns that attorneys will fleece their own clients.[18] This further removes any rational relationship to protecting the rights of the class as a whole. *In Re Amendment to Code of Professional Responsibility (Contingent Fees)*, 349 So.2d 630 (Fla. 1977), the court reviewed a Petition for Amendment of the Code of Professional Responsibility, recognizing the "constitutional right to make contracts for personal services so long as no fraud or deception is practiced and the contracts are legal in all respects." *Id*, at 632. The court rejected a proposed amendment to impose a maximum contingent fee schedule and "impinge upon the constitutional guarantee of freedom of contract." *Id*. Dispensing with the notion that such a cap, as now only exists in §440.34, Fla. Stat. (2010), was necessary, the court rhetorically asked "where is the rational basis for the proposed regulation?" *Id*. The court commented:

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[18] See Rules Regulating The Florida Bar, 4-1.5 FEES AND COSTS.

> On the record, briefs and argument before us there is no more rational basis to adopt as a part of our Code of Professional Responsibility the suggested maximum fee schedule than there is to establish such a maximum on the fees contracted for by architects, engineers, accountants or physicians, to name a few similar professions, for their activities to affect the public interest. It may be that to do so would lower the costs of such professional services, although there is no such guarantee. It is just as likely that the result would be to diminish the quality of service clients of these professions would receive or eliminate the services altogether for some..... However, we are persuaded that the most effective way to prevent any such overreaching is through diligent application of the time-tested criteria already contained in the Code of Professional Responsibility. The Florida Bar is charged with the responsibility to prosecute vigorously those who do not observe the Disciplinary Rules. We expect the Bar to discharge that responsibility diligently.

Id.

With the protections of the Bar and the Disciplinary Rules in place, very few members of the class need protection from unscrupulous attorneys or ill advised fee arrangements. Thus, the classification bears no rational relationship to a legitimate legislative goal of protecting the class because not all members of the class are similarly situated. Injured workers need protection from Carriers who deny their claims and force them into litigation, not from lawyers who want to assist them. The legislation irrationally relates to the intended purpose of protecting claimants by doing the polar opposite of what it purports to do. It arbitrarily harms the very class it intends to protect by leaving claimants defenseless. Consider the following example, could the legislature, under the guise of protecting consumers, arbitrarily

say that plumbers can only charge 10% for their services based on the cost of the products installed and then criminalize the act of exceeding the "plumber's fee schedule?" Obviously this would be an unconstitutional exercise of legislative power which would, as noted by the court, "diminish the quality of service clients of these professions would receive or eliminate the services altogether for some." The result-- toilets would be overflowing and pipes would be busting and there would be no plumbers willing to fix the problem due to the lack of reasonable compensation to do so. However, for some irrational reason, workers' compensation is the only area of law and professional services where the value of the service is legislatively capped with no regard for the reasonableness of the fee being charged, the complexity of the work involved or the ultimate harm to the consumer (the injured worker) that such limitation imposes.

Regarding to the purported legislative interest of reducing premiums, §440.34, with its unilateral application, is unconstitutional because it is arbitrarily and capriciously imposed. *See Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So. 2d 317, 319 (Fla. 1987). In *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), the court held that the type of classification regarding aggregate caps or limitations on noneconomic damages violates equal protection guarantees under the Florida Constitution when applied without regard to the number of claimants entitled to recovery. *Id.* at 972. Similarly, in *McCall*, under the Equal

Protection Clause, and guided by the decision in *Phillipe*, the court held that to reduce the cap on wrongful death noneconomic damages is not only arbitrary, but irrational, and it "offends the fundamental notion of equal justice under the law." *McCall*; *Phillipe*, at 972. A similar arbitrary pattern exists in §440.34. Differentiating between a claimant and a carrier with respect to limitations on the payment of fees by one but not the other bears no rational relationship to the purported Legislative goals.

IV. THE WORKERS' COMPENSATION ACT NO LONGER REMAINS A REASONABLE ALTERNATIVE TO COMMON-LAW REMEDIES AND VIOLATES THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION.

As properly found by the JCC, the Claimant was attempting to prove an exposure at work. (R. 6-9) The JCC correctly observed that in order to do this, the Claimant must, under §440.02(1), establish by clear and convincing evidence the exposure to the specific substance involved and establish the levels to which the employee was exposed. (R. 8) The statute expressly requires both a higher standard of proof (clear and convincing evidence) and a certain degree of specificity as to the specific substance involved and the levels to which the employee was exposed. See *Matrix Employee Leasing v. Pierce*, 985 So.2d 631, 634 (Fla. 1st DCA 2008). Commenting on the near impossibility of proving this, Judge Wolf wrote in a dissenting opinion that the "burden of proof for mold exposure claims which is artificial, illusory, and practically unachievable." *Altman Contractors v. Gibson*, 63 So. 3d 802, 805

(Fla. 1st Dist. 2011).

In the instant case, there was no way that Officer Miles, as a lay person, could marshal the evidence necessary to prove this. Further, it is equally as dubious that a seasoned attorney could accomplish this given the apparent need for contemporaneous air samples to the Meth to be taken at the time of the exposure. The only way one could meet these rigid criteria would be if she knew in advance he would be exposed, and showed up to work with an industrial hygienist to take air samples during the criminal investigation of the Meth lab. Do we want our law enforcement officers investigating crimes or documenting their own injuries?

The mandatory workers compensation law substitutes the benefits and procedures provided therein for the common law right of an employee to sue for injury. The Florida Supreme Court held:

> Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. Sec. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a *reasonable alternative* to protect the right of the people of the State to *redress for injuries*, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

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

The legislature so curtailed the benefit an injured worker can obtain under the Act that such it no longer provides "a reasonable alternative to protect the rights of the people of the State to

redress for injuries." *Id*. The undisputed evidence in the present case shows that workers' compensation is no longer simple, expeditious, inexpensive or self-executing. In cases such as the Appellant's, people go unrepresented. Further, the Legislature has created a benefits that is unattainable and illusory with respect to this type of exposure claim thereby denying access to courts.

Article I Section 21 of the Florida Constitution provides:

> Access to courts. The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

The reasonableness of the alternative means by which an injury might be redressed, is, of necessity, a recasting of the question of whether a substitute system of redress enacted by the Legislature is a just and adequate substitute for those rights available through statutory or common law existing upon the adoption of the Declaration of Rights of the Constitution of the State of Florida on November 5, 1968. See *Eller v. Shova*, 630 So. 2d 537, 542 n.4 (Fla. 1993). In 1968, an person injured at work had either the right to sue in tort for injury and recover the full amount of his damages, including full lost wages and other non-economic damages (without legislatively imposed restrictions imposed by the workers' compensation system) or that worker could file a workers' compensation claim and if successful, his attorney would be paid a reasonable fee. See §440.34, Fla. Stat. (1967). In 2009, the claimant has neither option, but instead must hope to

find counsel willing to accept her case under a guideline fee and then meet an impossible and illusory standard for exposure claims. The Appellant adopts and asserts, as though contained in full herein, the arguments of the Amicus on the access to courts issue.

V. §440.34 VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Article II, Sec. 3, of the Florida Constitution provides:

> Branches of government. 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 herein.

The principles underlying the governmental separation of powers antedate our Florida Constitution and were collectively adopted by the union of states in our federal constitution. *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260 (Fla 1991); *Mistretta v. United States*, 488 U.S. 361, 380, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty. *Chiles,* at 263.

1. THE SEPARATION OF POWERS PRECLUDES THE LEGISLATURE FROM ENCROACHING ON THE JUDICIAL BRANCH'S POWER TO ADMINISTER JUSTICE AND REGULATE ATTORNEYS.

The separation of powers doctrine encompasses two fundamental prohibitions: first, no branch may encroach upon the powers of another. See, e.g., *Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953). Second, no branch may delegate to another branch its

constitutionally assigned power. See, e.g., *Smith v. State*, 537 So. 2d 982, 987 (Fla. 1989). Section 440.34 (2009) violates both of these fundamental prohibitions. Under Article V, §15, the Supreme Court is the exclusive government regulator of attorneys and the practice of law. Article V, §1 gives the Judicial Branch the *sole* authority and "duty"... "to guarantee the rights of the people to have access to a functioning and efficient judicial system". *Chiles*, at 268-69. The Legislature is not in the Justice business; nor is the Executive branch. The administration of Justice and the protection of rights under the Constitution belongs solely to the Judicial Branch. See, e.g., Article V, §1; *Chiles,* at 260. An attorney is "not only a representative of the client, but also an officer of the court." *Moakley v. Smallwood*, 826 So. 2d 221,224 (Fla. 2002). As an officer of the Court, the practice of law is "intimately connected with the exercise of judicial power in the administration of justice." *In re Hazel H. Russell*, 236 So. 2d 767, 769 (Fla. 1970).

2. THE ELIMINATION OF A REASONABLE FEE IN §440.34(1) VIOLATES THE SEPARATION OF POWERS BY SUBVERTING THE JUSTICE SYSTEM FOR INDIVIDUALS AND THE PUBLIC AT LARGE AND BY ENCROACHING ON THIS COURT'S EXCLUSIVE POWER TO REGULATE ATTORNEYS.

The allowance of attorney's fees is a judicial action. *Lee Engineering & Constr. Co. v. Fellows*, 209 So.2d 454, 458 (Fla. 1968). A lawyer must comply with the Code of Professional Responsibility, including without limitation those provisions relating to the setting, charging, and collecting of fees. e.g. *In*

re The Integration Rule of the Florida Bar, 235 So. 2d 723 (Fla. 1970). Rule 4-1.5 (a) (1) and (b) of the Rules of Professional Conduct prohibits "clearly excessive" fees and mandates that fees be "reasonable." Florida Courts have overturned fees that are either excessive or inadequate in accordance with the Rules. See *Canal Authority v. Ocala Manufacturing Ice and Packing Company*, 253 So. 2d 495 (Fla. 1st DCA 1971) (considering factors in Code of Professional Responsibility award of inadequate attorney fees was an abuse of judicial discretion). The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. To carry out their duties to both client and the public at large, attorneys, as officers of the court, must be paid a "reasonable" fee or the system will not work properly. In *Baruch*, this Court stressed the importance of reasonable attorney fees:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.

Baruch v. Giblin, 122 Fla. 59, 63, 164 So. 831, 833 (1935); see also *Dade County v. Oolite Rock Company*, 311 So. 2d 699, 703 (Fla.

3d DCA 1975) (reasonable fees essential to establish and retain public confidence in the judicial process); *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 114 (Fla.1985) (recognizing the importance of reasonable attorneys' fees on the credibility of the court system and the legal profession).

Attorney fees must be reasonable. If fees are too low, justice for individual clients and the public suffers; if fees are too high, the credibility of the legal system is called into question. Thus, it follows that the legislature can neither mandate unreasonable fees nor prevent the payment of reasonable ones because it encroaches on a judicial function, harms the public, and impinges the independence of attorneys. The Bar and this Court recognize the direct correlation that exists between reasonable fees and competent and zealous representation free of conflicts of interest, and that attorneys who receive inadequate fees are, as part of human nature, subject to shirking their professional obligations to provide competent and zealous representation.[19] In *Florida Bar Ethics Opinion 98-2* (June 18, 1998) the Bar ruled that an attorney may not ethically enter into flat fee agreement in which "the set fee is so low as to impair her independent professional judgment or cause her to limit the representation" of a client. In so ruling, the Florida Bar adopted verbatim *Ohio*

[19]See also In the Matter of THE FLORIDA BAR, In re AMENDMENT TO CODE OF PROFESSIONAL RESPONSIBILITY (CONTINGENT FEES), 349 So.2d 630 (Fla. 1977)(Argument III, equal protection, infra)

Ethics Opinion 97-7 which concluded:

> an attorney or law firm may enter into a contract with a liability insurer in which the attorney or law firm agrees to do all or a portion of the insurer's defense work for a fixed flat fee. **However, the fee agreement must provide reasonable and adequate compensation; it must not be excessive or so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate. The fee agreement must not adversely affect the attorney's independent professional judgment; the attorney's representation must be competent, zealous, and diligent;** and the expenses of litigation, in addition to the flat fee, must ultimately be borne by the insurer.

The ethical requirement of reasonable and adequate compensation applies with no less force to fees arising by statute. Courts have long held that the legislature is without any authority to *directly or indirectly interfere* with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court. See *The Florida Bar v. Massfeller*, 170 So.2d 834 (Fla.1964); *State ex rel. Arnold v. Revels*, 109 So.2d 1 (Fla.1959). Affirming its authority to regulate attorneys in *Abdool v. Bondi*, 141 So. 3d 529, 553 (Fla.2014), the court remarked:

> This Court has the inherent authority to adopt and enforce an ethical code of professional conduct for attorneys. See *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... a code of professional responsibility for lawyers, and, in addition, has the procedure to interpret them and the authority to enforce them..."). *The Legislature, therefore, is without authority to directly or indirectly interfere with an attorney's exercise of his or her ethical duties as an officer of the court....(citations*

> *omitted)*... A statute violates the separation of powers clause when it interferes with the ethical duties of attorneys, as prescribed by this Court.

Without the prospect of reasonable attorneys fees being paid for an attorney's professional labor, conflicts of interest inevitably arise. (SR. 25-26(PDF 28-29)) Section 440.34 is thus unconstitutional, both facially and as applied, as the Legislature has interfered with an attorney's exercise of his or her ethical duties. *Id.* Further, when a statute puts an inflexible fee cap on the amount of compensation an attorney can receive, it is an unconstitutional violation of the doctrine of separation of powers. In *Irwin v. Surdyk's Liquor*, 599 N.W. 132, 142 (Minn. 1999), the Minnesota Supreme Court considered a mandatory guideline fee in a workers' compensation case which was awarded by a quasi-judicial officer of the executive branch. The court struck the statute as unconstitutional, holding that "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 as it impinges on the courts inherent power to oversee attorneys. *Id.*

Just as the legislature's "power to tax is the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316 (1819), the legislature's power to arbitrarily and unreasonably limit the fees

of an attorney is the power to regulate the attorney's conduct. This Court addressed the judiciary's role in the control of fees:

> Inadequate fees and excessive fees are not reasonable attorney fees. Further, we expect the appellate courts to review the factors presented to the courts so that only reasonable and necessary fees are awarded.

Murray, 994 So.2d at 1062.

In prohibiting a claimant from paying any reasonable fees to her counsel for time, services or advice, the legislature has now assumed oversight of fees ,and in so doing, has clearly exercised "powers appertaining to" the judicial branch.

3. THE ELIMINATION OF REASONABLE ATTORNEY FEES INHERENTLY PLACES A CLAIMANT'S ATTORNEY IN A PROHIBITED CONFLICT OF INTEREST.

Officer Miles' attorneys were ethically bound to prosecute her case with diligence and thoroughness.[20] As a result of the JCC's denial of a reasonable fee to be paid hourly, a conflict of interest for the claimant's attorneys was created. An attorney's failure to avoid prohibited conflicts of interest constitutes grounds for disciplinary proceedings. *See The Florida Bar v. Brown*, 978 So.2d 107 (Fla. 2008).

Because allowance of fees is a judicial action, *see Lee Engineering* (*supra*), Appellant submits that awarding *specific* fees is judicial action subject to judicial power, because the judicial branch is duty bound to protect access to justice and the rights of individuals. These goals cannot be realized without fees that are

[20] See Rules Regulating the Florida Bar 4-1.1 and 4-1.3.

reasonable and based upon evidence which accounts for the factors set forth in the Code of Professional Responsibility. See *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986)(a statute restricting fees for representing criminally accused was unconstitutional when applied in such manner as to curtail the Court's inherent power to ensure the adequate representation of the criminally accused.)

The application of the separation of powers doctrine to a legislative mandate on what fees can be awarded was addressed in *Maas v. Olive*, 992 So.2d 196 (Fla. 2008) (Olive II). There, this Court construed a similar statutory fee limitation which provided that "compensation above the amounts set forth in section 27.711 is not authorized. §27.7002(5)." This Court held that "in appropriate cases courts have inherent authority to grant compensation in excess of the statutory fee schedule." *Id.* at 205. The power to grant fees in excess of a statutory schedule in extraordinary and unusual circumstances stems from the courts' authority to do things essential to the performance of their judicial functions. *Id.* at 203. This authority emanates from the separation of powers provision of the Florida Constitution. *Id.* at 204.

In *Rose v. Palm Beach County*, 361 So.2d 135, 137 (Fla.1978), this Court recognized the inherent power of the courts and the importance of the doctrine of separation of powers, stating:

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions.
> .....

> The doctrine 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.

The Florida Supreme Court has established rules governing attorney fees in Rule 4-1.5. The Legislature, by enacting a rigid, inflexible, and mandatory standard in §440.34, has encroached upon this judicial function by governing attorney fees in workers' compensation cases and by giving the executive branch (the JCC) exclusive review as to the amount of an attorney fee with no regard for reasonableness of that fee. The judicial branch retains the sole constitutional power to regulate attorneys and fees. Indeed, because "allowance of fees is a judicial action," it is an improper exercise of authority for the legislative branch to delegate such final determination to the executive branch. Thus, §440.34 is unconstitutional, both facially and as applied, as it violates the separation of powers provision of the Florida Constitution.

THE SOLUTION: JCCs are a judicial tribunal performing the functions of a court for purposes of "due process" provisions of the State Constitution. Thus, Appellant asserts that the JCC fits within the broad use of the term "court," and as such, it is within the inherent power of a court in Florida to depart from the statute's fee guidelines when necessary in order to ensure that an attorney is compensated an amount which is reasonable and not confiscatory of his time, energy and talents. *See Makemson* (*supra*).

In furtherance of this, the Legislature empowered JCCs to do "all things conformable to law .... necessary to enable the judge to effectively discharge the duties of his or her office." See Fla. Stat. §440.33 (2010). Appellant submits that this power allows and compels the JCC to approve and award reasonable attorney's fees--no more and no less. To fail to reach this conclusion would place claimant's attorneys in ethical compromises against their clients.

If this Court determines §440.34 is unconstitutional, the workers' compensation system would not collapse. *In B.H. v. State*, 645 So.2d 987 (Fla. 1994), the court found §39.061(1990) unconstitutional and stated that "Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor." *See State ex rel Boyd v. Green*, 355 So.2d 789 (Fla.1978). Thus, the 1993 version of §440.34 would be revived.

CONCLUSION:

The Workers' Compensation Act is unconstitutional, as it impermissibly violates rights guaranteed under the First Amendment and is no longer a reasonable alternative to common law and violates the access to courts and equal protection provisions provision of our constitution and denies due process. The fee provisions of section 440.34 also violate the separation of powers doctrine. This Court should reverse and remand to the JCC with directions to allow for a new trial and allow the Claimant and her Union to pay a reasonable hourly fee of $150.

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Mail the 13th of May, 2015 to: George A. Helm, III, Esquire and William Rogner, Esquire, Attorneys for Appellees and filed with the 1st DCA.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is a computer generated brief in Courier New 12-point format and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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