AlaFile E-Notice

01-CV-2013-904687.00

Judge: PAT BALLARD

To: KING LAWRENCE TRACY
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NOTICE OF COURT ACTION

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

NORA CLOWER V. CVS CAREMARK CORPORATION
01-CV-2013-904687.00

A court action was entered in the above case on 5/8/2017 11:33:18 AM

ORDER

[Filer:]

Disposition:	GRANTED
Judge:	PJB
Notice Date:	5/8/2017 11:33:18 AM

ANNE-MARIE ADAMS
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL, 35203

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01-CV-2013-904687.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

NORA CLOWER,	)	
Plaintiff,	)	
	)	
v.	)	**01-CV-2013-904687**
	)	
CVS CAREMARK CORP.,	)	
Defendant.	)	

ORDER

This matter came before the Court on PLAINTIFF'S MOTION FOR RELIEF ** CONSTITUTIONAL CHALLENGE TO TWO STATUTES **. The Court has reviewed the extensive written submissions of the Parties and heard extensive oral argument by counsel for the Parties. The Court notes that the prerequisite notice to the Attorney General's office was satisfied. No response or comment of any sort was received by the Court from the Attorney General's office.

> There is . . . an obligatory duty of the courts, which are vested with the power to pass upon the constitutionality of statutes, to not overlook or disregard constitutional demands, which the judges are sworn to support, and therefore, when it is clear that a statute transgresses the authority vested in the Legislature by the Constitution, it is the duty of the courts to declare the act unconstitutional, and from this duty they cannot shirk without violating their oaths of office.

McCall v. Automatic Voting Mach. Corp., 236 Ala. 10, 13, 180 So. 695, 697 (1938). After careful consideration of the statutes in question, the arguments of counsel, and independent study of the issues by the Court, the undersigned concludes that Alabama Code §25-5-68 is unconstitutional under Article 1, §13 of the Constitution of Alabama (1901) and under the guarantee of equal protection expressed in the Fourteenth Amendment of the Constitution of the United States. Alabama Code §25-5-90(a) is likewise declared unconstitutional, as a violation of the separation of powers guarantee expressed in §43 of the Constitution of Alabama (1901), and

the due process protections of the state and federal constitutions.

Because the Court finds those statutes to be unconstitutional, the entire Workers' Compensation Act is declared unconstitutional because of the non-severability statute (Ala. Code §25-5-17) inserted into the Act by the Alabama Legislature in 1984. Because of the drastic result that the non-severability statute produces, this Order is hereby STAYED for a period of 120 days, to allow the Alabama Legislature, which is currently in session, to cure the constitutional deficiencies caused by Alabama Code §25-5-68 and Alabama Code §25-5-90. At the end of 120 days from the date of this Order, absent compelling reason or appropriate action by the Alabama Legislature, this Order shall take full effect, and the finding of unconstitutionality of the Alabama Workers' Compensation Act shall be made law.

I. The Plaintiff Has Standing to Bring This Challenge

"Any person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute..., and obtain a declaration of rights, status, or other legal relations thereunder." Ala. Code §6-6-223 (1975). In *City Council of City of Prichard v. Cooper*, 358 So. 2d 440 (Ala. 1978), the Supreme Court of Alabama relied on that statute and precedent to hold that a mayor properly had standing to seek a determination that the city council's practice of governing by a majority vote of its 5 members via correspondence was unlawful – *despite the fact that the mayor had not shown that any injury had yet occurred.* Because the Supreme Court determined that the council's chosen voting method "***might*** make [the mayor's] actions either inconsistent with his own legal duties or subject to legal challenge," 358 So. 2d at 441 (emphasis added), "standing" was properly invoked. Quoting precedent, the Court continued:

Official action, done *or threatened*, challenged as unlawful, a usurpation of

> official power, whether lack of authority appears in the terms of the statutes, ... are said to be determinable in this manner [by declaratory judgment] rather than to force the parties to seek injunctive relief....

358 So. 2d at 441 (emphasis added, citation omitted).

In other words, there are two ways to look at what here is presented: this Court could force a trial, achieve a result actually harmful to the plaintiff's position – and then require the plaintiff to ask to enjoin enforcement of the law, or this Court could recognize the threatened harm and decide the issue now. Given the procedural mandate of Rule 1(c), A.R.Civ. P. ("[t]hese rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action"), decreed by the Supreme Court of Alabama as the primary rule of procedure with good reason, and given further the legislative mandate in workers' compensation cases pursuant to Alabama Code §25-5-88 ("all civil actions filed [under the Workers' Compensation Act] shall be preferred actions and shall be set down and tried as expeditiously as possible"), addressing this issue now is not only permissible and preferable to addressing it later, it is wise stewardship of the resources of the judicial branch of government.

Although this Court found no Alabama precedent directly on point regarding challenges to the constitutionality of workers' compensation statutes, claimants in sister states have successfully challenged workers' compensation laws before meeting any ostensible requirement of having been subjected to their harsh application, and have done so despite objections to lack of "standing" to do so. For example, in *Lynch v. City of Jellico*, 205 S.W.3d 384 (Tenn. 2006), the constitutionality of certain workers' compensation statutes was before the Supreme Court of Tennessee. Before reaching that issue, however, that court preliminarily had to resolve the issue of whether the plaintiffs had standing to press the challenge. In *Lynch*, plaintiffs in two separate workers' compensation lawsuits challenged both the constitutionality of laws requiring benefit

review conferences and laws prescribing the method of calculating permanent partial disability benefits awards. Each side moved for summary judgment, and the defendants objected because the permanent partial disability calculations for these plaintiffs had not yet been applied. 205 S.W.3d at 394; *see also id*. at 389 – apparently, unlike this case, compensability in those cases was also undetermined. The Supreme Court of Tennessee ruled:

> [W]e are persuaded that the plaintiffs have standing to challenge the constitutionality of [these laws]. According to plaintiffs' complaints, they each suffered compensable work-related injuries on specific dates while working for specific employers. Taking these allegations as true – as we must at this point in the litigation – the plaintiffs' benefits are subject to the multiplier provisions of [the laws]. Thus, we are not confronted with a conjectural or hypothetical dispute. Also, the claims being advanced by the plaintiffs are capable of being redressed by a favorable decision of the courts.

205 S.W.2d at 395. Even though the particular statutes about which the plaintiffs complained as being unconstitutional had not yet been applied, because they qualified for protection of the workers' compensation act as a whole, they had standing to challenge the threatened application of the particular laws about which they complained.

In *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995), which addressed the constitutionality of several provisions of the Texas workers' compensation scheme, the plaintiffs included the Texas Legal Services Union Local 2, and the Texas AFL-CIO. At issue (in relevant part) was whether the Texas AFL-CIO had standing to make the constitutional challenge. In reliance on *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and because (a) the AFL-CIO was comprised of members who would have standing to sue individually, (b) the interests sought to be protected were germane to the organization's purpose, and (c) the claims asserted did not require the participation of individual members, the Texas Supreme Court held that the Texas AFL-CIO had standing to pursue the

constitutional challenge. 893 S.W.2d at 518-19. That holding is significant in this respect: because it was unnecessary for individual members of that organization to participate, that means that evidence of "actual" injury imposed by operation of the laws under attack was unnecessary. In other words, because only a declaration was sought, confronting the issue directly was permissible and preferable to waiting to wade through the time and expense of a full trial. In summary, the Texas Supreme Court noted, "to satisfy the requirement of standing, [plaintiffs] must demonstrate that they are suffering some actual or threatened restriction under the Act." 893 S.W.2d at 518.

Because, in this case, the plaintiff's claim is compensable, the actual or threatened application of §25-5-68 is present. Therefore, this Court concludes that Plaintiff Nora Clower has standing to pursue her challenges.

II. The Ways in Which Alabama Code §25-5-68 Is Unconstitutional

The plaintiff argues that the $220 "cap" expressed in Alabama Code §25-5-68 is unconstitutional in two ways. First, she says, that statute's cap violates her rights to equal protection of the law as secured by the Fourteenth Amendment to the Constitution of the United States, in that it creates separate classes of workers and effectively punishes one such class without any rational basis whatsoever. Second, she maintains that the statutory cap violates Article 1, §13 of the Constitution of Alabama (1901) in that its unbridled and self-perpetuating rotting away of a "remedy" has left it too infirm to qualify as a "remedy" sufficient to meet the requirement that the Workers' Compensation Act involve adequate "quid pro quo" to pass constitutional muster.

A. Equal Protection of the Law Under the U.S. Constitution

The plaintiff here must concede, for purposes of the equal protection analysis, that no

"suspect classifications" are here involved, and that, as such, this Court's task is to find a "rational basis" for the classifications created by the $220 cap in §25-5-68 in order to sustain it:

> "[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."

Ex parte Flexible Prods. Co., 961 So. 2d 111, 119 (Ala. 2006)(quoting *Nordlinger v. Hahn*, 505 U.S.1, 11-12 (1992))(further citations and internal quotation marks omitted).

Alabama Code §25-5-68 creates classifications in two distinct ways.

First, with no identifiable rational basis, the law classifies injured workers based on entitlement to indexed benefits, into a group (a) that *is* entitled to indexed benefits (those entitled to TTD and to permanent total disability benefits), versus a group (b) that *is not* entitled to indexed benefits (those entitled to PPD). By "indexed benefits," the Court refers to those benefits that are wed to the State of Alabama's average weekly wage, as compiled by the Department of Industrial Relations and revised annually. Because the state's average weekly wage has risen annually, the maximum TTD rates have increased lock-step and the maximum benefits payable for permanent total disability have increased identically. As a gentle reminder of the point to all this, PPD rates have stagnated in place at $220 per week for three decades.

Second, with no identifiable rational basis, §25-5-68 effectively classifies those entitled to PPD benefits into the "$220 group" and the "sub-$220 group." The gross irrationality of that classification is seen by understanding that (1) a worker who earned $350 per week and is found 99% disabled due to a job injury gets $220 per week for his PPD ($350 x 66 2/3% x 99% is greater than $220, so the cap applies), ***and*** (2) a worker who earned $3,000 per week and is found 99% disabled due to a job injury *also* gets $220 per week for *his* PPD ($3,000 x 66 2/3%

x 99% is greater than $220 so the cap applies). The "sub $220" group, on the other hand, is comprised of the lowest paid workers (earning under $330 per week) regardless of the percentage of permanent impairment and the higher paid workers with lower percentages of permanent impairment.

Workers' compensation laws, without doubt, are properly subject to challenges based upon the constitutional guarantee of equal protection under the law. In one such example, the Supreme Court of Ohio reviewed one of that state's statutes which provided that injured workers were not entitled to receive benefits for permanent partial disability pursuant to the applicable statutory schedule unless either (1) they had missed work and drawn temporary total disability benefits (or equivalent wages), or (2) they had received compensation for partial disability based upon an impairment to their earning capacity. Under that statute, one who broke a finger at work and drew a single week of TTD benefits while out recuperating *was* entitled to permanent partial disability ("PPD") benefits, while one who broke an identical finger but remained at work as a resulting infection rotted his arm off may *not* be eligible for PPD benefits. Even applying the minimal scrutiny of a "rational basis" review, that court easily (and unanimously) concluded that the bar to recovery was capricious – that it bore no rational basis to a single identifiable legislative goal. As such, it violated the workers' rights to equal protection under the law by baselessly classifying workers into two groups – those who missed work and those who didn't, and then discriminating against the group who missed no work by refusing them PPD benefits. *Fleischman v. Flowers*, 25 Ohio St. 2d 131, 267 N.E.2d 318 (Ohio 1971).

If there is no "rational basis" for a $220 cap, or if "'the relationship of the classification to its goal is ... so attenuated as to render the distinction arbitrary or irrational,'" *Ex parte Flexible Prods. Co.*, *supra*, then Alabama Code §25-5-68 must fail as a matter of course.

There is little credibility in telling two injured workers, both of whom are 99% disabled due to work injuries, that they both get $220 per week in PPD – *when one earns $8.50 per hour for a 40-hour work week, and the other earns an annual salary of $125,000.* There cannot *conceivably* be any more arbitrary, capricious, irrational, or attenuated idea than telling both workers that "equal protection of the laws" means that they each get the identical amount under those circumstances. Giving those disabled only temporarily the benefit of an indexed system of benefits and denying it to those permanently disabled (to an extent less than totally) makes no rational sense at all. Accordingly, this Court finds that the cap set forth in §25-5-68 is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

B. Article I, §13 of the Alabama Constitution (1901)

The plaintiff furnished to this Court data demonstrating that $220 per week exceeded minimum wage and exceeded the poverty level for a family of four when it was passed three decades ago; today, $220 has fallen from its genesis of 164% of 40 hours worked for minimum wage in 1985 to 76% of 40 hours worked for minimum wage, and from 105% in 1985 to 46.4% of the poverty level for a family of four. Additional factual data and statistics submitted of record likewise show that what once qualified as an adequate "remedy" for those partially disabled no longer does. For an illustrative example, the Court notes that, for injuries occurring on and for a year after July 1, 2015, the minimum compensation rate for those temporarily totally disabled stood at $224 weekly, and that figure rose to $229 weekly effective July 1, 2016; as such, the State's very lowest wage earners now receive more per week during periods of temporary total disability than do the State's highest wage earners who are 99% disabled for the remainder of their lives. Relative to the State's average weekly wage, $220 represented 69% of

the state's average weekly wage in 1985, and now represents 26.4% of the state's average weekly wage.

Because the constitutionality of a statute tested against Article 1, §13, depends on the existence of a sufficient and meaningful "quid pro quo" for the rights replaced by the statute, the ever less valuable "$220 cap" of §25-5-68 fails to meet that standard necessary to sustain its constitutionality, as well. "Quid pro quo" means generally "one thing in exchange for another." In the lexicon of our state's Supreme Court, it more loosely translates in this context to a "remedy for remedy." *Reed v. Brunson*, 527 So. 2d 102, 115 (Ala. 1988).

The "common law rights" approach by our Supreme Court to analysis under Article 1, §13, is grounded in Justice Shores concurrence in the result in *Fireman's Fund American Ins. Co. v. Coleman*, 394 So. 2d 334, 352 (Ala. 1980) (Shores, J., concurring in the result),which was adopted by a plurality of the Supreme Court of Alabama in *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982), and then followed by a majority in *Reed v. Brunson*, *supra*. The analysis tracks in this manner:

> "Legislation which abolishes or alters a common-law cause of action, then, or its enforcement through legal process, is automatically suspect under §13. It is not, however, automatically invalid. *Grantham* itself restates the established rule that such legislation will survive constitutional scrutiny if one of two conditions is satisfied:
>
> "1. The right is voluntarily relinquished by its possessor in exchange for equivalent benefits or protection, or
>
> "2. The legislation eradicates or ameliorates a perceived social evil and is thus a valid exercise of the police power.
>
> "I find it helpful to think of these alternatives as two different aspects of the *quid pro quo* concept: Thus, a right may be abolished if the individual possessor receives something in return for it (the individual *quid pro quo* dwelt upon in *Grantham*), or if society at large receives a benefit (thereby justifying exercise of the police power)."

Reed v. Brunson, 527 So. 2d at 115 (quoting Justice Shores's concurrence in the result from *Fireman's Fund*, 394 So. 2d at 352).

Reed v. Brunson involved a constitutional challenge under Article I, §13, to the statute (Alabama Code §25-5-11) that immunized from tort liability all co-employees of an injured worker for everything short of intentional conduct. Because, the Supreme Court said there "is a mutuality of immunity," given that the injured employee could not sue a co-employee for negligence or wantonness *or vice versa*, there is "'an exchange for equivalent ... protection" as required under prong (1) of the framework for review – and thus the abolition of a common law remedy against co-employees withstood §13 analysis. 527 So. 2d at 115.

Employing that analysis to the matter at hand, under prong (1) of the framework for review – "right is voluntarily relinquished by its possessor in exchange for equivalent benefits or protection," there is *no cap* under the common law for what an injured worker can receive for permanent partial disability. Because there is no "protection" afforded to an injured worker under §25-5-68, the search must be for "equivalent benefits" – benefits equivalent to what the

worker gives up under the common law. And they simply are not there in the form of the decaying $220 cap and sub-poverty level subsistence it affords.

And so attention shifts to prong (2) of the analysis under Article I, §13, of our constitution, to consider whether §25-5-68 withstands constitutional scrutiny because it somehow "eradicates or ameliorates a perceived social evil and is thus a valid exercise of the police power." The Court in *Reed v. Brunson* had no problem with upholding §25-5-11 under this test, because the Legislature, in §25-5-14 expressed itself virtually *ad nauseum* about the social evils of suing co-workers and the horribly deleterious effect it believed such lawsuits had on employment generally. Lawsuits brought against co-employees were societally evil, the Legislature stated – and the Supreme Court thus concluded that the immunity afforded to co-employees by §25-5-11 eradicated and ameliorated that evil in appropriate fashion. *Reed v. Brunson*, 527 So. 2d at 116-17.

But here, the jurisprudential analysis tacks in another direction. The Court in *Reed v. Brunson* observed, and the point is important in *this* case, that "'[the police] power must not be exercised arbitrarily or capriciously, and there must be some reasonable relation [between] the regulation and the ends to be attained.'" 527 So. 2d at 116 (quoting *Fireman's Fund*, 394 So. 2d at 357 (Beatty, J., dissenting)) (further citations and quotation marks omitted). This Court finds that the "$220 cap" meets the very definition of being arbitrary, capricious, irrational, and attenuated.

Although there may have been some equivalency in the "grand bargain" three decades past, there now is neither (1) a remedy relinquished for an "equivalent" remedy received, nor (2) anything but arbitrariness and caprice in the Legislature's apparent attempt at exercising a "police power." It was the failure of the Legislature in 1987 to index the cap so that it would

keep up with prevailing wages and the cost of living that makes the cap unconstitutional. In other words, it was unconstitutional from its enactment. Its unconstitutional nature has simply become more apparent over time. Therefore, this Court finds that the "$220 cap" set forth in Alabama Code §25-5-68 is unconstitutional under Article 1, §13, of the Constitution of Alabama (1901).

III. §25-5-90(a) IS UNCONSTITUTIONAL

The plaintiff also challenges Alabama Code §25-5-90(a), which caps attorneys' fees at 15% of the compensation awarded or paid in workers' compensation proceedings. At the outset, the Court confronts this question: Has the constitutionality of Alabama Code §25-5-90(a) already effectively been decided previously?

The defense presses *Woodward Iron Co. v. Bradford*, 206 Ala. 447, 90 So. 803 (1921), for the proposition that it has. There, the trial court awarded a 20% fee to the employee's attorney in a workers' compensation proceeding when the predecessor statute to the one here attacked allowed for only 10%; the Supreme Court held that the trial court could not award a 20% fee unless the statute capping fees was constitutionally infirm. The Court then held the trial court in error, and upheld the statute, noting that, "having *elected* to operate under and abide by the act, the parties waived the right to raise constitutional objections to same." 90 So. at 805 (emphasis added).

The plaintiff here argued with equal vigor that the legal basis for *Woodward Iron* no longer exists, given that the Workers' Compensation Act is no longer elective. Whereas in *Woodward Iron* the parties each elected to come within the provisions of the law, the plaintiff argues here that no "election" was possible due to the changes in the law. Accordingly, says the plaintiff, whereas the plaintiff in *Woodward Iron* chose voluntarily to accept the rights and

remedies of the Act – and then to complain of their unfairness, here, no such choice was available.

A review of the history of this aspect of the Act is in order. Both sides here agree that the Act was mutually elective at its birth. As Judge Moore explained, writing for the Court of Civil Appeals in *Ward v. Check Into Cash of Alabama, LLC.*, 981 So. 2d 434, 437 (Ala. Civ. App. 2007), cited by the defendant in this case at oral argument on the motion before this Court, "The Act formerly provided that it became effective '[i]f both employer and employee, by agreement, expressed or implied, ... become subject to this article.' Ala. Code 1940 (Recomp. 1958), Tit. 26, § 270 (before 1973 amendment). The Act further provided that '[a]ll contracts of employment ... shall be presumed to have been made with reference to and subject to the provisions of this article.' Ala. Code 1975, § 25-5-54 (before the 1992 amendment); see also Ala. Acts 1919, Act No. 245."

This Court also observes that, "[f]or reasons not readily apparent, the Alabama Legislature in 1973 amended Alabama Code 1940, Title 26, § 273 (now § 25-5-54), to remove all references to 'election' – leaving only a 'presumption' of coverage — and repealed Title 26, §§ 274, 275, and 276, relating to 'opt out' procedures." *Reed v. Brunson*, 527 So. 2d 102, 121-22 (Ala. 1988) (Jones, J., concurring). Indeed, it is both a crime and the object of a double-compensation "penalty" for employers of over 5 to not insure in a prescribed manner against the risk of accidents subject to the workers' compensation laws. Alabama Code §25-5-8(e) provides, in pertinent part, "An employer required to secure the payment of compensation under this section who fails to secure compensation shall be guilty of a misdemeanor, and upon conviction thereof, shall be subject to a fine of not less than $100.00 nor more than $1,000.00. In addition, an employer required to secure the payment of compensation under this section who

fails to secure the compensation shall be liable for two times the amount of compensation which would have otherwise been payable for injury or death to an employee." Thus, it is "an objective, indisputable fact – that § 25-5-54 no longer contains the 'right to elect' provisions that were [historically] part of the Workmen's Compensation Act from its inception until the 1973 amendment." *Id*. at n.1 (Jones, J., concurring).

There is no provision left in the Alabama Workers' Compensation Act which makes coverage elective *for the employee*, and thus saying that the Act is "elective" is contrary to the plain reading of the statutes. Employees no longer have any right to "elect" *not* to fall within the ambit of the Alabama Workers' Compensation Act. More accurately stated, in the words of the late Justice Jones, there is no way for an employee to "opt out" of the rights and obligations imposed by the Act. The way of "opting out" of coverage is extended *exclusively to employers*, notably in defiance of reciprocity (or quid pro quo), and requires notifications and postings of the sort that appear nowhere in the record presented to this Court. Alabama Code §25-5-50(a) provides: "Notwithstanding the foregoing, an employer electing not to accept coverage under this article and Article 4 of this chapter shall notify in writing each employee of the withdrawal of coverage. Additionally, the employer shall post a notice in a conspicuous place notifying all employees and applicants for employment that workers' compensation insurance coverage is not available."

In the absence of such notifications and postings – which are *exclusively* at the option of *employers*, the applicability of the Act is mandatory and *not* elective, at least for Ms. Clower and every other employee. In fact, Alabama Code §25-5-54 expresses as much: "If an *employer* is subject to this article, compensation, according to the schedules hereinafter contained, *shall* be paid by the employer...." (Emphasis added.) As such, from the standpoint of the employee, the

Act is *not* "elective." What remains is a right, vested *exclusively in employers*, to opt out of the applicability of the Act if it complies with the requirements of notifications and postings. As Justice Jones described it, as cited above, and respectfully notwithstanding Judge Moore's assertion to the contrary, the current version of the Act as not being "elective" simply is "an objective, indisputable fact."

Woodward Iron held that, because the employee and the employer each chose – "elected" – to play in the ballpark that was the Alabama Workers' Compensation Act that existed then, and because that ballpark's rules capped the employee's attorneys' fees at 10% of the compensation awarded, the employee was in no position to press a constitutional challenge to the fee-capping statute. The passage of time and the enactment of amendments to the Act, however, have rendered the Act mandatory for employees – *not* elective; because the rules of the ballpark have changed, the restriction on challenging the fee-capping statute no longer exists. While *Woodward Iron* is still good law, its field of application is limited to an Act that no longer exists. As such, the holding of that case does not bar Ms. Clower's constitutional challenge to §25-5-90(a).

Alabama Code §25-5-90(a) appears to be unique in the Code of Alabama in that it legislatively capping an attorney's fee to a specified percentage of recovery in a matter not involving the distribution of public funds. Unlike fee caps which apply to work done by lawyers in claims for Social Security benefits or Veterans' benefits, the fee cap in §25-5-90(a) applies only to compensation which is awarded or paid by employers or their insurers, and does not implicate payment from taxpayer-funded resources. The other statutes in the Alabama Code which address payment of attorneys' fees speak in terms of "reasonable attorneys' fees" – and leave the matter properly to the judiciary to determine reasonableness. For one example of

many, see Alabama Code §12-19-272, part of the "Litigation Accountability Act," providing for the payment of a "reasonable attorneys' fee" under prescribed circumstances.

Last year, the courts of last resort in both Florida and Utah struck legislative caps on attorneys' fees in workers' compensation proceedings, and this Court finds both rulings persuasive.

A. Due Process

In Florida, subsection (3) of §440.34, F.S.A., addressing attorneys' fees in workers' compensation proceedings, had been amended in 2009 to delete the requirement that a fee be "reasonable" and to substitute (except for disputed "medical-only" claims) a requirement that a lawyer's fee must equal the amount set forth in subsection (1), which, in turn, expressed a "sliding scale" fee schedule:

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

§ 440.34(1), Fla. Stat. (emphasis added). The constitutionality of that new law came to the court system, and in *Castellanos v. Next Door Co.*, 192 So. 3d 431 (Fla. 2016), the Supreme Court of Florida phrased its issue this way:

> This case asks us to evaluate the constitutionality of the mandatory fee schedule in section 440.34, Florida Statutes (2009), which eliminates the requirement of a reasonable attorney's fee to the successful claimant. Considering that the right of a claimant to obtain a reasonable attorney's fee has been a critical feature of the workers' compensation law, we conclude that the mandatory fee schedule in section 440.34, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and United States Constitutions as a violation of due process. See art. I, § 9, Fla. Const.; U.S. Const. amend. XIV, § 1.

192 So.3d at 433. The Florida Supreme Court laid out pertinent facts:

> Through the assistance of an attorney, Castellanos prevailed in his workers' compensation claim, after the attorney successfully refuted numerous defenses raised by the employer and its insurance carrier. However, because section 440.34 limits a claimant's ability to recover attorney's fees to a sliding scale based on the amount of workers' compensation benefits obtained, the fee awarded to Castellanos' attorney amounted to only $1.53 per hour for 107.2 hours of work determined by the Judge of Compensation Claims (JCC) to be "reasonable and necessary" in litigating this complex case.

192 So.3d at 433.

Next, the *Castellanos* Court laid out the test for determining whether the statute permitting only a fixed-fee (as opposed to permitting a "reasonable fee") passed muster – which led to the ineluctable conclusion that the statute arbitrarily capping attorneys' fees failed constitutional scrutiny:

> This Court has set forth the following three-part test for determining the constitutionality of a conclusive statutory presumption, such as the fee schedule provided in section 440.34: (1) whether the concern of the Legislature was 'reasonably aroused by the possibility of an abuse which it legitimately desired to avoid'; (2) whether there was a 'reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether 'the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.' *Recchi*, 692 So. 2d at 154 (citing *Markham v. Fogg*, 458 So. 2d 1122, 1125 (Fla. 1984)).

Castellanos, 192 So. 3d at 444.

The law in *Castellanos* was declared unconstitutional as violating state and federal constitutional due process guarantees. Statutes will not survive challenges under the federal guarantee of due process if they deny rights and benefits on the basis of facts presumed to exist and to be true (what this Court will later denominate as "predetermined adjudicative facts"), in the absence of affording an individual the opportunity of defending those facts. *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

Alabama Code §25-5-90(a) will be declared to fall for the same reason. The fee cap establishing that no more than 15% is enough, regardless of a myriad of potential attendant circumstances, fails to afford due process of the law.

B. Separation of Powers

Not only is due process of law implicated by the artificial cap on attorneys' fees, consideration of the rights and responsibilities of coordinate branches of government is due.

Utah had a "sliding scale" variant of regulating attorneys' fees in workers' compensation cases, providing generally that lawyers were capped at receiving 25% of the first $25,000 awarded, 20% of the next $25,000 awarded, and 10% of all beyond $50,000 – and the total not to exceed $18,590. Facing a challenge under that state constitution's separation of powers clause in *Injured Workers' Ass'n of Utah v. Utah*, 2016 Utah 21, 374 P.3d 14 (2016), the law was

stricken as unconstitutional. The court ruled that it had the exclusive right to regulate the practice of law, and thus the right to regulate attorneys' fees – and it noted an imbalance that will resonate here:

> "The fee schedule heretofore in place additionally affects the quality of representation because it exacerbates the differences between worker and employer/insurer in an adversarial setting. While workers' attorneys are strictly limited in fees, and in complex cases may not be able to afford adequate discovery, witnesses, etc., ***employers and their insurers suffer no such limitations***. The legislature originally assumed that this would not be a problem as workers' compensation cases tend to be more straightforward than traditional common-law claims and do not involve questions of fault. But even that lowered burden has ***not stopped employers and insurers from investing heavily in defense against awards***."

374 P.3d at 23 (emphasis added.)

In the end, the Utah Supreme Court held:

> "We are persuaded at this time that the absence of a fee schedule will allow injured workers the flexibility to negotiate appropriate fees with their attorneys. For very simple cases, the attorney and injured worker can negotiate a small fee, perhaps even less than that mandated by the current fee schedule. For more complex cases, the attorney and injured worker can come up with an appropriate fee that will not cause the lawyer to lose money by taking on the case and will still give the injured worker the representation needed to receive an adequate award. Fears about unscrupulous attorneys preying upon unsophisticated injured workers are exaggerated, as attorneys are still constrained by rules of professional conduct.

Injured Workers, 374 P.3d at 23.

Alabama's workers' compensation scheme has its genesis in Minnesota's system, and Minnesota precedent in this area of the law is accepted as having special persuasiveness as a consequence. *Goodyear Tire & Rubber Co. v. J.M. Tull Metals Co.*, 629 So. 2d 633, 637 (Ala. 1993). For that reason, this Court has also considered the persuasive holding of the Minnesota Supreme Court in *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 134 (Minn. 999):

> The relators in these consolidated cases challenge the attorney fees awarded by the compensation judge and the Workers' Compensation Court of Appeals (WCCA) pursuant to Minn.Stat. § 176.081 (1998). The relators assert that the 1995 amendments to section 176.081, which limit the availability and amounts of attorney fees, violate the Separation of Powers and Due Process Clauses of the Minnesota Constitution. See Minn. Const. art. III, § 1, and art. I, § 7. Neither of the lower courts addressed the constitutionality of the statute, acknowledging that they lacked jurisdiction. We hold that the statutorily imposed limitation on attorney fees violates the doctrine of separation of powers insofar as it is not subject to review by a duly established court and grants final authority over attorney fees to a non-judicial body. We therefore reverse and remand.

Irwin, 599 N.W.2d at 134. The court added: "However, in order for the legislative guidelines to be constitutionally permissible, we must retain final authority over attorney fee determinations." *Id*. at 141. Further:

> This limitation goes beyond merely indicating what the legislature deems desirable. Even as here, where there was a finding that the fees awarded were inadequate to reasonably compensate relators' attorney, the legislature has prohibited any deviation from the statutory maximum. 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 of Minn. Const. art. III, § 1. Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional.

Id. at 141-42.

This Court also considers as highly persuasive a jurisprudential analysis from Pennsylvania. At issue in *Marquez v. Hahnemann Hospital*, 3 Phila. 164 (Pa. Com. Pl. 1979), was the fact that Pennsylvania's legislature enacted medical malpractice laws that fixed fees for plaintiff's counsel to fixed percentages, with no manner in which those fees could ever be raised dependent upon circumstances. On constitutional challenge based upon a separation-of-powers argument, proponents of the law pointed to caps in the state's workers' compensation fee

statutes. The court rejected the analogy: "But even where this is the case, the Compensation Act allows an increase in fee for cause shown. In the present statute, the legislature departed from the most compelling precedent it had in the area of contingent fees and embarked upon tampering with the rights of an entire segment of the bar." 3 Phila. at 164. And:

> From the earliest days of this Commonwealth, it has been accepted that even where a fee bill (usually called a " table of fees") has been fixed by statutory law, counsel has the right to petition the court for an amount higher than that set in the table. *Brackenridge v. McFarlane*, Add. R. 49 (1973).
>
> Section 604 may be seen as a direct interference with the judiciary in an area where it has traditionally exercised supervision. As one commentator put it " [The] positive aspect of separation of powers imposes on courts affirmative obligations to assert and fully exercise their powers, to operate efficiently by modern standards, to protect the independent status, and to fend off legislative or executive attempts to encroach upon judicial prerogatives" (emphasis ours). Corrigan, Inherent Powers and Finance, 7 Trial 22 (Sept./Oct. 1971). By fixing fee limitations, without allowance for exceptional and unique circumstances the legislature may have intruded on a judicial province. As the late Dean Roscoe Pound pointed out:
>
> Hence, if anything was received from England as a part of our institutions, it was that the making of these general rules of practice was a judicial function. Indeed, this was well understood in the beginning of American law.

Pound, The Rule-Making Powers of the Courts, 12 A.B.A.J. 599, 601 (1926).

This principle was recently relied upon by the Supreme Court of New Hampshire in *Smith v. State*, A.2d (1978), in striking down a statute limiting compensation for court appointed lawyers to $500 in most felony cases and in general setting low hourly fees. It is peculiarly within the judicial province, the court held, to ascertain reasonable compensation. What constitutes reasonable compensation has "historically been a matter for judicial determination." Despite the wave of antagonism toward lawyers following the Jacksonian Revolution, the Supreme Court of Pennsylvania affirmed the inherent power of the Court to regulate the practice of law. When the Pennsylvania General Assembly attempted to prescribe minimum

qualifications for admission to the Bar, the Court held in *In Re Splane*, 16 A. 481, 483 (1889):

> [The Act of 1887] is an encroachment upon the judiciary department of the government. . . . It is an imperative command to admit any person to practice law upon complying with certain specified conditions. . . . No judge is bound to admit, or can be compelled to admit, a person to practice law who is not properly qualified. . . . The attorney is an officer of the court, and is brought into close and intimate relations with the court. Whether he shall be admitted, or whether he shall be disbarred, is a judicial and not a legislative question.

Marquez, 3 Phila. at 164. And this:

> Because Sec. 604(a) fixes inelastic maximum percentages ('may not exceed') (and we shall assume arguendo that 'may' means the same as 'shall') no statutory procedure is established to determine whether such maximum limits are, in fact, reasonable for '[t]he determination of the reasonableness of a fee requires consideration of all relevant circumstances....' EC 2-18, Code of Professional Responsibility. There is no allowance for judicial consideration of unusual or complex circumstances which might warrant a fee beyond the statutory maximum. This is what most disturbs the court.

Id. at 164.

Alabama's constitution makes certain the premise of separation of powers between each of the three coordinate branches of government, and provides: "In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Ala. Const.1901, §43. The reach of the Legislature is likewise constitutionally limited: "The legislative power of this state shall be vested in a legislature, which shall consist of a senate and a house of representatives." Ala. Const.1901, §44. Additionally of import is the "Judicial Article," which provides in pertinent part, Ala.Const.1901 Art. VI, §11: "6.11 Power to make rules. The supreme court shall make

and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts...."

In Alabama, regulating attorneys' fees has historically been a function of the judicial branch of government. In *Diamond Concrete & Slabs, LLC. v. Andalusia-Opp Airport Auth.*, 181 So. 3d 1171, 1075-76 (Ala. Civ. App. 2015), for example, the court battle involved a recovery of just over $11,000, and the trial court awarded a fee of only just over $5,000 – despite the fact that the governing statute (Ala. Code §8-29-6) authorized the prevailing party to collect from the loser a "reasonable attorneys' fee"; the winner sought almost $250,000 in fees which the trial court rejected in favor of imposing a fee corresponding to 40% of the amount of the award. The appellate court reversed:

> Our supreme court has held:
>
> "The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and its determination on such an issue will not be disturbed on appeal unless in awarding the fee the trial court exceeded that discretion. *State Bd. of Educ. v. Waldrop*, 840 So. 2d 893, 896 (Ala. 2002); *City of Birmingham v. Horn*, 810 So. 2d 667, 681-82 (Ala. 2001); *Ex parte Edwards*, 601 So. 2d 82, 85 (Ala. 1992), citing *Varner v. Century Fin. Co.*, 738 F.2d 1143 (11th Cir. 1984).
>
> "This Court has set forth 12 criteria a court might consider when determining the reasonableness of an attorney fee:
>
> "'(1) [T]he nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8) whether a fee is fixed or contingent; (9) the nature and length of a professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances.'" *Van Schaack v. AmSouth Bank, N.A.*, 530 So. 2d 740, 749 (Ala. 1988). These criteria are for purposes of evaluating whether an attorney fee is reasonable; they are not an exhaustive list of specific criteria that must all be met. *Beal Bank v. Schilleci*, 896 So. 2d 395, 403 (Ala. 2004), citing

Graddick v. First Farmers & Merchants Nat'l Bank of Troy, 453 So. 2d 1305, 1311 (Ala. 1984).

"We defer to the trial court in an attorney-fee case because we recognize that the trial court, which has presided over the entire litigation, has a superior understanding of the factual questions that must be resolved in an attorney-fee determination. *Horn*, 810 So. 2d at 681-82, citing *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Nevertheless, a trial court's order regarding an attorney fee must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee. Horn, 810 So. 2d at 682, citing *American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999); *see also Hensley*, 461 U.S. at 437, 103 S.Ct. 1933."

Pharmacia Corp. v. McGowan, 915 So. 2d 549, 552-53 (Ala. 2004).

"Although all of the criteria set forth above must be taken into consideration by the trier of the facts in determining a proper counsel fee __ and it has been said that all of these factors should be utilized and applied as the facts so indicate __ it is generally recognized that the first yardstick that is used by the trial judges is the time consumed."

Peebles v. Miley, 439 So. 2d 137, 141 (Ala. 1983).

The trial court's March 7, 2014, order stated that the trial court had" reviewed the file in this cause and, as stated above, all arguments and testimony as well as all applicable statutes and case law." The trial court further stated that it found that Diamond was " entitled to an attorney's fee which is reasonable for the type of case contemplated by the agreement between [Diamond] and [its] counsel." A trial court is not required to set forth a detailed analysis of all the applicable factors considered by it in exercising its discretion in establishing a reasonable attorney fee. However, where the trial court's order does not articulate the basis for its attorney-fee award, we are left to search the record for the basis for the award. The record "must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee." *Pharmacia*, 915 So. 2d at 553. In this case, we are unable to determine the rationale used by the trial court for its finding that the amount requested by Diamond was not reasonable or that a fee equal to 40% of the amount recovered was reasonable in light of any of the Peebles factors. It appears that the trial court set the fee solely as a percentage of the amount actually recovered and without considering the amount of time expended by Diamond's counsel in the course of this litigation and whether such time was reasonable. *See Pharmacia Corp.*, 915 So. 2d at 556 (reversing an order awarding attorney fees and remanding the case because " the trial court's method of calculating the award [was] with complete disregard for the time expended" by

counsel for the party requesting attorney fees).

Thus, although the Legislature statutorily authorized that a fee could be awarded, regulating the amount of the fee was seen clearly as a function of the judiciary. *See also* *Ex parte Peck*, 572 So. 2d 427, 428 (Ala. 1990)(in approving pro ami settlements, judicial function to set reasonable attorneys' fee); *General Motors Corp. v. Lucas*, 530 So. 2d 224 (Ala. 1988) (determination of "reasonable attorney's fee" prescribed by Alabama Code §8-20-8 in breach of warranty cases was judicial function); *Lewis v. Haleyville Mobile Home Supply, Inc.*, 447 So. 2d 691 (Ala. 1984) (determination of "reasonable fee" was judicial function); *King v. Keith*, 257 Ala. 463, 60 So. 2d 47 (1952)(determining reasonable fee for lawyer of estate administrator was judicial function); *Harlow v. Sloss Indus. Corp.*, 813 So. 2d 879 (Ala. Civ. App. 2001) (reasonableness of attorney fee determined as judicial function where protected by lien); *see generally Edelman & Combs v. Law*, 663 So. 2d 957 (Ala. 1995) (discussing the bases for judicially setting attorney fees in class-action common-fund cases); *Carver v. Foster*, 928 So. 2d 1017, 1026-27 (2005)(footnote omitted) ("We hold that, although the value of the property involved or the amount of sale proceeds in a partition or sale-for-division case is relevant to considerations such as the risk associated with undertaking the responsibility for rendering appropriate legal services, the reasonableness of an attorney-fee award cannot be based solely on an arbitrary percentage of that value. The fee must bear a reasonable relationship to the time expended on the case, in light of the hourly rate of attorneys practicing in the community.")

The Preamble to the Alabama Rules of Disciplinary Procedure provides:

> The Supreme Court of Alabama has inherent responsibility to supervise the conduct of lawyers who are its officers, and, in furtherance thereof, it promulgates the following Rules of Disciplinary Procedure (Interim), superseding all other rules and statutes pertaining to disciplinary procedure heretofore promulgated or enacted.
>
> The purpose of lawyer discipline and disability proceedings is to maintain appropriate standards of professional conduct to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or are likely to be unable to properly discharge their professional duties.
>
> The license to practice law in this state is a continuing proclamation by the Court that the holder is fit to be entrusted with professional matters and to aid in the administration of justice as a lawyer and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself or herself, at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice.
>
> The disciplinary procedure rules, at Ala.R.Disc.Proc. 2(b), provide:
>
> "Discipline may be imposed for any of the following reasons:
>
> ...
>
> (b) Violation of a rule of professional conduct contained in the Alabama Rules of Professional Conduct as from time to time shall be in effect in the state of Alabama, whether or not the violation occurred in the course of the lawyer-client relationship...."
>
> Attorneys' fees are regulated in Alabama by the proviso found at Ala.R.Prof.Cond. 1.5(a): "A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee." Although the rules are drafted by the State Bar on a grant of legislative authority, Alabama Code §34-3-81, those rules are not effective until substantively approved by the judicial branch of our government, through the Alabama Supreme Court.

Admittedly, §25-5-90(a) does permit a tiny area within which judicial discretion has a role – the fee can be less than 15%, but never more; the discretion, therefore, is but one-way discretion only. If a lawyer works 200 hours to serve a client with a low recovery of compensation benefits in order also to preserve the client's critical medical rights conferred by

§25-5-77, the lawyer will be paid 15% of a low recovery – rather than what the judicial branch might view as a "reasonable fee." The *Castellanos* case from Florida discussed above illustrates the point quite neatly. Although the trial bench in Alabama generally sees far more disputes involving the parties' respective rights and obligations relating to the provision of medical benefits (rather than indemnity benefits), often even after adjudication by order or settlement of claims for indemnity benefits, the Legislature provided no mechanism by which lawyers for claimants can be paid for that work – despite the fact that insurers have nearly unlimited resources with which to pay their lawyers to oppose claimants on the identical medical issues.

For the foregoing reasons, this Court concludes that §25-5-90(a) constitutes legislative trespass into a function reserved to the judicial branch of government. In Alabama, the reasonableness of what attorneys charge for their services is a function of the judicial branch of government, not a function of the legislative branch. For these reasons, this Court finds that §25-5-90(a) is unconstitutional under Alabama's constitutional guaranty of separation of powers as well.

IV. CONCLUSION AND STAY

This Court is not blind to the magnitude nor the consequence of its holding. There will be impact on medical providers, who presumably draw great income from the provision of medical care billed to workers' compensation insurers, employers, and self-insurance funds. There will be impact to insurers, given that the sales of, and premiums collected for, workers' compensation insurance in Alabama will halt in the absence of workers' compensation laws. Self-insurance funds will cease function as anything other than vessels paying out claims that existed prior to the declaration of the Act's unconstitutionality. Employers will face tort lawsuits upon the occurrence of industrial actions, subjecting them and co-workers of the injured victim

to lawsuits for compensatory and punitive damages available within the confines of the common law. And workers will have to turn to other sources – or none at all – for the provision of medical care or subsistence compensation upon suffering the misfortune of workplace accidents; inevitably, this will mean that Alabama's taxpayers will shoulder a large measure of the burden. These crises are the direct result of a problem created and allowed to persist by the Legislature. *New York C. R. Co. v. White*, 243 U.S. 188, 201-02 (1917). Alabama's effort at a "just settlement of a difficult problem, affecting one of the most important of social relations" has now eroded to the point that "the method of compensation that is established as a substitute [for common law rights ceded] transcends the limits of permissible state action."

This ruling is stayed in all respects for 120 days. At the expiration of 120 days, counsel for the plaintiff is ordered to report to this Court any efforts underway to amend, salvage, or modify the Act such that this Order need not be made effectual and implemented.

DONE and ORDERED this 8th day of May, 2017.

/s/ PAT BALLARD
CIRCUIT JUDGE