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Workers' Compensation: Necessary Changes In Favor Of The Injured Worker

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Workers' Compensation: Necessary Changes In Favor Of The Injured Worker

Abstract

Florida's workers' compensation is intended to provide a "reasonable alternative to tort litigation" by providing medical and wage- loss benefits to injured workers.

KEYWORDS: Compensation, Disability, Workers

WORKERS' COMPENSATION: NECESSARY CHANGES IN FAVOR OF THE INJURED WORKER

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I. INTRODUCTION 54
II. ATTORNEY'S FEES 56
  A. *Current Legislation* 56
  B. *History* 56
  C. *Castellanos Ruling* 59
    1. Violation of Due Process 61
      a. *Whether the Concern of the Legislature was Reasonably Aroused by the Possibility of an Abuse Which It Legitimately Desired to Avoid* 62
      b. *Whether There Was a Reasonable Basis for a Conclusion That the Statute Would Protect Against Its Occurrence* 63
      c. *Whether the Expenses and Other Difficulties of Individual Determinations Justify the Inherent Imprecisions of a Conclusive Presumption* 64
    2. Conclusion 65
III. DISABILITY BENEFITS 66
  A. *Background* 66
  B. *History* 67
  C. *Westphal Ruling* 68
    1. Denial of Access to Courts 72
    2. Conclusion 75

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IV. POSSIBLE EFFECTS TO FLORIDA'S WORKERS' COMPENSATION SYSTEM 77

I. INTRODUCTION

Florida's workers' compensation is intended to provide a "*reasonable alternative* to tort litigation" by providing medical and wage-loss benefits to injured workers.[1] The Workmen's Compensation Act of 1935 was passed to give the employees simple, expeditious, and inexpensive relief from their work-related injury.[2] In Florida, the workers' compensation system is a no-fault system wherein the legislature's intent is to assure a quick and effective delivery of remedies to employees injured in the course of their employment.[3] However, over the years, "the workers' compensation system has become increasingly complex"—which, in turn, forces employees to hire attorneys to ensure they receive all of the benefits to which they are rightfully entitled.[4] Furthermore, if an injured employee were to be successful in his claim for benefits, the employer would be liable for the employee's attorney fees.[5] This allows the employee to retain the full amount of his benefits.[6] However, the legislature has abolished all *reasonableness* in awarding attorney's fees, pursuant to section 440.34 of the Florida Statutes, to the point where some attorneys are earning less than minimum wage for their successful services.[7] Additionally, the legislature has diminished the time frame for temporary benefits to injured employees, to the point where a *gap* has been created between temporary and permanent benefits—leaving the injured employee without any benefits for an uncertain amount of time.[8] Thus, the legislature made it impossible for the Supreme

1. Westphal v. City of St. Petersburg, 194 So. 3d 311, 322–23 (Fla. 2016).
2. Lee Eng'g & Constr. Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968).
3. FLA. STAT. § 440.015 (2015).
4. Castellanos v. Next Door Co., 192 So. 3d 431, 434, 448 (Fla. 2016).
5. FLA. STAT. § 440.34(3)(b) (2009), *declared unconstitutional by* Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016).
6. *See id.*
7. *See id.*; *Castellanos*, 192 So. 3d at 433 (the claimant's attorney made "$1.53 per hour for 107.2 hours," and the lower courts and the Supreme Court of the United States ruled that the 107.2 hours were *reasonable and necessary* due to the complexity of the case).
8. *See* FLA. STAT. § 440.15(2)(a) (2015); Westphal v. City of St. Petersburg, 194 So. 3d 311, 321 (Fla. 2016) (the employee's right to temporary benefits had reached its statutory time limit and he was not eligible for permanent benefits); Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 626 (Fla. 1st Dist. Ct. App. 2011) (en banc), *overruled by* Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st Dist. Ct. App. 2013).

Court of Florida to construe the statutes regarding attorney's fees and temporary benefits in "a manner so as to avoid an unconstitutional result."[9] In *Castellanos v. Next Door Co.*,[10] the Supreme Court of Florida ruled that the irrebuttable presumption in the attorney's fee schedule was a violation of Florida's Due Process Clause in accordance to section 440.34 of the Florida Statutes.[11] In *Westphal v. City of St. Petersburg*,[12] the Supreme Court of Florida ruled that the statutory time limit in section 440.15 of the Florida Statutes for temporary benefits was a denial of the right to access the court under article I, section 21 of the Florida Constitution.[13]

This Comment will discuss the current legislation regarding the attorney's fees statute and how it has been interpreted by the Supreme Court of Florida as unconstitutional.[14] Second, this Comment will discuss the history of awarding attorney's fees and how it has evolved to the point where the *Castellanos* court found the principle to be unconstitutional.[15] Third, this Comment will discuss the *Castellanos* decision and how the current attorney's fees statute is a violation of due process.[16] Fourth, this Comment will discuss how current legislation of disability benefits is calculated and the history of the statutory time limit for temporary benefits.[17] Fifth, this Comment will discuss the *Westphal* decision and how the 104 week limitation on temporary benefits is a violation of a person's right to access the courts.[18] Finally, this Comment will analyze the possible impact of the Supreme Court of Florida's ruling on attorney's fees and disability benefits, the reaction from the business community, and whether those reactions are justified.[19]

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9. Murray v. Mariner Health, 994 So. 2d 1051, 1057 (Fla. 2008) (quoting State v. Jefferson, 758 So. 2d 661, 664 (Fla. 2000)).

10. 192 So. 3d 431 (Fla. 2016).

11. *Id.* at 449; *see also* FLA. CONST. art. I, § 9; FLA. STAT. § 440.34 (2009), *declared unconstitutional by* Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016).

12. 194 So. 3d 311 (Fla. 2016).

13. *Id.* at 327; *see also* FLA. CONST. art. I, § 21; FLA. STAT. § 440.15 (2009).

14. *See infra* Section II.A.

15. *See infra* Section II.B, II.C.

16. FLA. STAT. § 440.34 (2015); *Castellanos*, 192 So. 3d at 432; *see also* FLA. CONST. art. I, § 9; *infra* Section II.C.1.

17. *See infra* Sections III.A–B.

18. *Westphal*, 194 So. 3d at 313; *see also* FLA. CONST. art. I, § 21; *infra* Section III.C.

19. Jim Saunders, *Florida Supreme Court Rejects Another Part of Workers-Comp System*, ORLANDO SENTINEL (June 9, 2016 2:29 PM), http://www.orlandosentinel.com/business/os-nsf-florida-workers-comp-ruling-20160609-story.html; *See also infra* Part IV.

II. ATTORNEY'S FEES

A. *Current Legislation*

An employee is not required to pay for his own attorney's fees if the employee succeeds in his claim against the employer.[20] Once a claim is filed, the employer will not be liable for any attorney's fees until thirty days after the filing date.[21] This allows the employer the opportunity to settle the claim with the employee before the employer would be responsible for any attorney's fees.[22] However, the amount of attorney's fees either party would have to pay is restricted by a statutory formula and calculated based solely on the benefits that were secured.[23] Further, the Judge of Compensation Claims ("JCC") has no discretionary power to allow the fees to be greater than the statutory formula.[24] This statutory formula restricts attorney's fees to "20[%] [for] the first [five thousand dollars] of [secured benefits], 15[%] for the next [five thousand dollars] . . . [and] 10[%] of the remaining amount of the benefits secured."[25]

B. *History*

Awarding attorney's fees in addition to compensability awards began in 1941, when the legislature realized that the assistance of an attorney was crucial.[26] At the adoption of awarding attorney's fees, the amount was based on a reasonableness criteria approved by the JCC.[27] The purpose for awarding the attorney's fees was to remain consistent with the legislature's intent of granting employees an inexpensive relief and reducing the *economic stress* associated with a work-related injury.[28] Additionally, conveying attorney's fees over to the employer/carrier ("E/C") would deter the E/C from denying claims in an attempt to get a settlement.[29]

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20. FLA. STAT. § 440.34(3)(a) (2015).
21. *Id.* § 440.34(3)(d).
22. *See id.*
23. *Id.* § 440.34(1).
24. *Id.*
25. FLA. STAT. § 440.34(1) (2015).
26. *See* Castellanos v. Next Door Co., 192 So. 3d 431, 438 (Fla. 2016).
27. *Id.*
28. Lee Eng'g & Constr. Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968); *see also* FLA. STAT. §§ 440.015, .34 (2015).
29. Ohio Cas. Grp. v. Parrish, 350 So. 2d 466, 470 (Fla. 1977).

The courts are guided by Canon 12 of the Rules of Ethics Governing Attorneys in determining reasonable attorney's fees.[30] However, without a fixed method of determining reasonable attorney's fees, the courts rely on precedent and the factual record for indication as to the amount of work and time an attorney put into a case.[31] Reasonable attorney's fees should "not be so low as to" deter experienced attorneys from taking on a case, leaving the employee without adequate representation.[32] At the same time, the attorney's fees cannot be so excessive as to place a heavy burden on the E/C and the workers' compensation program.[33] Following *Lee Engineering & Construction Co. v. Fellows*,[34] in 1977, the legislature amended section 440.34(1) of the Florida Statutes to include the statutory formula as a basis for calculating attorney's fees, while adding discretionary factors the JCC can use to increase or decrease the fee to confirm that a *reasonable* attorney's fee was awarded.[35] The legislature determined reasonable attorney's fees by having the JCC apply the statutory formula and then adjust the amount based on the discretionary factors for each case.[36] The statutory formula acted as a starting point, where a departure was valid only if the

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30. *Castellanos*, 192 So. 3d at 439 (citing Fla. Silica Sand Co. v. Parker, 118 So. 2d 2, 4 (Fla. 1960)).

31. *Fla. Silica Sand Co.*, 118 So. 2d at 4.

32. *Castellanos*, 192 So. 3d at 439.

33. *Id.*

34. 209 So. 2d 454 (Fla. 1968).

35. *See* Act effective July 1, 1977, ch. 77-290, § 9, 1977 Fla. Laws 1284, 1293–94.

> (1) If the employer or carrier shall file notice of controversy as provided in s. 440.20, or shall decline to pay a claim on or before the [twenty-first] day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the *claimant* . . . shall have employed an attorney at law in the successful prosecution of the claim, there shall, in addition to the award for compensation, be awarded *a* reasonable attorney's fee *of 25 % of the first $5,000 of the amount of the benefits secured, 20 % of the next $5,000 of the amount of the benefits secured, and 15 % of the remaining amount of the benefits secured*, to be approved by the judge of industrial claims, which *fee* may be paid direct to the attorney for the claimant in a lump sum. *However, the judge of industrial claims shall consider the following factors in each case and may increase or decrease the attorney's fee if in his judgment the circumstances of the particular case warrant such action: (a) [t]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (b) [t]he likelihood, if apparent to the claimant, that the acceptance of the particular employment will preclude employment of the lawyer by others or cause antagonisms with other clients; (c) [t]he fee customarily charged in the locality for similar legal services; (d) [t]he amount involved in the controversy and the benefits resulting to the claimant; (e) [t]he time limitation imposed by the claimant or the circumstances; (f) [t]he nature and length of the professional relationship with the claimant; (g) [t]he experience, reputation, and ability of the lawyer or lawyers performing the services; (h) [t]he contingency or certainty of a fee.*

Id. at 1293–94.

36. Murray v. Mariner Health, 994 So. 2d 1051, 1059 (Fla. 2008).

formula would produce a *manifestly unfair* result.[37] The legislature again amended section 440.34 of the Florida Statutes in 1980 by restricting the amount of attorney's fees to only the benefits "that the attorney is responsible for securing."[38] Furthermore, in 1993, the legislature further limited the amount of attorney's fees by lowering the percentages of the statutory formula to the percentages currently in place.[39]

Ten years later, Governor Bush reformed Florida's entire workers' compensation system.[40] In the Governor's Commission on Workers' Compensation Reform, the legislature abandoned the *Lee Engineering* discretionary factors used to determine the reasonableness of an attorney's fee.[41] However, according to the language of the statute, the JCC still had to approve reasonable attorney's fees, but was strictly forced to follow the statutory formula in effect.[42] The interpretation of the newly reformed statute implies that, in every instance, the statutory formula will equate to a reasonable award of attorney's fees.[43]

As *Murray v. Mariner Health*[44] evidenced, this is not always the case.[45] In *Murray*, the statutory formula resulted in an attorney's fee for the prevailing employee's attorney of $8 per hour for eighty hours of work.[46] On the other hand, the E/C's attorney received $125 per hour for 135 hours in its unsuccessful attempt to oppose paying benefits.[47] The JCC stated that the employee's attorney's fees cannot be seen to be reasonable but instead "would appear to be *manifestly unfair*."[48] The court in *Murray* ruled that the statute's plain language was ambiguous; yet, the court did not want to rule the statute was unconstitutional due to the statutory principle of avoiding unconstitutionality whenever it is possible.[49] The Supreme Court of Florida

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37. Alderman v. Fla. Plastering, 805 So. 2d 1097, 1100 (Fla. 1st Dist. Ct. App. 2002).

38. Act effective July 1, 1980, ch. 80-236, § 14, 1980 Fla. Laws 722, 736.

39. Act effective Jan. 1, 1994, ch. 93-415, § 34, 1993 Fla. Laws 62, 154 (codified at FLA. STAT. § 440.34 (1994)).

40. Act effective Oct. 1, 2003, ch. 2003-412, § 26, 2003 Fla. Laws 1, 85; Castellanos v. Next Door Co., 192 So. 3d 431, 441–42 (Fla. 2016).

41. Ch. 2003-412, § 26, 2003 Fla. Laws at 85; *Castellanos*, 192 So. 3d at 442; *see also* Lee Eng'g & Constr. Co. v. Fellows, 209 So. 2d 454, 458–59 (Fla. 1968).

42. Ch. 2003-412, § 26, 2003 Fla. Laws at 85.

43. *See* FLA. STAT. § 440.34(1) (2003).

44. 994 So. 2d 1051 (Fla. 2008).

45. *Id.* at 1057.

46. *Id.* at 1055.

47. *Id.*

48. *Id.* at 1055–56; Murray v. Mariners Health, OJCC Case No. 04-00032DFT (Fla. Div. of Admin. Hearings Compensation Order filed Jan. 17, 2006) (*Murray* 2006 Compensation Order) at *5.

49. Murray v. Mariner Health, 994 So. 2d 1051, 1057 (Fla. 2003).

stated in the *Murray* decision that the *Lee Engineering* factors be used once again as the standard for reasonableness, even though the legislature repealed them in the 2003 amendment to the attorney's fees provision.[50]

Following the ruling in *Murray*, in 2009, the legislature removed the remaining ambiguity by removing any reference to reasonableness in section 440.34 of the Florida Statutes.[51] In effect, this resulted in strict compliance with the attorney fee schedule and removal of any discretionary power from the JCC to alter the fee schedule due to inadequate or excessive fees.[52] Therefore, this created an *irrebuttable presumption* that the fee schedule will guarantee a reasonable attorney's fee.[53] Furthermore, this paved the way for the Supreme Court of Florida to hear the *Castellanos* case and rule section 440.34 of the Florida Statutes as unconstitutional.[54]

C. *Castellanos Ruling*

In *Castellanos*, the Supreme Court of Florida ruled the irrebuttable presumption in the statutory fee schedule of section 440.34 of the Florida Statutes as a violation of due process under the Florida Constitution.[55] In this case, the Petitioner, Marvin Castellanos, was a forty-six year old man that was injured during the course and scope of his employment as a press break operator for Next Door Company.[56] Next Door Company was a manufacturer of metal doors and door frames, with their principal place of business in Miami, Florida.[57] Mr. Castellanos received multiple head, neck,

50. *Id.* at 1062 (The Supreme Court of Florida was unclear as to why the legislature took out the factors in the first place, because they still authorized entitlement to reasonable attorney's fees, but now they did so without any standard to define what is considered reasonable.).

51. Act effective July 1, 2009, ch. 2009-94, § 1, 2009 Fla. Laws 1, 1–2.

> (1) A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved [*as reasonable*] by the [JCC] or court having jurisdiction over such proceedings . . . .
> (3) If any party should prevail in any proceedings before a [JCC] or court, there shall be taxed against the non-prevailing party the reasonable costs of such proceedings, not to include attorney's fees. A claimant *is* responsible for the payment of her or his own attorney's fees, except that a claimant *is* entitled to recover *an* attorney's fee *in an amount equal to the amount provided for in subsection (1) or subsection (7)* . . . .

Id. (emphasis added); *see also Murray*, 994 So. 2d at 1062.

52. *See* Ch. 2009-94, § 1, 2009 Fla. Laws at 1; Castellanos v. Next Door Co., 192 So. 3d 431, 443 (Fla. 2016) (removing *reasonableness* effectively made the statute unambiguous with the same restriction as in the 2003 reform).

53. *Castellanos*, 192 So. 3d at 432.

54. *See id.*

55. *Id.*; *see also* FLA. CONST. art. I, § 9.

56. *Castellanos*, 192 So. 3d at 433, 435.

57. *Id.* at 435.

and right shoulder contusions as a result of the work-related injury.[58] Subsequently, Next Door Company and their insurance carrier, Amerisure—collectively E/C—provided an authorized physician, who requested medically necessary treatment from the E/C.[59] However, the E/C refused to authorize their chosen physician's prescribed treatment—consequently, Mr. Castellanos filed a petition for benefits with his attorney.[60] The E/C responded to the petition for benefits by denying compensability on the basis of section 440.09(4) of the Florida Statutes.[61] The E/C filed twelve defenses during the proceedings, and the final hearing was composed of "numerous depositions, exhibits, and live testimony."[62] The JCC's final compensation order awarded Mr. Castellanos compensation for his work-related injuries, entitling him recovery of attorney's fees from the E/C.[63]

Following the JCC's ruling, Mr. Castellanos "filed a motion for attorney's fees, seeking an hourly [rate] of $350 for" 107.2 hours of work.[64] However, as a result of the mandatory fee schedule, Mr. Castellanos' attorney was only allowed to recover a fee of $1.53 per hour.[65] Because the fee schedule is based solely on the amount of benefits secured, a case with complex legal issues for only a minimum amount of benefits—as in Mr. Castellanos' situation—would result in scant attorney's fees.[66] Expert witnesses testified on behalf of Mr. Castellanos that the amount of hours Mr. Castellanos' attorney put forth was "reasonable and necessary . . . given that 'this was a very difficult case.'"[67] Additionally, the experts testified that there would have been no way for Mr. Castellanos to receive compensation for his injuries without the assistance of his attorney.[68]

58. *Id.*

59. *Id.*

60. *Id.* (A petition for benefits is the form that is used to file a claim under Florida's workers' compensation.).

61. *Castellanos*, 192 So. 3d 435; FLA. STAT. § 440.09(4) (2009); *see also* FLA. STAT. § 440.105(4)(b)(9) (2009) (An employee will not be entitled to compensability of benefits when they "knowingly [or intentionally] present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits.").

62. *Castellanos*, 192 So. 3d at 435.

63. *Id.*; *see also* FLA. STAT. § 440.34(3)(b) (2015) (An employee is entitled to recover attorney fees "[i]n any case in which the employer or carrier files a response to petition denying benefits with the Office of the Judges of Compensation Claims and the injured person has employed an attorney in the successful prosecution of the petition.").

64. *Castellanos*, 192 So. 3d at 435.

65. *Id.* at 436.

66. *See* FLA. STAT. § 440.34(1) (2015); *Castellanos*, 192 So. 3d at 443.

67. *Castellanos*, 192 So. 3d at 436.

68. *Id.*

An expert witness on behalf of the E/C testified that he had not seen one case where an employee was successful in litigating without an attorney and that the statutory fee "in this case was 'an unreasonably low hourly rate' and *an absurd result*."[69] However, the JCC was bound by precedent to follow the statutory fee schedule and did "not have the jurisdiction to declare a state statute unconstitutional," even though the JCC was in agreement with the expert witnesses' testimony.[70] The First District Court of Appeal affirmed the JCC's decision; however, the court noted that a constitutional issue arose as a result of this case.[71] The Supreme Court of Florida granted review and ruled the statute unconstitutional "as a violation of due process."[72]

1. Violation of Due Process

"[T]he inability of any injured worker to challenge the reasonableness of the fee award in his or her individual case is a facial constitutional due process issue."[73] In order to assert a constitutional issue, the *true party in interest* must have standing.[74] The courts do not look at the award of attorney's fees "from the point of view of the attorney's rights, because the attorney[s]" have the discretion to take on a case.[75] Furthermore, putting a barrier on reviewing a decision of attorney's fees would "ultimately result in a net loss of attorneys willing to represent" injured workers.[76] Consequently, this would diminish the injured employee's ability to challenge an E/C's denial of benefits.[77] Thus, the injured worker, not the attorney, is the *true party in interest* when awarding attorney's fees.[78] Accordingly, Mr. Castellanos had standing to assert the constitutional challenge of attorney's fees.[79]

In *Recchi America Inc. v. Hall*,[80] the court concluded that the irrebuttable presumption, in section 440.09(3) of the Florida Statutes, was a violation of due process because it did not allow the employee to overcome

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69. *Id.*
70. *Id.* at 437.
71. *Id.*; *see also* FLA. CONST. art. I, § 9.
72. *Castellanos*, 192 So. 3d at 437; *see also* FLA. CONST. art. I, § 9.
73. *Castellanos*, 192 So. 3d at 443; *see also* FLA. CONST. art. I, § 9.
74. *See id.* at 443–44.
75. *Id.* at 443.
76. Pilon v. Okeelanta Corp., 574 So. 2d 1200, 1201 (Fla. 1st Dist. Ct. App. 1991) (per curiam).
77. *Id.*
78. *Castellanos*, 192 So. 3d at 443.
79. *Id.* at 443–44.
80. 692 So. 2d 153 (Fla. 1997).

the presumption that the intoxication was the cause of the industrial accident.[81] The *Recchi America Inc.* court adopted a three-prong test to determine whether a statute's irrebuttable presumption provision, such as the mandatory fee schedule in section 440.34 of the Florida Statutes, violates the constitutional right to due process.[82] The three-prong test to determine the constitutionality of an irrebuttable presumption consists of:

> (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.[83]

a. *Whether the Concern of the Legislature was Reasonably Aroused by the Possibility of an Abuse Which It Legitimately Desired to Avoid*[84]

The statutory fee schedule was created with the intent of standardizing the amount awarded for attorney's fees.[85] Prior to the creation of the irrebuttable presumption, the statutory fee schedule was used as a starting point in determining the award amount.[86] However, the fee schedule was not intended to be the sole deciding factor in determining the award amount for attorney's fees.[87] The current irrebuttable presumption in section 440.34 of the Florida Statutes reflects the legislative intent to standardize the fee; however, it only considers the amount of benefits secured.[88] The fee schedule lacks any consideration to the *time and effort* the attorney spent in a case.[89] As the court in *Martin Marietta Corp. v. Glumb*[90] stated, "[a]mong

81. *See* FLA. CONST. art. I, § 9; FLA. STAT. § 440.09(3) (2009); *Recchi Am. Inc.*, 692 So. 2d at 154.
82. *See* FLA. CONST. art. I, § 9; FLA. STAT. § 440.34(1) (2015); *Recchi Am. Inc.*, 692 So. 2d at 154.
83. *Recchi Am. Inc.*, 692 So. 2d at 154.
84. *Id.*
85. Alderman v. Fla. Plastering, 805 So. 2d 1097, 1100 (Fla. 1st Dist. Ct. App. 2002).
86. Fumigation Dep't v. Pearson, 559 So. 2d 587, 590 (Fla. 1st Dist. Ct. App. 1989).
87. *Id.*
88. FLA. STAT. § 440.34(1) (2015); *see also* Castellanos v. Next Door Co., 192 So. 3d 431, 444 (Fla. 2016). *But see* Martin Marietta Corp. v. Glumb, 523 So. 2d 1190, 1195 (Fla. 1st Dist. Ct. App. 1988) ("[A]lthough the amount of benefits obtained is a significant factor, it is not determinative of the maximum amount that can be awarded . . . .").
89. *Castellanos*, 192 So. 3d at 444.
90. 523 So. 2d 1190 (Fla. 1st Dist. Ct. App. 1988).

the major considerations involved in the determination of a workers' compensation attorney's fee are the time and labor reasonably required to prosecute the claim, and the hourly fee customarily charged in the area for similar services."[91]

As to the claim that the legislature aimed to avoid excessive attorney's fees, the legislature had already taken that into consideration with *Lee Engineering* factors they had previously codified.[92] Additionally, the statutory fee schedule limits only the injured employee's—claimant—attorney's fees without limiting the employer's attorney's fees.[93] In the first ten years of the codification of the irrebuttable presumption in section 440.34 of the Florida Statutes, the claimant's attorney's fees have decreased from 48.91% of the aggregate fees to 36.27%, while the employer's attorney's fees have increased from 51.09% of the aggregate fees to 63.73%.[94] Additionally, the claimant's attorney is barred from agreeing to a reasonable lump sum with the claimant without the approval of the JCC, who in turn is forced to approve only an amount equal to the statutory fee schedule.[95]

b. *Whether There Was a Reasonable Basis for a Conclusion That the Statute Would Protect Against Its Occurrence*[96]

Assuming the legislative intent of avoiding excessive attorney's fees passes the first prong of the due process test, there is no evidence the irrebuttable presumption actually serves that purpose.[97] On the contrary, in some cases, the fees can be excessive as well as inadequate as the court in *Murray* explained:

> In some cases such as the present case [and the *Castellanos* case], the amount of benefits is small, but the legal issues are complex and time consuming, and require skill, knowledge, and experience to recover the small but payable benefits. In other cases, the amount of benefits is substantial, but

91. *Id.* at 1195.

92. *See* Act effective July 1, 1977, ch. 77-290, § 9, 1977 Fla. Laws 1284, 1293–94 ("the time and labor required, the novelty, [complexity], and difficulty of the questions involved, and the skill requisite to perform the legal service properly"); Lee Eng'g & Constr. Co. v. Fellows, 209 So. 2d 454, 458–59 (Fla. 1968).

93. *See* FLA. STAT. § 440.34(1) (2015).

94. *Castellanos*, 192 So. 3d at 445.

95. *See* FLA. STAT. § 440.34(1) (2015) ("The [JCC] shall not approve . . . 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.").

96. Recchi Am. Inc. v. Hall, 692 So. 2d 153, 154 (Fla. 1997).

97. *See Castellanos*, 192 So. 3d at 445–46.

> the legal issues are simple and direct, and do not require exceptional skill, knowledge, and experience. In the former case, a mandatory, rigid application of the formula results in an inadequate fee; in the latter, such application of the formula results in an excessive fee.[98]

Additionally, the First District Court of Appeal explained that a customary hourly rate to calculate attorney's fees will be more effective in cases in which the value of the attorney's services greatly outweighs the financial benefits those services secured.[99] As in *Castellanos*, the attorney's value of service and dedication to persevere through the twelve defenses of opposing counsel greatly outweighs the limited, yet necessary, benefits sought by Mr. Castellanos.[100] Therefore, the removal of the JCC's discretionary authority to alter attorney's fees, whether excessive or inadequate, frustrates the workers' compensation system.[101] The irrebuttable presumption does not protect against the occurrence of an excessive fee.[102]

c. *Whether the Expenses and Other Difficulties of Individual Determinations Justify the Inherent Imprecisions of a Conclusive Presumption*[103]

This final prong of the due process test weighs heavily against the irrebuttable presumption in the fee schedule.[104] The JCC is the individual who makes the determination of whether the expenses and difficulties justify the irrebuttable presumption.[105] However, the irrebuttable presumption does not allow the JCC to do anything regarding an unreasonable attorney fee.[106] In fact, before the irrebuttable presumption was created, the fee schedule was used as a starting point to award a reasonable attorney fee.[107] Additionally, the JCC has been able to determine reasonable attorney's fees since the role's enactment in 1941 without "undue expense or difficulty to avoid unfairness and arbitrariness" through the use of the *Lee Engineering* factors

98. Murray v. Mariner Health, 994 So. 2d 1051, 1057 n.4 (Fla. 2008); *see also Castellanos*, 192 So. 3d at 445–46.

99. Alderman v. Fla. Plastering, 805 So. 2d 1097, 1100 (Fla. 1st Dist. Ct. App. 2002).

100. *See Castellanos*, 192 So. 3d at 435–36; *Alderman*, 805 So. 2d at 1100.

101. *Castellanos*, 192 So. 3d at 446.

102. *Id.*; *see also Murray*, 994 So. 2d at 1057 n.4.

103. Recchi Am. Inc. v. Hall, 692 So. 2d 153, 154 (Fla. 1997).

104. *Castellanos*, 192 So. 3d at 445–46.

105. *See id.* at 446.

106. *See id.*

107. *Id.* at 444, 446.

as a guideline for the determination of reasonableness.[108] Therefore, prior to the creation of the irrebuttable presumption, "[t]his type of review to control abuse, limit excessive fees, and award reasonable fees provide[d] no basis" to depart from this type of review.[109]

2. Conclusion

The goal of the Florida's workers' compensation system has remained the same, which is "the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer."[110] However, the legislature has granted the E/C the opportunity to take advantage of the workers' compensation system by eliminating reasonableness as a prerequisite to awarding attorney's fees.[111] In turn, the E/C is incentivized to delay and resist paying benefits by raising multiple defenses, as was done in *Castellanos*, to encourage a settlement between the employee and their attorney.[112] Conversely, awarding reasonable attorney's fees will benefit the injured employee because attorneys will be inclined to take on a case even for a modest, albeit necessary, benefit because the attorney will be paid a *reasonable* fee for his time and labor.[113]

In effect, the fundamental purpose of awarding attorney's fees is to deter the employer from unnecessary delay and to allow the employee to receive a net recovery of his benefits.[114] This purpose is completely eviscerated by eliminating the requirement of a *reasonable* attorney's fee.[115] It is irrelevant whether the attorney's fee schedule can produce reasonable attorney's fees because that is not the constitutional issue; the facial due process violation is in regards to the irrebuttable presumption in section 440.34(1) of the Florida Statutes that "precludes *every* injured worker from challenging the reasonableness of the [attorney's] fee award."[116] As Justice

108. *Id.* at 446, 449; Lee Eng'g & Constr. Co. v. Fellows, 209 So. 2d 454, 458–59 (Fla. 1968).

109. *Castellanos*, 192 So. 3d at 446.

110. FLA. STAT. § 440.015 (2015).

111. *Castellanos*, 192 So. 3d at 436.

112. *Id.* at 435, 447–48; Ohio Cas. Grp. v. Parrish, 350 So. 2d 466, 470 (Fla. 1977).

113. *Castellanos*, 192 So. 3d at 448; *Ohio Cas. Grp.*, 350 So. 2d at 470.

114. *Castellanos*, 192 So. 3d at 439, 447–48; *Ohio Cas. Grp.*, 350 So. 2d at 470.

115. *Castellanos*, 192 So. 3d at 448.

116. *Id.* at 434; *see also* FLA. STAT. § 440.34(1) (2009), *declared unconstitutional by* Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016); FLA. CONST. art. I, § 9.

Pariente of the Supreme Court of Florida stated: "Without the ability of the attorney to present, and the JCC to determine the reasonableness of the fee award and to deviate where necessary, the risk is too great that the fee award will be entirely arbitrary, unjust, and grossly inadequate."[117] Therefore, section 440.34 of the Florida Statutes violates Florida's constitutional guarantee of due process.[118] The proper remedy would be to revive the statute's interpretation in *Murray*, where the court held that the *Lee Engineering* factors would be used to confirm that a reasonable award of attorney's fees is provided.[119] This is because "Florida law has long held that, when the [l]egislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless, it too would be unconstitutional."[120]

III. DISABILITY BENEFITS

A. *Background*

In Florida, once an employee gets injured on the job, they are entitled to receive disability benefits if the injury results in more than twenty-one days of disability.[121] After the twenty-one days, the employee is entitled to disability benefits, the amount of which is dependent on his or her work status and earnings.[122] An employee's average weekly wages ("AWW") is used to determine the amount of disability benefits an employee is entitled to receive.[123] AWW considers an employee's average earnings in the thirteen weeks prior to his injury.[124] Once the AWW is set and the authorized physician has put the employee on a limited work status, the employee may be entitled to partial temporary disability ("PTD") benefits—only if the employee is currently earning less than 80% of his AWW each week.[125] When an employee is entitled to PTD benefits, he or she will receive 80% of the difference of 80% of the employee's AWW and current weekly

117. *Castellanos*, 192 So. 3d. at 448.

118. FLA. STAT. § 440.34(1) (2009); *Castellanos*, 192 So. 3d at 448; *see also* FLA. CONST. art. I, § 9.

119. *See Castellanos*, 192 So. 3d at 448–49; Murray v. Mariner Health, 994 So. 2d 1051, 1062 (Fla. 2008); Lee Eng'g & Constr. Co. v. Fellows, 209 So. 2d 454, 458 (Fla. 1968).

120. B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994) (per curiam).

121. FLA. STAT. § 440.12(1) (2015).

122. *Id.*; FLA. STAT. § 440.14(1) (2015).

123. FLA. STAT. § 440.14(1) (2015).

124. *Id.* § 440.14(1)(a).

125. FLA. STAT. § 440.15(4)(c) (2009).

earnings.[126] If the physician has put the employee on a *no-work status*, then the employee is entitled to receive total temporary disability ("TTD") benefits.[127] As part of the TTD benefits, the employee will receive 66.67% of the employee's AWW.[128] However, temporary benefits, whether partial or total, will terminate after 104 weeks or when the authorized physician has placed them at maximum medical improvement ("MMI").[129]

Only an employee who has reached MMI can become eligible for permanent disability benefits.[130] Impairment income benefits, also known as permanent partial disability benefits, are given to those employees who have reached MMI and are based on the percentage of the employee's total body that is permanently impaired due to the work-related injury.[131] At that point, the employee will be given an impairment rating by the authorized physician, and, depending on the impairment rating percentage, the employee will receive 75% of TTD benefits for a certain number of weeks for each percentage point.[132] Finally, an employee is eligible for PTD benefits if he or she can prove that he or she can no longer work, even in a limited capacity, and that the permanent disability was caused as a result of the work-related injury.[133] However, PTD benefits are available only for employees who are incapable of engaging in employment beyond the date of MMI or employees with catastrophic injuries.[134]

B. *History*

Since the enactment of the Florida's workers' compensation system, section 440.15 of the Florida Statutes has governed the payment of disability benefits.[135] Initially, MMI did not govern PTD benefits, but rather PTD was determined "in accordance [to] the facts."[136] Additionally, TTD benefits had a maximum duration of 350 weeks.[137] Before the codification of MMI,

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126. *Id.* § 440.15(4)(a).
127. *Id.*; *see also* Scotty's v. Boles, 680 So. 2d 524, 526 (Fla. 1st Dist. Ct. App. 1996).
128. FLA. STAT. § 440.15(2)(a) (2009).
129. *Id.*
130. *Id.* § 440.15(1)–(3).
131. FLA. STAT. § 440.15(3)(b)–(c) (2015). Impairment benefits are also referred to as permanent impairment benefits. *See id.* § 440.15(3).
132. *Id.* § 440.15(3)(b)–(c), (g).
133. *See* FLA. STAT. § 440.15(1)(a) (2009) (PTD amounts to 66.67% of the employee's AWW); FLA. STAT. § 440.02(22) (2015).
134. FLA. STAT. § 440.15(1)(a) (2015).
135. FLA. STAT. § 440.15(1)–(3) (1941).
136. *Id.* § 440.15(1)(b).
137. *Id.* § 440.15(2).

Corral v. McCrory Corp.[138] had already established that "[MMI] mark[ed] the end of temporary disability and the beginning of permanent disability [benefits]."[139] In 1979, the legislature added the term MMI with the meaning established in *Corral*, along with the addition that MMI be "based upon reasonable medical probability."[140] The definition of MMI continues to be the "date after which . . . recovery . . . or lasting improvement . . . can no longer reasonably be anticipated, based [on] reasonable medical probability."[141]

In 1990, the legislature reduced the maximum duration for temporary benefits from 350 weeks to 260 weeks.[142] Four years later, the legislature decided this reduction in 1990 was insufficient, and reduced the maximum duration for temporary benefits to 104 weeks.[143]

C. *Westphal Ruling*

In 2009, Bradley Westphal, a fifty-three year old fireman, suffered an injury in the course of his employment duties.[144] Westphal suffered severe injuries to his lower back and lost feeling in his left leg below the knee.[145] Additionally, he required spinal fusion surgery and other surgical procedures.[146] Due to his no work status, Westphal began receiving workers' compensation benefits in the form of medical benefits and TTD benefits.[147] At the time of the accident, pursuant to section 440.15(2) of the Florida Statutes, TTD benefits were terminated "[o]nce the employee reache[d] the maximum number of weeks allowed, [104 weeks], or the employee reache[d] the date of [MMI], whichever occurs earlier . . . and the injured worker's permanent impairment shall be determined."[148] The *permanent impairment* refers to assigning a rating percentage used to pay impairment income benefits pursuant to section 440.15(3)(b) of the Florida Statutes.[149] However, Westphal was not eligible to receive impairment income benefits

138. 228 So. 2d 900 (Fla. 1969).

139. *Id.* at 903 (establishing that "[MMI] is the date after which recovery or lasting improvement can no longer reasonably be anticipated").

140. Act effective July 1, 1979, ch. 79-40, § 2, 1979 Fla. Laws 215, 221; *see also Corral*, 228 So. 2d at 903.

141. FLA. STAT. § 440.02(10) (2015); *see also Corral*, 228 So. 2d at 903.

142. Act effective July 1, 1990, ch. 90-201, § 20, 1990 Fla. Laws 894, 935.

143. Act effective Jan. 1, 1994, ch. 93-415, § 20, 1994 Fla. Laws 62, 120.

144. Westphal v. City of St. Petersburg, 194 So. 3d 311, 315 (Fla. 2016).

145. *Id.*

146. *Id.*

147. *Id.* at 315–16.

148. FLA. STAT. § 440.15(2)(a) (2009).

149. *Id.* §§ 440.15(3)(b), .02(22).

because those benefits did not become due until MMI had been reached.[150] In 2009, MMI was defined in section 440.02(10) of the Florida Statutes as "the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability."[151]

Although Westphal was not placed on MMI, his TTD benefits ceased after he had reached the statutory time limit of 104 weeks.[152] At that time, Westphal, following the advice from his physicians, was still not able to return to work or obtain any employment due to the severity of his injuries.[153] Accordingly, Westphal filed a petition for benefits seeking permanent total disability benefits.[154] Section 440.15(1) of the Florida Statutes governs entitlement to PTD benefits; however, it limits that entitlement to a certain class of individuals:

> No compensation shall be payable under this section if the employee is engaged in, or is *physically capable of engaging in, at least sedentary employment*. . . . In the following cases, an injured employee is presumed to be permanently and totally disabled unless the employer or carrier establishes that the employee is physically capable of engaging in at least sedentary employment within a fifty-mile radius of the employee's residence.
>
> . . . .
>
> In all other cases, in order to obtain permanent total disability benefits, the employee must establish that he or she is not able to engage in at least sedentary employment, within a fifty-mile radius of the employee's residence, due to his or her physical limitation. . . . *Only claimants with catastrophic injuries or claimants who are incapable of engaging in employment, as described in this paragraph, are eligible for permanent total benefits*. In no other case may permanent total disability be awarded.[155]

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150. *Westphal*, 194 So. 3d at 315–16; *see also* FLA. STAT. § 440.15(3)(a) (2009); Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 624 (Fla. 1st Dist. Ct. App. 2011) (en banc), *overruled by* Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st Dist. Ct. App. 2013).

151. FLA. STAT. § 440.02(10) (2009).

152. *Westphal*, 194 So. 3d at 316.

153. *Id.*

154. *Id.*

155. FLA. STAT. § 440.15(1)(a)–(b) (2009) (emphasis added); *see also* *Westphal*, 194 So. 3d at 316, 319–20.

The legislature has made it clear through the statute's plain language that PTD benefits are limited to injured workers with *catastrophic injuries*, as defined in the statute, and those who are incapable of obtaining employment.[156] Further, by definition, catastrophic injuries entail a permanent impairment—and, pursuant to section 440.02 of the Florida Statutes, permanent impairment is defined as "any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, *existing after the date of maximum medical improvement*, which results from the injury."[157] Consequently, Westphal must have been able to prove, upon the cessation of his temporary benefits, not only that he was completely disabled, but also that he will remain completely disabled "after the date of [MMI]."[158] Unfortunately, in Westphal's situation, the authorized physician opined that determining whether he will remain totally and permanently disabled after the date of MMI *was too speculative*.[159] In effect, Westphal was fully deprived "from [his] disability benefits for an indefinite amount of time."[160]

As demonstrated in Westphal's case, the statutory scheme has created a gap wherein an injured worker who has not yet reached MMI at the end of the 104-week maximum duration of TTD benefits would remain ineligible for PTD benefits until the injured worker has reached MMI.[161] Consequently, the JCC denied Westphal's claim for PTD benefits.[162]

The JCC denied Westphal's claim based on the precedent set by *Matrix Employee Leasing, Inc. v. Hadley*,[163] in which the court recognized the possibility of a gap in temporary and permanent benefits to injured workers who had not reached MMI.[164] However, since the statute's language is clear and unambiguous, the courts do not have the power to interpret the statute to eliminate the possibility of a gap in disability benefits because that remedial power lies with the legislature.[165]

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156. FLA. STAT. § 440.15(1)(b) (2009); *see also Westphal*, 194 So. 3d at 319.

157. FLA. STAT. § 440.02(22) (2009); *see also* Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 624 n.4 (Fla. 1st Dist. Ct. App. 2011) (en banc), *overruled by* Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st Dist. Ct. App. 2013).

158. *Matrix Emp. Leasing, Inc.*, 78 So. 3d at 625 (alteration in original); *see also Westphal*, 194 So. 3d at 316–17.

159. *Westphal*, 194 So. 3d at 316.

160. *Id.*

161. *See* FLA. STAT. § 440.15(2) (2009); *Westphal*, 194 So. 3d at 316.

162. *Westphal*, 194 So. 3d at 316.

163. 78 So. 3d 621 (Fla. 1st Dist. Ct. App. 2011) (en banc), *overruled by* Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st Dist. Ct. App. 2013).

164. *Id.* at 624.

165. *Id.* at 626.

On appeal, the First District Court of Appeal agreed with Westphal's assertion that the 104-week limitation on TTD benefits was an unconstitutional denial of access to the courts.[166] The court relied on *Kluger v. White*[167] to conclude that the statutory limitation on benefits amounted to an inadequate remedy when compared to the original 350-week limitation on TTD benefits.[168] This equated to a denial of access to the courts because the legislature does not have the power to abolish the 350-week limitation without providing a reasonable alternative.[169]

"Subsequent to the panel['s] decision, the First District granted" an en banc rehearing, where it attempted to save the statute's constitutionality by setting forth a new interpretation.[170] The new interpretation had construed the meaning of *permanent impairment* in section 440.15(2)(a) of the Florida Statutes to indicate that the injured worker has reached MMI.[171] Consequently, the court held that when an injured worker is totally disabled at the expiration of his TTD benefits, the employees are automatically deemed at MMI.[172] The First District Court of Appeal receded from the decision in *Hadley* that had recognized the possibility of a statutory gap in disability benefits.[173] The First District Court of Appeal did not further address the constitutionality issue due to the new interpretation of the statute, which discredited the *Hadley* ruling.[174] However, the First District Court of Appeal discredited the *Hadley* ruling with a statutory interpretation that they had already condemned in that case:

> The statutory interpretation advocated by the dissent would eliminate the *gap* by equating the expiration of the eligibility for temporary benefits with the date of MMI, as that phrase is used in the definition of *permanent impairment*. The main problem with this interpretation is that "date of maximum medical improvement" is statutorily-defined as the date after which the employee is not reasonably anticipated to have further medical recovery or improvement from the injury, . . . whereas the date temporary benefits cease by operation of law has nothing to do with the employee's ultimate medical condition or prognosis.[175]

166. *Westphal*, 194 So. 3d at 317.
167. 281 So. 2d 1 (Fla. 1973).
168. *Westphal*, 194 So. 3d at 317; *see also Kluger*, 281 So. 2d at 1.
169. *See Kluger*, 281 So. 2d at 4.
170. *Westphal*, 194 So. 3d at 317.
171. FLA. STAT. §440.15(2)(a) (2009); *Westphal*, 194 So. 3d at 317.
172. *Westphal*, 194 So. 3d at 317.
173. *Id.*; *see also Matrix Emp. Leasing, Inc.*, 78 So. 3d at 621.
174. *Westphal*, 194 So. 3d at 317; *see also Matrix Emp. Leasing, Inc.*, 78 So. 3d at 621.
175. *Matrix Emp. Leasing, Inc.*, 78 So. 3d at 626 n.6 (citations omitted).

Therefore, the First District is contradicting itself in interpreting the statute with an interpretation it had discredited two years earlier.[176] Nonetheless, the First District certified the question "as one of great public importance" and the Supreme Court of Florida granted review.[177]

However, the Supreme Court of Florida concluded that the First District's new statutory interpretation from the "*en banc* opinion is an impermissible judicial rewrite of the [l]egislature's plainly written statute."[178] The court recognized that "statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome."[179] However, the First District's attempt to preserve the constitutionality of the statute is invalid because "the clear language of the statute" does not permit it.[180] It is clear the legislature intended for temporary benefits to cease at 104 weeks.[181] "It is further clear that the [l]egislature intended to limit the class of" injured workers eligible for PTD benefits "to those with catastrophic injuries" who cannot work within a *fifty-mile radius* of their homes.[182] Consequently, the legislature "create[d] a gap in disability benefits for those injured workers who are totally disabled upon the expiration of temporary disability benefits, but fail to prove prospectively that total disability will exist after the date of MMI."[183] Even though it may be unfair or unwise to leave open a statutory gap in benefits for injured workers, the courts do not have the power to rewrite the statute; therefore, the First District's en banc opinion was withdrawn, and now the Supreme Court of Florida turns to the constitutional issue regarding whether the 104-week limitation of temporary benefits violates a person's right to access the court.[184]

1. Denial of Access to Courts

Pursuant to article I, section 21, of the Florida Constitution, "[t]he courts shall be open to every person for redress of any injury, and justice

176. *Westphal*, 194 So. 3d at 317; *see also* FLA. STAT. § 440.15 (2015).
177. *Westphal*, 194 So. 3d at 317.
178. *Id.* at 318.
179. *Id.* at 320.
180. *Id.*
181. FLA. STAT. § 440.15(2)(a) (2009); *Westphal*, 194 So. 3d at 321.
182. *See* FLA. STAT. § 440.15(1)(b) (2009); *Westphal*, 194 So. 3d at 319, 321.
183. *See* Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 626 (Fla. 1st Dist. Ct. App. 2011) (en banc), *overruled by* Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st Dist. Ct. App. 2013).
184. *Westphal*, 194 So. 3d at 317–18, 321; *Matrix Emp. Leasing, Inc.*, 78 So. 3d at 626; *see also* FLA. CONST. art. I, § 21.

shall be administered without sale, denial, or delay."[185] In *Kluger*, the court explained how the *access to courts* provision is applied and what is needed to show a constitutional violation:

> [W]here 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 [section 2.01 of the Florida Statutes], the [l]egislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the [l]egislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[186]

Prior to the enactment of the access to courts provision, Florida's Legislature had already abolished any tort remedy for an employee to sue an employer.[187] Instead, the legislature provided the employee with a workers' compensation system that placed the burden on the employer and allowed the employee to be relieved of the economic stress resulting from the industrial injury in a *simple, expeditious, and inexpensive* manner.[188] Further, the court in *Kluger* held that Florida's workers' compensation system fell within one of the exceptions to the right to redress for an injury, wherein the workers' compensation system equated to "a *reasonable alternative* to tort litigation" because it provided "*adequate, sufficient, and even preferable safeguards for an employee who is injured on the job*."[189] Therefore, a statute will pass constitutional muster as long as it provides a "reasonable alternative to tort litigation."[190]

Accordingly, when the legislature first reduced the maximum weeks for temporary benefits from 350 to 260 weeks, the court in *Martinez v. Scanlan*[191] ruled that the reduction did not violate the access to courts provision, as Florida's workers' compensation continued to be a "*reasonable alternative* to tort litigation."[192] The reduction to 260 weeks for temporary

185. FLA. CONST. art. I, § 21.
186. Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973); *see also* FLA. CONST. art. I, § 21.
187. *Westphal*, 194 So. 3d at 322.
188. *Id.*
189. *Id.* at 322–23 (quoting *Kluger*, 281 So. 2d at 4).
190. *Id.*
191. 582 So. 2d 1167 (Fla. 1991).
192. *Id.* at 1171; *Westphal*, 194 So. 3d at 322–23; *see also* FLA. CONST. art. I, § 21.

benefits passed constitutional muster because it continued to be a "*reasonable alternative* to tort litigation" by continually providing "adequate and sufficient safeguards for injured employees."[193] Accordingly, "[i]t continue[d] to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation."[194] Therefore, when encountered with a constitutional challenge based on the access to courts provision, the question is "whether the law 'remains a reasonable alternative to tort litigation.'"[195] That is, it must provide *adequate and sufficient safeguards* for the injured employee, as in providing full medical and wage-loss disability benefits regardless of fault.[196]

Applying the reasonable alternative test, the further reduction to 104 weeks does not merely reduce the number of weeks, as it did in *Martinez*; rather, it creates a statutory gap in benefits that completely cuts off benefits to the injured worker.[197] As Justice Pariente of the Supreme Court of Florida illustrated, "there must eventually come a 'tipping point,' where the diminution of benefits becomes so significant as to constitute a *denial* of benefits—thus creating a constitutional violation."[198] Also, the denial of benefits would be for an indefinite period of time because the authorized physician could not confirm that Mr. Westphal was at MMI—nor could they determine when or if he would ever reach MMI—leaving Mr. Westphal without disability benefits for an indefinite period of time.[199] Hypothetically, even if Mr. Westphal were to reach MMI, allowing him to be eligible for PTD benefits, he would not be able to recover the disability benefits he had lost during the time between the end of his temporary benefits and the start of his permanent benefits.[200]

As illustrated, decreasing the period of payments from 350 weeks to 104 weeks—a 70% reduction—alone is a dramatic change from the workers' compensation system since 1968—the year the access to courts provision was adopted.[201] Judge Van Nortwick, in the dissenting opinion in *Matrix*

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193. *Westphal*, 194 So. 3d at 323 (quoting Martinez v. Scanlan, 582 So. 2d 1167, 1171–72 (Fla. 1991)).

194. *Martinez*, 582 So. 2d at 1172.

195. *Westphal*, 194 So. 3d at 323; Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973) ("[T]he [l]egislature is without power to abolish such a right—[350 weeks for temporary benefits]—without providing a reasonable alternative to protect the rights of the people . . . ."); *see also* FLA. CONST. art. I, § 21.

196. *See Westphal*, 194 So. 3d at 323; *Martinez*, 582 So. 2d at 1172.

197. *Westphal*, 194 So. 3d at 323.

198. *Id.*

199. *Id.* at 324.

200. *See id.*

201. *Id.*; *see also* FLA. CONST. art. I, § 21.

Employee Leasing, Inc., had recognized how the statutory gap in benefits would have constitutional implications:

> [I]n the case of a totally disabled claimant whose rights to temporary disability benefits has expired, but who is prohibited from receiving permanent disability benefits, the elimination of disability benefits may reach a point where the claimant's cause of action has been effectively eliminated. In such a case, the courts might well find that the benefits under the Workers' Compensation Law are no longer a reasonable alternative to a tort remedy and that, as a result, workers have been denied access to courts.[202]

The reduction to 104 weeks by the legislature has crossed the *constitutional tipping point* wherein the injured employee's "cause of action has been effectively eliminated."[203] Therefore, the reduction in temporary benefits to 104 weeks, which resulted in a statutory gap of disability benefits, is a constitutional violation of the injured employee's right to access to courts because the statute no longer equates to "a *reasonable alternative* to tort litigation."[204]

The proper remedy in this situation is for the previous time frame of 260 weeks—which has already passed constitutional muster by being a reasonable alternative to tort litigation—to be automatically revived.[205] This is because "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."[206] Even though a 260-week limitation on temporary benefits still leaves open the statutory gap, it adds an additional three years for temporary benefits, which is a significant and sufficient amount of time for an injured employee to attain MMI.[207]

2. Conclusion

The access to the court's provision, under article I, section 21 of the Florida Constitution, allows a person to redress their injuries without denial

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202. Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 634 (Fla. 1st Dist. Ct. App. 2011) (en banc), *overruled by* Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st Dist. Ct. App. 2013).

203. *Westphal*, 194 So. 3d at 325 (quoting *Matrix Emp. Leasing, Inc.*, 78 So. 3d at 634.

204. *Id.*; *see also* FLA. CONST. art. I, § 21.

205. *Westphal*, 194 So. 3d at 327.

206. B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994) (per curiam).

207. *Westphal*, 194 So. 3d at 327.

or delay.[208] In *Kluger*, the court established a precedent, wherein the legislature is without authority to deny a person's right, which predates the adoption of the access to courts provision "without providing a reasonable alternative to protect th[at] right[]."[209] Prior to the adoption of access to the courts provision, Florida's workers' compensation abolished the right to sue an employer in tort litigation by providing an alternative system wherein the employee is provided "full medical care and wage-loss payment for total or partial disability regardless of fault."[210] Thus, the workers' compensation system provides adequate safeguards for employees injured on the job.[211] At that time, the limit on temporary benefits was 350 weeks.[212]

The legislature first reduced the limit to 260 weeks, in which the Supreme Court of Florida, in *Martinez*, ruled that the time frame still provided a "reasonable alternative to tort litigation" by continuing to provide full medical benefits to injured employees *regardless of fault*.[213] However, the further reduction of temporary benefits to 104 weeks resulted in creating a *statutory gap in benefits*.[214] Section 440.015 of the Florida Statutes states that the legislature's intent for the workers' compensation system was "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment."[215] The further reduction is the opposite of this intent when it cuts off benefits to an injured worker for an indefinite amount of time.[216] The legislature is not assuring "quick and efficient delivery" of benefits to assure reemployment when it creates a gap in benefits, leaving a severely injured worker—as in *Westphal*—without any medical or disability benefits.[217] Consequently, this time frame of 104 weeks fails to provide full medical and *wage-loss* benefits *regardless of fault* to an injured worker.[218] Accordingly, the 104-week limitation on temporary benefits in section 440.15(2)(a) of the Florida Statutes does not equate to a reasonable alternative to tort litigation because it lacks any adequate safeguard for the

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208. FLA. CONST. art. I, § 21.

209. Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973); *see also* FLA. CONST. art. I, § 21.

210. *Westphal*, 194 So. 3d at 314 (quoting Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991)); *see also* FLA. CONST. art. I, § 21.

211. *Kluger*, 281 So. 2d at 4.

212. FLA. STAT. § 440.15(2) (1941).

213. Act effective July 1, 1990, ch. 90-201, § 20, 1990 Fla. Laws 894, 935; *see also Martinez*, 582 So. 2d at 1171–72.

214. *Westphal*, 194 So. 3d at 314.

215. FLA. STAT. § 440.015 (2015).

216. *Westphal*, 194 So. 3d at 314.

217. *See id.*

218. *Id.*; *see also Martinez*, 582 So. 2d at 1172.

injured employee.[219] Therefore, the 104-week limitation on temporary benefits is a constitutional violation of a person's right to access the courts, and the 260-week limitation should be revived as the proper remedy.[220]

IV. POSSIBLE EFFECTS TO FLORIDA'S WORKERS' COMPENSATION SYSTEM

The National Council on Compensation Insurance ("NCCI") is a license rating organization that works with Florida's Office of Insurance Regulation ("OIR") in proposing new premium rates for the workers' compensation insurance companies.[221] The OIR is the office that regulates and enforces statutes relating to insurance companies covering businesses.[222] The NCCI has come up with a proposal for new premium increases for businesses, wherein the NCCI projected a 15% rate increase in response to *Castellanos* and a 2.2% rate increase in response to *Westphal*.[223] Further, these proposal rates went into effect October 1, 2016.[224] In response to this proposal, the president of the Florida Chamber of Commerce, Mark Wilson, stated: "[We have] led efforts for more than [ten] years to help lower workers' comp rates by almost 60[%], and now that personal injury trial lawyers and an activist court are forcing rates to likely skyrocket, [we are] not about to back down."[225]

The increased rate on workers' compensation insurance premiums will "adversely affect [Florida's] economy, job growth, and small businesses."[226] Additionally, the rate increase could affect homeowners, because contractors will have to quote higher prices, which may not be

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219. *See Westphal*, 194 So. 3d at 314–15.

220. *Id.* at 315.

221. Press Release, Fla. Office of Ins. Regulation, Office Statement on NCCI Workers' Compensation Rate Filing to Address Recent Legal Changes (May 27, 2016).

222. *See* Press Release, Fla. Office of Ins. Regulation, Office Receives Amended NCCI Workers' Compensation Rate Filing (July 1, 2016).

223. *Id.*; Press Release, Fla. Office of Ins. Regulation, *supra* note 221; *see also Westphal*, 194 So. 3d at 327; Castellanos v. Next Door Co., 192 So. 3d 431, 449 (Fla. 2016).

224. Press Release, Fla. Office of Ins. Regulation, *supra* note 222.

225. Press Release, Fla. Chamber of Commerce, 17.1% Workers' Comp Rate Increase Will Harm Florida's Economy/Job Growth (May 27, 2016).

226. Noreen Marcus, *Florida Supreme Court Workers' Comp Fee Ruling Signals Unease with Law*, DAILY BUS. REV. (May 2, 2016), http://www.dailybusinessreview.com/id=1202756499888/Florida-Supreme-Court-Workers-Comp-Fee-Ruling-Signals-Unease-With-Law; *see also* Stephanie Goldberg, *Florida Braces for Big Comp Rate Hikes*, BUS. INS. (June 19, 2016, 12:00 AM), https://www.businessinsurance.com/article/20160619/NEWS08/306199979/florida-supreme-court-workers-comp-rate-hikes-bradley-westphal-v.

affordable to Florida's consumers.[227] Business advocates are outraged that most of the revenues resulting from these increases will go into "the pockets of lawyers."[228]

Accordingly, the business industry is spinning the focus of the rate increase on attorneys and their fees; however, it is more of a significant victory to the injured worker because they will now have the ability to seek the benefits they rightfully deserve.[229] This problem was evident in those cases such as *Castellanos*—wherein the employee sought minimal benefits relating to a complex claim.[230] Yet, in the grand scheme of things, those minimum benefits are crucial to those injured workers who are making ends meet—for some families, it could make the difference between putting food on the table and having an apartment to live in.[231]

Lastly, it is noted that business premiums have gone down 60% since the legislative reform in 2003.[232] However, the legislature created the opportunity for insurance companies to charge lower premiums at the expense of the injured worker's benefits.[233] At the same time, this results in a workers' compensation system so complex that the injured employee cannot navigate through the system without the assistance of an attorney.[234] Business lobbyists might overlook these factors, but the court has recognized the diminution of benefits that the legislature has been cutting away from the injured workers.[235] Florida's workers deserve better, and only time will tell whether the legislature will amend the statute or the entire workers' compensation system will fundamentally be reformed.[236]

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227. Don Magruder, *Workers' Compensation Rulings to Impact Construction*, DAILY COM. (July 9, 2016) (on file with author).

228. *Id.*

229. *See* Gary Blankenship, *Court Strikes Fee Limits in WC Cases*, FLA. B. NEWS (May 15, 2016), https://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/RSSFeed/648531A40726BDEC85257FAB0049B8DF.

230. *Id.*; *see also* Castellanos v. Next Door Co., 192 So. 3d 431, 443 (Fla. 2016).

231. Blankenship, *supra* note 229.

232. Press Release, Fla. Chamber of Commerce, *supra* note 225.

233. *See* Amy O'Conner, *Florida Braces for Rate Hikes, Litigation Due to Workers' Compensation Fee Ruling*, INS. J. (Apr. 29, 2016), http://www.insurancejournal.com/news/southeast/2016/04/29/407063.htm; Blankenship, *supra* note 229.

234. *Castellanos*, 192 So. 3d at 434 n.3.

235. *See id.*; Marcus, *supra* note 226.

236. *See* Saunders, *supra* note 19.