Workers’ Compensation

James F. Robinson*
# Workers' Compensation: 1991 Survey of Florida Law

**James F. Robinson**

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## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>444</td>
</tr>
<tr>
<td>II. The Comprehensive Economic Development Act of 1990</td>
<td>446</td>
</tr>
<tr>
<td>A. Definitions</td>
<td>446</td>
</tr>
<tr>
<td>B. Coverage</td>
<td>448</td>
</tr>
<tr>
<td>1. Recreational and Social Activities</td>
<td>450</td>
</tr>
<tr>
<td>2. Going or Coming</td>
<td>450</td>
</tr>
<tr>
<td>3. Deviation from Employment</td>
<td>451</td>
</tr>
<tr>
<td>4. Traveling Employee</td>
<td>451</td>
</tr>
<tr>
<td>C. Medical Services and Supplies</td>
<td>452</td>
</tr>
<tr>
<td>D. Compensation for Disability</td>
<td>456</td>
</tr>
<tr>
<td>1. Permanent Total Disability</td>
<td>456</td>
</tr>
<tr>
<td>2. Temporary Total Disability</td>
<td>456</td>
</tr>
<tr>
<td>3. Permanent Impairment and Wage-Loss Benefits</td>
<td>456</td>
</tr>
<tr>
<td>4. Temporary Partial Disability</td>
<td>458</td>
</tr>
<tr>
<td>5. Fraud</td>
<td>458</td>
</tr>
<tr>
<td>E. Death Benefits</td>
<td>459</td>
</tr>
<tr>
<td>F. Claim Procedure</td>
<td>459</td>
</tr>
<tr>
<td>G. Payment of Compensation</td>
<td>460</td>
</tr>
<tr>
<td>H. Claims Procedure and Hearing Requests</td>
<td>461</td>
</tr>
<tr>
<td>1. Mediation</td>
<td>461</td>
</tr>
<tr>
<td>2. Pre-Trial Hearings</td>
<td>461</td>
</tr>
<tr>
<td>I. Attorney's Fees</td>
<td>461</td>
</tr>
<tr>
<td>J. Self-Insurers</td>
<td>461</td>
</tr>
<tr>
<td>K. Penalty for Failing to Secure Compensation</td>
<td>462</td>
</tr>
<tr>
<td>L. Special Disability Trust Fund</td>
<td>463</td>
</tr>
<tr>
<td>III. The Constitutional Challenge</td>
<td>463</td>
</tr>
<tr>
<td>IV. Conclusion</td>
<td>470</td>
</tr>
</tbody>
</table>

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WHEREAS, the [Florida] Legislature finds that there is a financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state. . . .

I. INTRODUCTION

Given the above statement, it is little wonder that the Florida Legislature set out to enact a comprehensive change in the workers' compensation law in this state. Actually, the groundswell for change had been building in the late 1980s, particularly from various business groups which claimed that workers' compensation insurance coverage for their employees was becoming extremely cost prohibitive. The proposition that escalating workers' compensation costs were a problem was supported by various sources referred to by the Legislature. For example, the Florida Economic Growth and International Development Commission, created in 1988, concluded that Florida's reputation as a high cost workers' compensation state inhibited economic growth. Also, the Florida Chamber of Commerce published a report concluding that workers' compensation costs were a significant negative factor on the state's business climate and urged reforms in the worker's compensation laws which had placed Florida in a competitive disadvantage vis-à-vis other states. Additionally, a joint legislative committee found that Florida had experienced one of the highest five-year period premium increases in the country for workers' compensation insurance. Insurance rates were fifty-four percent higher than the national average, and seventy-five percent higher than other southeastern states. This same legislative report also focused on the medical and indemnity benefits paid to employees under Florida's workers' compensation law and concluded those benefits were substantially higher than the national average. Specifically, medical benefits were forty-two percent higher in Florida than the national average and thirty-eight percent higher than

2. Id. at 897-98.
3. Id. at 898.
4. Id. at 899.
Likewise, indemnity benefits were thirty-one percent higher than the national average and sixty percent higher than the southern state average.\footnote{Id.}

Legislative reform actually began in 1989 with several significant changes in the existing law.\footnote{Id.} Some of these changes included: the implementation of a work place drug testing policy;\footnote{See Fla. Stat. § 440.13(2)(e)2 (1989).} a requirement that all construction industry employers having one or more employees carry workers' compensation coverage;\footnote{Fla. Stat. § 440.09(6)(a) (1989).} and, changing the threshold for wage loss benefits to include not just a permanent impairment rating, but also the need for a work-related physical restriction.\footnote{Fla. Stat. § 440.09(14)(b)2 (1989).} Furthermore, bad faith was eliminated and replaced with a modified twenty-one day rule for establishing entitlement of an attorney's fee by the injured worker's attorney to be paid by the employer/carrier.\footnote{Fla. Stat. § 440.15(3)(b)1 (1989).} Considerable case law has developed since the adoption of the bad faith standard in 1989, and even technical omissions or commissions of an employer/carrier were found to constitute bad faith. Thus, finding bad faith combined with a demonstrated economic loss to the injured worker provided the basis for an award of attorney's fees to the injured worker's attorney which was to be paid by the employer/carrier.\footnote{Fla. Stat. § 440.34(3)(b) (1987).}

Case decisions pointed out that the workers' compensation system was intended to be self-executing and carriers had an affirmative duty to timely investigate and provide needed benefits to injured workers.\footnote{King Motor Co. v. Parisi, 445 So. 2d 1074, 1075 (Fla. 1st Dist. Ct. App. 1984); Holiday Care Center v. Scriven, 418 So. 2d 322, 326 (Fla. 1st Dist. Ct. App. 1982); Florida Erection Serv., Inc. v. McDonald, 395 So. 2d 203, 209 (Fla. 1st Dist. Ct. App. 1981).} Rehabilitation services under section 440.49 of the Florida Statutes were also eliminated and replaced with something called training and education.\footnote{See Comprehensive Economic Dev. Act of 1990, ch. 90-201, sec. 40, 1990 Fla. Laws 894, 980 (codified at Fla. Stat. § 440.49 (Supp. 1990)).} While the rehabilitation services necessary to restore the injured worker to suitable gainful employment had previously been the responsibility of the employer/carrier, training and education was to be
provided by the Division of Workers' Compensation, unless voluntarily offered by the employer or carrier.¹⁶

II. THE COMPREHENSIVE ECONOMIC DEVELOPMENT ACT OF 1990

The new Comprehensive Economic Development Act of 1990 (the Act), affected the entire workers’ compensation system including the amount of benefits payable, various medical provisions, and appellate procedure. The following is a summary of the major changes made by the Legislature in 1990.

A. Definitions

In response to a growing concern for the increase in claims for stress-related injuries in the work place, the definition of “accident” was amended.¹⁷ Specifically, “[a] mental or nervous injury due to stress, fright or excitement only . . . [is] deemed not to be an injury by accident arising out of the employment.”¹⁸ The definition of “employee” was broadened to include partners, sole proprietors,¹⁹ and corporate officers of companies actively engaged in the construction industry.²⁰ This further tightened the coverage requirements which were initially directed at the construction industry in 1989.²¹ Prior to that, the term “employment” included all private employments in which three or more employees were employed by the same employer. However, effective October 1, 1989, an exception to this general rule was carved out for the construction industry providing that all construction-related private employments having one or more employees, who were employed by the same employer, were included under the employment definition.²² The 1990 law also provided that the term “employee” excluded an independent contractor not subject to the control and direction of the employer as to actual conduct.²³ However, the term “employee” was also amended to include the construction industry worker

¹⁶. Id.
¹⁸. Id.
²². Id.
who was otherwise an independent contractor. In the definition of "wages" was revised to eliminate many fringe benefits included in the average weekly wage calculation (AWW). Previously, a substantial body of case law developed regarding what constituted fringe benefits. In practice, the failure of the employer/carer to include fringe benefits was often based on a fair market replacement basis. Thereafter, the reasonable value of fringe benefits was defined as the actual cost to the employer. Effective July 1, 1990, the only fringe benefits to be included in the AWW are health insurance, the reasonable value of permanent year-round residential housing provided to an employee, and housing for migrant workers unless provided after the time of injury. This amendment eliminated a multitude of previously defined fringe benefits from the AWW calculation including life, disability and accident insurance, uniforms, vacation, vested pension plans, parking, and meals.

Two other major changes in the wages definition involve gratuities and concurrent employment. In practice, claims of many service-oriented employees, such as bartenders and waitresses, commonly involve litigation over the amount of tips to be included in the AWW calculation. Employers would "look the other way" when their service personnel (who are usually paid a minimum hourly wage) under-reported tips, but would vigorously protest when those same employees—when injured on the job—sought workers' compensation benefits based on the full amount of tips earned. Inclusion of tips obviously could make a significant difference in an employee's compensation benefits. The Industrial Relations Commission, and later Florida's First District Court of Appeal, have indicated disapproval of an employer's indifference to

24. Id.
26. See infra notes 28-33 and accompanying text.
27. FLA. STAT. § 440.02(24) (Supp. 1990).
32. Rhaney, 415 So. 2d at 1278.
33. Id.
accurate tip reporting through decisions which hold that an injured worker's unreported tips would be included in the AWW calculation if there was evidence suggesting the employer knew tips were being received but not reported.\textsuperscript{34} However, unreported tips would not be included in the AWW calculation if the employer had provided a reasonable reporting system with which the employee had failed to follow.\textsuperscript{35} The 1990 amendment codified the notion that gratuities are considered wages only "to the extent reported to the employer in writing as taxable income."\textsuperscript{36}

Perhaps one of the more controversial changes in the 1990 amendment involved the elimination of wages earned in concurrent employment. Previously, an injured worker having two jobs was entitled to be compensated on the basis of wages earned at both jobs, assuming that the injured worker was unable to work at either job following the injury and the concurrent employment was of a type covered under the Act.\textsuperscript{37} Under the new definition, wages now include only those wages earned on the job where the injury occurred and does not include wages from concurrent employment.\textsuperscript{38} The only exception to this rule is the concurrent earnings of a volunteer firefighter.\textsuperscript{39}

B. Coverage

The Legislature continued to address and refine the law relative to the interrelationship between alcohol or drug abuse and injuries in the workplace. In section 440.102(1)(a) of the Florida Statutes, "drug" was defined as "alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of the substances listed."\textsuperscript{40} The Act continued to provide that injuries "occasioned primarily by the intoxication of the employee" or the influence of narcotic drugs, barbiturates, or other stimulants "not prescribed by a physician" that impaired the employee's normal faculties

\textsuperscript{34} See, e.g., Hanks v. Tom Brantley's Tire Broker, 500 So. 2d 614, 615 (Fla. 1st Dist. Ct. App. 1986).
\textsuperscript{35} Id.
\textsuperscript{36} FLA. STAT. § 440.02(24) (Supp. 1990).
\textsuperscript{37} See FLA. STAT. § 440.02(23) (1989).
\textsuperscript{38} FLA. STAT. § 440.02(24) (Supp. 1990).
\textsuperscript{39} Id.
\textsuperscript{40} FLA. STAT. § 440.102(1)(a) (Supp. 1990).
were not compensable.\textsuperscript{41} It is legally presumed that the injury was primarily occasioned by intoxication given evidence of a .10 percent (or greater) blood alcohol level or influence of a drug upon a positive test confirmation.\textsuperscript{42} Where the employer does not have a drug-free workplace program, the presumption may be rebutted by clear and convincing evidence that intoxication or drug influence did not contribute to the injury.\textsuperscript{43} Furthermore, if before the accident, "the employer had actual knowledge of and expressly acquiesced in the employee's presence at the workplace while under the influence," the presumption is inapplicable.

As initially provided in the 1989 law,\textsuperscript{44} the employer who has "reason to suspect" that an injury was primarily occasioned by intoxication or use of any drug may require the employee to submit to a test for the detection of any or all drugs.\textsuperscript{45} Seeking to provide employers with some guidance, the legislature defined "[r]easonable suspicion drug testing" as that based on a belief that the employee has or is using drugs in violation of the workplace policy.\textsuperscript{46} Such belief is to be made in light of specific facts and inferences drawn therefrom.\textsuperscript{47} These facts and inferences may be based on:

1. direct observation of drug use or the associated physical symptoms;
2. abnormal or erratic behavior or significant work performance deterioration;
3. report of drug use by reliable and credible source independently corroborated;
4. evidence of drug test tampering with current employer;
5. information that employee has caused or contributed to accident; and,
6. evidence that employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery or equipment.\textsuperscript{48}

If the employee refuses to submit to a test for nonprescription controlled substances or alcohol, it is presumed, in the absence of clear and convincing evidence otherwise, that the injury was primarily occasioned

\textsuperscript{41} FLA. STAT. § 440.09(3) (Supp. 1990).
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} FLA. STAT. § 440.09(6)(a) (1989).
\textsuperscript{45} FLA. STAT. § 440.09(7)(a) (Supp. 1990).
\textsuperscript{46} FLA. STAT. § 440.102(1)(i) (Supp. 1990).
\textsuperscript{47} Id.
\textsuperscript{48} Id.
by alcohol or a nonprescription controlled substance and benefits are not payable.\footnote{49. \textit{Fla. Stat.} § 440.09(7)(b) (Supp. 1990).}

The 1989 law provided for a twenty-five percent reduction of indemnity benefits where the employee's injury was caused by a "willful" refusal to use a safety appliance provided by the employer.\footnote{50. See \textit{Fla. Stat.} 440.09(3) (Supp. 1990).} Presumably in an effort to lessen the employer/carrier's burden of proof to support this partial defense, the 1990 law substituted the term "knowing" for willful.\footnote{51. \textit{Fla. Stat.} § 440.09(4) (1989).}

The 1990 legislation also sought to address the compensability issue in several categories which commonly arise\footnote{52. \textit{Fla. Stat.} § 440.09(4) (Supp. 1990).} and have given impetus to their own sub-body of case law. These cases have usually turned on the specific facts presented and have produced widely recognized rules of compensability.

1. Recreational and Social Activities

Injuries by accident occurring at recreational or social activities are not compensable unless the activity was an expressly required incident of employment and produced a substantial and direct benefit to the employer beyond a general improvement in employee health and morale.\footnote{53. See generally \textit{Fla. Stat.} § 440.092 (Supp. 1990).} This provision is a codification of a three-prong test previously adopted by Florida's First District Court of Appeal in \textit{Brockman v. City of Dania}.\footnote{54. \textit{Fla. Stat.} § 440.092(1) (Supp. 1990).}

2. Going or Coming

The general rule that an injury occurring while going to or coming from work does not arise out of, and in the course of, employment now applies even where the employer has provided some means of transportation.\footnote{55. 428 So. 2d 745 (Fla. 1st Dist. Ct. App. 1983).} This is contrary to previous decisional law providing generally that employer-provided transportation, incident to the employment contract, is the exception to the going and coming rule.\footnote{56. \textit{Fla. Stat.} § 440.092 (Supp. 1990).} However, an em-
employee's injuries which occur going to or coming from work in employer-provided transportation remain compensable if, at the time of the accident, the employee was “engaged in a special errand or mission for the employer.”

3. Deviation from Employment

Injuries occurring while an employee has deviated from the course of employment, including the leaving of the work premises, are not compensable unless the deviation was either expressly approved by the employer or in response to an emergency and designed to save life or property.

4. Traveling Employee

In an effort to limit what had become a general rule that injuries occurring to traveling employees were nearly always compensable, the new law provides that the traveling employee must be actively engaged in the employment duties including travel to and from the place where the duties “are to be performed and other activities reasonably required by the travel status.” While it remains unclear how “other activities reasonably required” will be interpreted, this amendment was clearly aimed at cases where traveling employees have sustained what were held to be compensable injuries in activities seemingly far removed from the employment and more of a personal nature.

In Gray v. Eastern Airlines, Inc., a flight attendant sustained a broken nose in a pickup basketball game at a YMCA located near the hotel where the attendant was staying. The incident occurred on a two-day layover. Citing Larsen’s treatise, on workers’ compensation law, the court noted that the “traveling employees” rule was applicable and stated that:

“Employees whose work entails travel away from the employer’s

60. FLA. STAT. § 440.092(4) (Supp. 1990).
61. Id.
63. Id. at 1289.
64. Id.
premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct [departure] on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.\footnote{Id. (quoting ARTHUR LARSON, WORKMAN'S COMPENSATION § 25.00 (1979)).}

In a two-to-one decision, the appellate court reversed a finding of noncompensability and held that exercise (in the form of basketball) was necessary as an activity reasonably required for the employee's personal health and comfort.\footnote{Id. at 1290.}

In a second case, Garver v. Eastern Airlines, Inc.,\footnote{553 So. 2d 263 (Fla. 1st Dist. Ct. App. 1989).} again involving a flight attendant, the employee was injured in a motor vehicle accident during an extended layover.\footnote{Id. at 264.} With her morning return flight canceled and rescheduled for midnight, the employee arranged lunch with a friend who lived in the area.\footnote{Id.} After lunch, they started out for the friend's house about twenty miles from the restaurant.\footnote{Id.} After traveling about five miles, the accident occurred.\footnote{Id.} Announcing a new test for a traveling employee's injury sustained while not actively performing employment duties, the appellate court held such injury is compensable "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of employment."\footnote{Garver, 553 So. 2d at 267 (quoting Cavalcante v. Lockheed Elec. Co., 204 A.2d 621, 624 (N.J. Super. Ct. 1964)).} Interestingly, this was also a two-to-one decision. A thoughtful dissent was written by the same judge who earlier had dissented in Gray.\footnote{See id. at 268-69 (Nimmons, J., dissenting); Gray, 475 So. 2d 1290 (Nimmons, J., dissenting without opinion).}

C. Medical Services and Supplies

Several of the 1990 changes under the medical provision of the Act had as their impetus the sometimes truly adversarial nature of the system. An "[i]ndependent medical examination" was defined as an objective medical or chiropractic evaluation of an injured employee's
medical condition and work status. In apparent response to the erosion of the employer/carrier's traditional right to authorize medical care, the new law provides that referrals may not be made by health care providers to other providers or facilities without prior authorization from the carrier or self-insured employer, except in emergency situations.

Previously, the employer/carrier's right to seek an independent medical examination (IME) was grounded in section 440.25(6) of the Florida Statutes, which provided that the physician conducting such an examination was to be either designated, or at least approved, by the judge of compensation claims (JCC). The 1990 Act gave the employer/carrier the right to schedule an IME with a doctor of its own choice without court approval in the following situations:

1. [W]hen the authorized doctor fails to provide medical reports;
2. to determine if overutilization by a health care provider has occurred;
3. to determine if a change of doctors is necessary; or,
4. to determine if treatment is necessary or where the employee appears not to be making appropriate progress.

In the absence of agreement between the parties, the doctor conducting the IME shall not become the treating physician. It should be noted that some doctors who conduct IMEs refuse to become the treating physician even where the parties are in agreement.

The new law has also sought to address the procedure to be followed where the employer/carrier wishes to deauthorize a previously-authorized treating physician. Previously, the statute provided that a carrier was required to seek an order of deauthorization from the JCC. Furthermore, in *Cal Kovens Construction v. Lott*, the First District Court of Appeal made it clear that once a satisfactory doctor-patient relationship had been established, the employer/carrier seeking to deauthorize that doctor must obtain an order approving the

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78. *Id.*
deauthorization and designation of a newly-authorized physician. The 1990 Act provided for peer review and utilization review whereby treatment by a medical care provider could be reviewed by a panel of physicians having the same specialty. If it was determined that overutilization had occurred, the medical care provider could be deauthorized without a judge’s order provided alternative medical care was offered. If there is a finding of overutilization, the division of workers’ compensation may order the doctor to show cause why he or she should not make repayment. The law also continued to provide that a physician was barred from payment under the Act upon three findings of overutilization.

The subject of attendant care also continued to receive the legislature’s attention. Without a doubt, awards of attendant care had become increasingly frequent during the late 1980s. In 1988, the Act had been amended to provide that nonprofessional attendant or custodial care provided by a family member was to be reimbursed at the federal minimum wage if the family member was unemployed. If the family member chose to leave employment in order to provide the attendant/custodial care, he or she would be paid at a rate equal to his or her hourly wage at the previous employment which could not exceed the customary hourly rate for such care in the community. “Family member” was also defined as “spouse, father, mother, brother, sister, child, grandchild, father-in-law, mother-in-law, aunt or uncle.”

In 1989, the Act was again amended to limit the compensation of family members for nonprofessional attendant/custodial care to no more than twelve hours per day. In 1990, seeking to further define the parameters of attendant care reimbursement, the Legislature indicated that both professional and nonprofessional custodial care must be performed at a physician’s direction and control. Attendant or custo-
dial care was defined as care usually rendered by trained professionals and beyond the scope of household duties. The doctor must state that the home or custodial care is required because of the compensable accident and must describe the nature and extent of the duties to be performed with a reasonable degree of particularity. Codifying existing case law, family members can be reimbursed only for care which goes beyond the scope of routine household duties normally performed as a gratuity.

Another one of the more controversial provisions of the 1990 Act involved the obligation of the court to order an IME under any of the following circumstances:

where there is disagreement in opinions of medical providers; where two providers have determined there is no medical evidence supporting the employee's complaints or the need for further medical treatment; or, where the providers agree that the employee is able to work.

If one or more of these situations exist, the judge must, within fifteen days upon the written request of any party, order an IME to be performed by a doctor chosen from a list promulgated by the division of workers compensation. Under this so-called “Super-Doc” feature of the statute, the opinion of the independent medical examiner is presumed correct unless there is clear and convincing evidence otherwise. The independent medical examiner’s report is to be sent within thirty days from the order providing for the examination. All indemnity benefits “shall terminate” during any period the employee fails to cooperate in performance of the independent medical exam.

A final change in the medical service provision of the Act addressed the expert witness fee charged by health care providers to give deposition testimony. Typically, most medical evidence is offered at the merits hearing through deposition. Prior to this amendment, expert

94. Id.
95. Id.
96. Id.
98. Id.
99. Id.
fees charged by providers ranged from $150 to $500 and occasionally more. The amendment provides that the expert witness fee cannot exceed $200.103

Initially, this fee cap created some problems, but as time has passed, it has become less so. While the legislation had a commendable purpose of attempting to provide some control and uniformity on medical expert witness fees, it may have contributed to the undesirable trend of an increasing number of health care providers refusing to treat workers’ compensation patients as a result of the reimbursement for their services being reduced according to a maximum fee schedule. The dwindling availability of medical care providers to treat injured employees is becoming an increasing problem in everyday practice.

D. Compensation for Disability

1. Permanent Total Disability

In order to establish entitlement to permanent total disability (PTD) benefits, the employee has the burden to show an inability to perform even light work on an uninterrupted basis as a result of physical limitations. A 1990 amendment added a geographical component to this burden of proof providing that the employee must demonstrate an inability to do light work which is available within a 100-mile radius of the injured employee’s home.104

2. Temporary Total Disability

The length of time for which temporary total disability (TTD) benefits may be received was reduced from 350 weeks to 260 weeks.105 Catastrophic temporary total disability benefits (i.e. the increased benefit for the severely injured) were eliminated for the permanent and total loss of use of an arm, leg, hand or foot because of organic damage to the nervous system.106

3. Permanent Impairment and Wage-Loss Benefits

The legislature provided that a three-member panel and the divi-

sion were to establish a uniform disability rating guide. For post-July 1, 1990 injuries, the Minnesota Department of Labor and Industry Disability Schedule is to be used until the new rating guide is developed. Retaining the language of the 1989 amendment, an injured worker with a permanent impairment and one or more work-related physical restrictions may be entitled to wage-loss benefits.

The wage-loss formula was amended to reduce the amount of benefits payable. Additionally, the legislature indicated that wage-loss forms and job search reports must be filed with the carrier within fourteen days after the time benefits are due. Failure to timely file the forms and job search reports, demonstrating that the employee made a minimum of five job searches, will result in no payment of benefits for that respective period of time.

Also, a significant change in wage-loss entitlement was made. Prior to July 1, 1990, an injured employee with a permanent impairment and work-related physical restriction could receive wage-loss benefits for up to 525 weeks after reaching maximum medical impairment. Under the new law, the length of time for which wage-loss benefits can be received is tied directly to the impairment rating assigned. For example, an employee with a three percent permanent impairment is eligible for wage-loss benefits for up to twenty-six weeks. At the other end of the spectrum, an employee with a permanency of twenty-four percent or greater is entitled to the maximum length of wage-loss benefits, which is 364 weeks. In addition to reducing the number of weeks for which wage-loss benefits could be received, a number of defenses were also codified. The right to wage loss benefits ends if, in a two-year period, there are three occurrences of the following:

1. the employee voluntarily terminates employment for reasons

108. *Id.*
110. *Id.*
112. *Id.*
unrelated to the injury; (2) refusal of suitable employment within the employee's ability; (3) termination from employment due to the employee's own misconduct as statutorily defined; and, (4) the employee voluntarily limits his or her own income. 118

Each of the three occurrences must arise in different bi-weekly periods. 119 Also, with each occurrence, the employee may be disqualified from receiving workers' compensation benefits for three bi-weekly periods. 120

The 1990 Act also provided for the termination of wage-loss benefits if the employee is convicted of criminal violations ranging from second degree misdemeanors to capital felonies. 121 "Convicted" is defined as "adjudication of guilt, a plea of guilty or nolo contendere" or "a jury verdict of guilty when . . . adjudication is withheld" and probation is imposed. 122 Wage-loss benefits are also terminated if the employee is imprisoned for motor vehicle/uniform traffic control offenses thereby affecting the ability to perform his usual or other appropriate employment. 123

4. Temporary Partial Disability

As with wage-loss benefits, the formula for temporary partial disability was changed resulting in reduced benefits. 124

5. Fraud

Another major change in the 1990 Act involved the defense of fraud in the hiring process. 125 Theretofore, the landmark case, Martin v. Carpenter, 126 provided a three-prong test which the employer/carrier had to satisfy in order to defeat compensability: 1) the employee knowingly misrepresented the existence of the previous condition; 2) the employer relied on the misrepresentation thereby hiring the employee; and

118. Id.
119. Id.
120. Id.
122. Id.
123. Id.
126. 132 So. 2d 400 (Fla. 1961).
3) that such reliance resulted in consequent injury to the employer.\textsuperscript{127} However, benefits are now payable for an aggravation or acceleration of a preexisting condition unless the employee falsely represents in writing that he or she was not previously disabled or received compensation because of such previous disability, impairment, anomaly or disease.\textsuperscript{128} Employer reliance on the misrepresentation of a preexisting condition is no longer required.

E. \textit{Death Benefits}

In 1989, the Act was amended to eliminate the termination of death benefits to a deceased employee’s spouse who remarries. Pursuant to the 1990 amendment, the spouse who remarries is entitled to a lump sum payment equal to twenty-six weeks of compensation at the rate of fifty percent of the average weekly wage.\textsuperscript{129} If such lump sum causes the $100,000.00 benefits limitation to be exceeded, the spouse who remarries shall receive the remaining balance.\textsuperscript{130}

F. \textit{Claim Procedure}

Claims for benefits under the 1990 Act must be dismissed if they lack the required specificity.\textsuperscript{131} The legislative intent is the avoidance of needless litigation or delay in payment of benefits by requiring claimants to provide sufficiently detailed information to the employer/carrier so a timely and informed decision on the benefits requested can be made. However, if the claimant is unrepresented, the division shall provide the necessary assistance in filing a claim that conforms to the specificity requirements.\textsuperscript{132}

Emphasizing the role of the division in cases of disputed claims, the legislature has indicated the division is to take a proactive position in preventing and resolving disputes.\textsuperscript{133} If after investigation, the division determines that the claimed benefits are due, it shall assist the employee in securing those benefits.\textsuperscript{134} If the division determines the

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\textsuperscript{127} Id. at 406.
\textsuperscript{128} FLA. STAT. 440.15(5)(a) (Supp. 1990).
\textsuperscript{129} FLA. STAT. § 440.16(1)(b)2 (Supp. 1990).
\textsuperscript{130} Id.
\textsuperscript{131} FLA. STAT. § 440.19(1)(e)4 (Supp. 1990).
\textsuperscript{132} Id.
\textsuperscript{133} FLA. STAT. § 440.19(1)(h) (Supp. 1990).
\textsuperscript{134} Id.
claimed benefits are not due and owing, the division must inform the
employee accordingly. The division decision is not res judicata, but
may be considered by the JCC or mediator.

G. Payment of Compensation

Prior to July 1, 1990, lump sum settlements under the Act took
only two forms. The first, under Florida Statutes section 440.20(12)(a)
permitted the employer/carrier's release of liability for all benefits
other than future medical care, training and education. This form of
settlement could only occur where the employee was at least three
months past maximum medical improvement. The second form of
pre-July 1, 1990 settlement was pursuant to Florida Statutes section
440.20(12)(b). This settlement, commonly referred to as a total lump
sum washout, provided for a full discharge of the employer's liability in
cases where it was denied that a compensable accident or injury had
occurred and a written notice to controvert had been filed. Inter-
estingly, this form of settlement since the July 1989 amendment specifi-
cally excluded discharge from training and education expenses.

There is now a third form of settlement available under limited
circumstances which is a true total washout. The requirements are
that the employee has: 1) reached MMI; 2) a five percent or less per-
manent impairment rating; and 3) not received medical treatment for
at least three months.

The amount of settlement is determined by a statutory formula
consisting of the compensation rate multiplied by three producing a
product which is then multiplied by the permanent impairment rat-
ing. This form of settlement mandates that the claimant be responsi-
ble for payment of his or her own attorney's fees and fully discharges
the employer/carrier for all benefits including medical expenses, train-
ing and education.

135. Id.
136. Id.
139. Id.
141. Id.
142. Id.
143. Id.
H. **Claims Procedure and Hearing Requests**

1. **Mediation**

The 1990 Act retained the provision for mediation, while eliminating a major objection to the original 1989 legislation involving attorney participation. In its initial form, neither party could be represented at the mediation. Now, the employer/carrier may be represented if the employee has counsel.\(^{144}\)

2. **Pre-Trial Hearings**

A pre-trial hearing is to be held between thirty and sixty days after the request for an application for a hearing has been filed.\(^{145}\) All parties shall be given at least fifteen days notice of the pre-trial hearing.\(^{146}\) A final hearing is to be set at the pre-trial hearing which allows, absent consent of the parties otherwise, at least ninety days to conduct discovery.\(^{147}\) Final hearings are to be held within 120 days after the pre-trial hearing.\(^{148}\)

I. **Attorney's Fees**

In determining a reasonable attorney's fee, the JCC is to consider only benefits the attorney was responsible for securing when applying the statutory formula.\(^{149}\) Under the 1990 Act, the term "benefits secured" does not include future medical benefits provided beyond five years after the date the claim was filed.\(^{150}\) This obviously has the potential to limit the amount of attorney's fees awarded in connection with successful prosecution of a claim for medical benefits for which the evidence supports the need for lifetime medical care.

J. **Self-Insurers**

An extensive provision was included in the 1990 Act relative to

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144. FLA. STAT. § 440.25(3)(b)1 (Supp. 1990).
145. FLA. STAT. § 440.25(3)(b)3 (Supp. 1990).
146. *Id.*
147. *Id.*
148. *Id.*
149. FLA. STAT. § 440.34(2) (Supp. 1990).
150. *Id.*
employers seeking to be self-insured for workers' compensation purposes. The employer may be required to post an indemnity bond or securities to procure payment of compensation. A company seeking to be self-insured must have trained personnel who can ensure that benefits are provided and a safe working place available. The self-insured employer must also carry reinsurance for actuarial stability. If the employer fails to maintain the required financial security, the authority to self-insure shall be revoked unless a certified opinion of an independent actuary estimating future compensation benefits is provided and a security deposit is made. Failure to do so will result in revocation of the employer's authorization to self-insure. At that point, the employer must provide a certified actuarial opinion regarding estimated future compensation payments for claims incurred while self-insured and post a security deposit equal thereto. Such actuarial opinions are to be provided at six month intervals until such time as the claims incurred have no remaining value. Failure to provide reports or security deposit gives rise to a cause of action in circuit court against the employer by the Florida Self-Insured Guarantee Association to recover a judgment equal to the present value of estimated future compensation payments and attorney's fees.

The new Act also provides a third alternative to a company purchasing traditional workers' compensation coverage or becoming self-insured. The employer can obtain a twenty-four hour health policy which provides medical benefits and an insurance policy which provides the indemnity benefits required by the Act.

K. Penalty for Failing to Secure Compensation

An employer failing to have workers' compensation coverage is guilty of a second degree misdemeanor and may be enjoined from employing individuals and doing business until payment for compensation

152. Id.
153. Id.
154. Id.
156. Id.
158. Id.
159. Id.
is secured. If upon being provided written notice, the employer fails to show evidence of workers' compensation coverage, a $500.00 penalty shall be assessed. If coverage is not obtained within the next ninety-six hours, a daily penalty of $100.00 will be assessed until the employer complies.

L. Special Disability Trust Fund

The schedule of preexisting physical conditions giving rise to a conclusive presumption that the employer considered the condition to be permanent or likely to be a hinderance or obstacle to employment was amended to add obesity. To qualify under the provision, the employee had to be thirty percent or more over the average weight designated for that employee's height and age.

III. The Constitutional Challenge

In Scanlon v. Martinez, the plaintiffs filed an action for declaratory and injunctive relief seeking a determination as to the validity of portions of chapter 89-289 and chapter 90-201 of the Laws of Florida. The plaintiffs consisted of a group of individuals as well as some labor organizations. It was the plaintiffs' position that sections of the Comprehensive Economic Development Act of 1990 violated certain constitutional provisions, including due process, separation of powers and the single subject rule under the Florida Constitution.

The Circuit Court of Leon County held that chapter 90-201 of the Laws of Florida did, in fact, violate the single subject rule contained in the Florida Constitution. The court found that the subject matter of

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162. Id.
163. Id.
165. Id.
166. 44 Fla. Supp. 2d 170 (Fla. 2d Cir. Ct. 1990).
167. Id.
168. Id.
169. Id. at 171. Fla. Const. art. III, § 6 provides:
   Every Law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section subsection, or paragraph of a subsection. The enacting clause of every Florida law
the Act, the economic growth and development of Florida, was too broad and that the disparate topics were not reasonably and rationally related to the subject of the bill.\textsuperscript{170} Chapter 90-201 was, therefore, held to be constitutionally invalid in its entirety.\textsuperscript{171}

The circuit court then addressed the alleged separation of powers violation under the Florida Constitution.\textsuperscript{172} It analyzed the section of chapter 90-201 which created the Industrial Relations Commission within the executive branch. While an executive branch entity, the new law provided that the IRC judges were subject to Supreme Court Judicial Nominating Commission appointment and retention.\textsuperscript{173} Further, the law provided that the governor must reappoint any IRC judge who received a favorable report from the Judicial Nominating Commission.\textsuperscript{174} The circuit court held that the retention provision, together with the fact that the IRC judges were subject to disciplinary proceedings by the JNC, violated the separation of powers rule and therefore, chapter 90-201 was invalid in its entirety for this reason as well.\textsuperscript{175}

In addition to finding the entire Act constitutionally invalid, the circuit court also addressed several specific provisions. It found that the "Super-Doc" provision lacked a rational basis in providing that the opinion of the court-appointed doctor should carry greater credibility than the opinions of other doctors.\textsuperscript{176} The court also found that this provision usurped the fact-finding responsibility of the JCC and concluded that this section violated both the due process and access to courts guarantees.\textsuperscript{177}

The circuit court also held that chapter twenty of the Act, providing that the employee seeking permanent total disability benefits must show that he or she is unable to do even light work available within a 100 mile radius of home, violated the access to courts guarantee of the Florida Constitution because it was not a reasonable alternative to common law rights otherwise available.\textsuperscript{178} Constitutional deficiencies were also found in chapter twenty of the Act amending the wage loss

\textsuperscript{170} Scanlon, 44 Fla. Supp. 2d at 171.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 171.
\textsuperscript{175} Scanlon, 44 Fla. Supp. 2d at 172.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 173.
provision by providing for a shifting burden of proof based on the amount of permanency. The circuit court likewise found that the sunset provisions of chapter 89-289 and backward repealer provision of chapter 90-201 were an invalid attempt by the legislature to sunset general laws. The circuit court did rule that constitutional frailties of the individual provisions outlined above were, however, severe and therefore declined to declare the entire Act unconstitutional on that basis. The circuit court held that the sunset provision of chapter 89-289 and all of chapter 90-201 of the Laws of Florida were invalid.

Following the Leon County Circuit Court announcement of its opinion on December 5, 1990, the legislature met in a special session in order to address the objections enunciated to the new legislation. Out of this special session emerged two different bills which served to separate the workers' compensation provisions from the international affairs and trade subject matter. Both bills essentially readopted the provisions initially contained in chapter 90-201 and with minor exception, provided for retroactive application to July 1, 1990. The legislature also passed chapter 91-2, House Bill 11-b, which provided for the repeal of Florida Statutes section 20.171(5) (chapter 90-201 of the Laws of Florida), which had created the Industrial Relations Commission, and section four, chapter 90-201 of the Laws of Florida, relating to IRC rules of adoption by the Florida Supreme Court. This bill also provided for the repeal of section 440.4415 regarding creation of the Workers' Compensation Oversight Board and legal counsel.

In addition to the above provisions, chapter 91-2 of the Laws of Florida, House Bill 11-b, also amended the Act relative to the construction industry. The definition of "employee" was amended to permit no more than three officers of a corporation involved in the construction industry to make an election of exemption from the Act by filing written notice pursuant to Florida Statutes section 440.05. It also provided that partners or sole proprietors in the construction industry are considered employees unless they elect to be excluded and file written notice. As with corporations in the construction industry, no more than three partners in a partnership actively involved in the construc-

179. Id.
180. Scanlon, 44 Fla. Supp. 2d at 173.
181. Id. at 174.
182. Id. at 175.
tion industry may elect to be excluded from the Act.

Chapter 91-2 also amended section 440.05 regarding the notice of waiver of exemption as it applies to every sole proprietor, partner or corporate officer actively engaged in the construction industry. Upon receipt of a proper written notice, the division must issue a certificate of the election to the party so making it. A copy of the election certificate is to be sent to the workers’ compensation carrier that is otherwise providing coverage for the sole proprietorship, partnership or corporation. The election certificate remains valid for two years or until the election is revoked, whichever occurs first. Additionally, any contractor responsible for compensation under section 440.10 can register with any subcontractor’s carrier thereby being entitled to receive written notice of any cancellation or non-renewal of coverage. Further, the contractor may require any subcontractor to provide evidence of workers’ compensation coverage or a copy of the subcontractor’s certificate of election. Any subcontractor who has elected to be exempt from the Act must provide a copy of the election certificate to the contractor. If the contractor or third party payor becomes liable for payment of compensation to an employee of a subcontractor who has made an invalid election to be exempt, the contractor or third party payor may recover from the sole proprietorship, partnership or corporation all benefits paid or payable, plus interest, unless the contractor and subcontractor had a written agreement that coverage was to be provided by the contractor.

Following the 1991 special legislative session, during which the above amendments were passed, the Florida Supreme Court, in a deeply divided opinion, announced its decision in *Martinez v. Scanlon*. This decision had been received by way of certification from the First District Court of Appeal as a case of great public importance. This list of parties to the action and non-parties submitting amicus curiae briefs reads like a list of who’s who in the business and labor world.

186. *Id.*
187. 582 So. 2d 1167 (Fla. 1991).
188. *Id.*
189. *Id.* The list included Associated Industries of Florida, the Florida Chamber of Commerce, National Counsel on Compensation Insurance, Employers Insurance of Wausau, Tampa Bay Area NFL, Inc., South Florida Sports Corporation, Professional Firefighters of Florida, Inc., the AFL-CIO and IBEW, Communication Workers’ of America, Florida Police Benevolent Association, Florida Construction, Commerce and
Turning to the trial court opinion, the supreme court noted that the plaintiffs alleged in the declaratory action that they were taxpayers, employers, employees or labor organizations who were interested in and had doubt as to their rights under the 1989 and 1990 amendments. The defendants argued that the plaintiffs lacked the requisite standing to bring suit, that some of the claims were either premature or moot and that the amendments were constitutional.

Reviewing the declaratory judgment statute, the court noted that an individual may seek declaratory relief only where it can be shown there exists a bona fide, actual present need for the declaration. The court's majority stated it had serious reservations that the action was properly the subject of the declaratory judgment act. It noted the parties had given little or no mention to this procedural issue. However, while cautioning trial courts to exercise their discretion in such cases involving constitutional challenges, the court declined to dismiss the action itself.

Citing case law, the court rejected the argument that the provisions of the 1990 law, with the substantial reduction in benefits, violated the constitutional right of access to courts. While acknowledging the reduction in benefits, the court found the law to be a reasonable alternative to tort litigation noting that full medical care and wage loss benefits, regardless of fault, continued to be available without delay and uncertainty. It also noted that in situations which were previously compensable, but no longer so because of the amendment, employees were still free to prosecute their claims in tort.

The court next addressed the constitutional challenge for violation of the single subject requirement. It agreed with the lower court that

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190. Id. at 1169-70.
191. Id. at 1170.
193. Martinez, 582 So. 2d at 1170.
194. Id. at 1171.
195. Id.
196. Id.
197. Id. at 1171-72.
198. Martinez, 582 So. 2d at 1172.
chapter 90-201 violated this principle and was therefore unconstitutional. However, the State of Florida argued that this constitutional problem had been cured by virtue of the January 1991 special session which separated chapter 90-201 into distinct bills, one addressing international trade and the other workers' compensation. While acknowledging merit in the state's argument, the court noted that it was being asked to scrutinize the constitutionality of a statute that was no longer in existence. Noting that the 1991 Act was not before it, the court indicated that if it were subsequently found unconstitutional as a result of the reenacted provisions, the validity of the 1990 Act would still be in question. While suggesting that it could remand the case back to the trial court for reconsideration in the light of the 1991 amendments, the court chose to retain jurisdiction in the interest of judicial economy.

The court found that the separation of powers violation had been resolved by the 1991 Act and the issue was therefore moot. However, it also stated that the trial court erred when finding the entire Act unconstitutional as a result of the separation of powers violation. The court found that the IRC provisions and creation of the Workers' Compensation Oversight Board were severable and even if unconstitutional, would not render the entire Act invalid. Further, the trial court should not have considered these provisions under the Declaratory Judgment Act because the plaintiffs were unable to show their rights were affected by them.

As with the separation of powers argument, the court also noted that the plaintiffs could not demonstrate their rights were actually affected by the individual provisions of the 1989 and 1990 Acts which were attacked on various other constitutional grounds. Since the plaintiffs could show only that their rights might be affected in the future by these provisions, they were not properly the subject of a declaratory judgment action. Accordingly, the trial court's finding that chapter 90-201 was unconstitutional for violation of the single subject rule
was affirmed, as was its holding that the 1990 law did not violate any constitutional access to courts provision. The remainder of the trial court's holding was reversed.\textsuperscript{208}

The Florida Supreme Court then addressed the issue as to what effective date should apply to its ruling. Previous case law suggested that whether or not a statute was void ab initio depended on whether the legislative body passing the law had the power or authority to do so. Here, the issue was not one of the legislature's constitutional authority to pass chapter 90-201, but rather the form of the law itself.\textsuperscript{209} The supreme court pointed to previous opinions, both its own\textsuperscript{210} and those of the United States Supreme Court\textsuperscript{211} where statutes had been declared unconstitutional, but the decisions were given prospective effect only.\textsuperscript{212} The rationale common to these decisions involve equitable principles and the avoidance of injustice or hardship resulting from a retroactive application.\textsuperscript{213} The legislature's declaration that the 1991 curative statutes were to be given application retroactively to the effective date of the 1990 Act was cited by the court. While refusing to rule on these retroactive provisions of the 1991 Act, the court concluded that its holding of chapter 90-201 as unconstitutional in its entirety was prospective only.\textsuperscript{214}

In his concurring opinion, Justice Kogan agreed that the 1990 statute was unconstitutional for violation of the single subject rule.\textsuperscript{215} He found all other issues raised therefore moot, noting that the court later address the constitutionality of the 1991 Act, if challenged.

In an opinion, concurring in part and dissenting in part, Justice Barkett (joined by Chief Justice Shaw and Justice Kogan) agreed that the 1990 Act violated the single subject rule and therefore other issues raised were premature.\textsuperscript{216} However, Justice Barkett dissented to the extent that the majority opinion was to be given prospective application only. While acknowledging existence of legal precedent supporting prospective application, Justice Barkett's disagreement with these deci-
sions was evident. In her view, a statute declared facially unconstitutional is null and void from its inception.

IV. CONCLUSION

While it is now clear that the Comprehensive Economic Development Act of 1990, chapter 90-201, has been declared unconstitutional, there remain many questions as to what direction the workers' compensation law of this state will take in the foreseeable future. Certainly, as Justice Kogan suggested in his concurring opinion, the door remains open for a separate constitutional challenge to the 1991 statute. However, as a result of the curative 1991 legislation which addressed the constitutional objections to the 1990 Act, it is perhaps more likely that further constitutional challenges will be more narrow, focusing on specific provisions of the 1991 Act as amended.