

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

EMMA MURRAY,

Petitioner,

CASE NO.: SC07-244

vs.

Lwr Tribunal: 1D06-475

MARINER HEALTH/ACE USA,

Respondent.

_____ /

PETITIONER'S INITIAL BRIEF ON JURISDICTION

BRIAN O. SUTTER, ESQUIRE
2340 Tamiami Trail
Port Charlotte, Florida 33952
Counsel for Claimant/Petitioner

BILL MCCABE, ESQUIRE
1450 SR 434 West,
Suite 200
Longwood, Florida 32750
Co-Counsel for
Claimant/Petitioner

This is an Initial Brief on Jurisdiction seeking to invoke discretionary jurisdiction to review a decision of the First District Court of Appeal, Tallahassee, Florida, opinion rendered October 16, 2006.

TABLE OF CONTENTS

	Page
TABLE OF CITATIONSii,iii
PRELIMINARY STATEMENT	iv
STATE OF THE CASE AND STATEMENT OF THE FACTS	1
POINT ON APPEAL3
SUMMARY OF ARGUMENT3
ARGUMENT	4
WHETHER OR NOT THIS HONORABLE COURT HAS JURISDICTION ON THE GROUNDS THAT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY DECLARED FLORIDA STATUTE 440.34, AS SIGNIFICANTLY AMENDED IN 2003, TO BE VALID AND CONSTITUTIONAL.	
CONCLUSION10
CERTIFICATE OF SERVICE11
CERTIFICATE OF TYPE FACE COMPLIANCE12

TABLE OF CITATIONS

	Page
<u>Acton II v. Fort Lauderdale Hospital,</u> 440 So.2d 1282(Fla.1983).	4
<u>Campbell v. Aramark,</u> 933 So.2d 1255 (Fla. 1 st DCA 2006)	3
<u>Davis v. Bon Secours-Maria Manor,</u> 892 So.2d 516(Fla.1st DCA 2004).	6
<u>Davis v. Keto Inc.,</u> 463 So.2d 368(Fla.1st DCA 1985).	8
<u>De Ayala v. Florida Farm Bureau Casualty Insurance,</u> 543 So.2d 204(Fla.1989).	4
<u>Horn v. New Mexico Educators Federal Credit Union,</u> 899 P. 2 nd 234(N.M. CT of App 1994).	6
<u>Irwin v. Surdyk's Liquor,</u> 599 N.W. 132(Minn 1999).	8,10
<u>Joseph v. Oliphant Roofing Company,</u> 711 8. 2 nd 805(Del. Super. 1997).	8
<u>Lee Engineering and Construction Company v. Fellows,</u> 209 So.2d 454(Fla.1968).	4,5,8
<u>Lundy v. Four Seasons Ocean Grand Palm Beach,</u> 932 So.2d 506 (Fla. 1 st DCA 2006).	3,7,9
<u>Makemson v. Martin County,</u> 491 So.2d 1109(Fla.1986).	8,10
<u>Recchi America Inc. v. Hall,</u> 692 So.2d 153(Fla.1997).	9
<u>Wood v. Florida Rock Industries,</u> 929 So.2d 542(Fla.1st DCA 2006).	1,7
 <u>FLORIDA STATUTES</u>	
440.34(1)(1977)	5
440.34(1)(2003)	3,5,6
440.34(3)(2003)	1,4,5,6

OTHER

Fla.R.App.P. 9.030(a)(2)(A)(i).4
Article V, Section 3(b)(3), Fla. Const.. . . . 4

PRELIMINARY STATEMENT

The Petitioner, EMMA MURRAY, shall be referred to herein as the "Claimant" or by her separate name.

The Respondents, MARINER HEALTH/ACE USA, shall be referred to herein as the "Employer/Carrier" (E/C) or by their separate names.

References to the record on appeal shall be abbreviated by the letter "V" (Volume), followed by the applicable volume and page number.

The Judge of Compensation Claims shall be referred to as the JCC.

References to the Appendix attached to Petitioner's Initial Brief on Jurisdiction will be referred to by the letters "AP" and followed by the applicable appendix page number. The Appendix contains the opinion issued by the First District Court of Appeal on October 16, 2006.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This is a case involving the constitutionality of the Workers' Compensation Attorney Fee Statute, F.S.440.34(3) as amended in 2003, that may severely impair, if not eliminate, the ability of Claimants to obtain the assistance of counsel, Wood v. Florida Rock Industries, 929 So.2d 542(Fla.1st DCA 2006), Judge Barfield, concurring opinion at page 545.

On 5/9/05, following a 12/12/04 hearing (V1-12), the JCC entered a Final Compensation Order (V1-12-18), in which the JCC found that the lifting incident at work on 10/31/03 was the major contributing cause of the Claimant's prolapsed uterus, need for surgery, and disability (V1-16,17).

On 8/10/05 a hearing on Claimant's Verified Petition for Attorney's Fees was held before the JCC (V1-141). At that hearing, counsel for Claimant, Brian O. Sutter, who has been practicing workers' compensation since 1985 (V2-261), and who has been Board Certified since 1990 (V2-262), indicated that he expended a total of 84.4 hours in representing the Claimant (V1-36). Mr. Sutter also expended \$2,098.83 in out-of-pocket costs in prosecuting the claim (V1-26, V2-266).

Peter Burkert, Board Certified Attorney in workers' compensation (V2-202) and Rosemary Eure, an attorney specializing in workers' compensation for sixteen years (V2-232) testified that if there is a finding in this case that would

only yield a fee in the amount of \$8.00 to \$10.00 per hour, a Claimant would not be able to hire an attorney to represent them (V2-202, 235, 236). Both testified that Claimants are unable to handle a case like this themselves due to the complex workers' compensation litigation system (V2-203, 236).

Cora Malloy, an attorney who has been practicing workers' compensation, with a defense firm, since 1996 (V1-145,146) testified it would be extremely difficult for a lay person to tackle the legal issues, the new law issues, old law issues without the assistance of competent counsel (V1-169). Ms. Malloy acknowledged that counsel for the E/C, in the case at bar, invested 135 hours in defending the claim, was paid at the rate of \$125 an hour, and made \$16,050 for their role in defending the claim up through the date of trial (V1-185).

On 1/17/06 the JCC entered his Final Compensation Order on attorney's fees (V2-302-313). The JCC found that the initial merit proceedings in this case resulting in the 5/9/05 order involved difficult, complex, factual legal and medical issues (V2-305). The JCC found that the total amount of benefits secured by counsel for Claimant was \$3,244.21 (V2-304). The JCC found that a statutory guideline attorney's fee per F.S.440.34(1)(2003) would be \$648.84 yielding an hourly rate of \$8.11 per hour (V2-306). The JCC therefore found that a "reasonable" attorney's fee awarded in this case is \$648.84 even

though that resulted in an hourly rate of \$8.11 per hour and totally ignored the so called Lee Engineering factors (V2-307).

The JCC further found that had the JCC utilized the Lee Engineering criteria, a reasonable attorney's fee in this case would be \$16,000, based on 80 hours of work at \$200 per hour (V2-308-310).

On 10/16/06 the First District Court of Appeal affirmed the JCC's 1/17/06 order on attorney's fees. In its 10/16/06 opinion, the First DCA stated, inter alia:

"The appellant's constitutional challenges to this statute, as significantly amended in 2003, were considered and rejected in our recent decisions in Lundy v. Four Seasons Ocean Grand Palm Beach, 31 Fla. L. Weekly D1663(Fla.1st DCA June 20, 2006); and Campbell v. Aramark, 31 Fla. L. Weekly D1966(Fla.1st DCA July 24, 2006). Accordingly, we are constrained to affirm the JCC's award of a reasonable attorney's fee based on the statutory guideline formula." (AP-1,2).

POINT ON APPEAL

WHETHER OR NOT THIS HONORABLE COURT HAS JURISDICTION ON THE GROUNDS THAT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY DECLARED FLORIDA STATUTE 440.34, AS SIGNIFICANTLY AMENDED IN 2003, TO BE VALID AND CONSTITUTIONAL.

SUMMARY OF ARGUMENT

I

The First DCA concluded that F.S.440.34, as significantly amended in 2003, is constitutional (AP-1,2). This Honorable Court therefore has jurisdiction to review this matter since the First DCA has upheld the constitutionality of F.S.440.34(2003),

Fla.R.App.P. 9.030(a)(2)(A)(i), De Ayala v. Florida Farm Bureau Casualty Insurance, 543 So.2d 204(Fla.1989).

ARGUMENT

WHETHER OR NOT THIS HONORABLE COURT HAS JURISDICTION ON THE GROUNDS THAT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY DECLARED FLORIDA STATUTE 440.34, AS SIGNIFICANTLY AMENDED IN 2003, TO BE VALID AND CONSTITUTIONAL.

Article V, Section 3(b)(3), Fla. Const., and Fla.R.App.P.9.030(a)(2)(A)(i) provides that the jurisdiction of this Honorable Court may be invoked to review any decision of a District Court of Appeal that:

" . . .Expressly declares valid a State statute"

In the case at bar, the opinion of the First DCA expressly declares valid F.S.440.34, as significantly amended in 2003 (AP-1,2). Therefore, Petitioner respectfully submits that the jurisdiction of this Honorable Court may be invoked, De Ayala v. Florida Farm Bureau Casualty Insurance, 543 So.2d 204(Fla.1989), Acton II v. Fort Lauderdale Hospital, 440 So.2d 1282(Fla.1983).

In 1968, in Lee Engineering and Construction Company v. Fellows, 209 So.2d 454(Fla.1968), this Honorable Court held that a "reasonable attorney's fee" in a workers' compensation case was to be determined by considering various listed factors (time and labor, et al).

Effective 10/1/77, the Workers' Compensation Statute included, for the very first time, a statutory guideline

attorney's fee, see F.S.440.34(1)(1977). The aforesaid statute also set forth other enumerated factors which were from this Honorable Court's decision in Lee Engineering and Construction Company v. Fellows, Supra, for the JCC to consider, and the JCC could increase or decrease the attorney's fee if in his judgment the circumstances of the particular case warranted such action.

Effective 10/1/03, the Legislature amended F.S.440.34(1)(2003) by leaving in the statutory guideline fee, but by eliminating the other enumerated factors from Lee Engineering, Supra. However, the statutory language in F.S.440.34(3)(2003), which is the portion of the attorney's fee statute that allows a Claimant to recover a "reasonable attorney's fee" from the Employer/Carrier under certain circumstances, was unchanged.

The case at bar involves counsel for Claimant's entitlement to recover a "reasonable attorney's fee" from the Employer/Carrier per the provisions of F.S.440.34(3)(2003).

The JCC in the case at bar found that counsel for Claimant was restricted to the statutory guideline fee set forth in F.S.440.34(1)(2003) which yielded an hourly rate of \$8.11 per hour (V2-306), even though the JCC found that such an attorney's fee would be "manifestly unfair" (V2-306).

The First DCA, in its 10/16/06 opinion, affirmed the JCC's 1/17/06 order and found that F.S.440.34 was constitutional.

Prior to the 10/1/03 amendments to F.S.440.34(2003), a JCC had the discretion to deviate from the statutory guideline fee when the presumptive fee produced by the statutory formula is "manifestly unfair", Davis v. Bon Secours-Maria Manor, 892 So.2d 516(Fla.1st DCA 2004). The decision of the First DCA herein does not allow any deviation from the statutory guideline fee.

Claimant submits that the mandated, inflexible statutory cap on the amount of an attorney's fee that counsel for Claimant may receive, without any ability to deviate from the guideline fee, violates at least four provisions of the Florida Constitution.

1. It violates Claimant's right to equal protection, per Article I, Section II of the Florida Constitution and Article XIV, Section I of the United States Constitution, because there is no corresponding cap or restriction on the amount of attorney's fees that the E/C may pay their attorney, Horn v. New Mexico Educators Federal Credit Union, 899 P. 2nd 234(N.M. CT of App 1994). For example, counsel for Claimant in the case at bar was awarded a total attorney's fee of \$648.84 resulting in an hourly rate of \$8.11 per hour (V2-307), even though counsel for the E/C was paid for 135 hours at the rate of \$125 per hour for a total of \$16,050 for their role in defending the claim up through the date of trial (V1-185).

In the case at bar, the First DCA relied on Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So.2d 506 (Fla.1st DCA 2006), which is a case wherein the First DCA concluded that the statute does not violate the Claimant's right to equal protection because the statute applies to all claimants in a workers compensation proceeding. The Equal Protection argument, however, is that Claimants and Employer Carriers are treated differently.

2. The statute violates Claimant's due process rights under the provisions of Article I, Section 9 of the Florida Constitution and Article XIV, Section I of the United States Constitution because it severely impairs, if not eliminates, the ability of the Claimants to obtain the assistance of counsel, Wood v. Florida Rock Industries, Supra, concurring opinion of the Honorable Judge Barfield. By severely impairing, if not eliminating, the ability of Claimants to obtain the assistance of counsel, a Claimant's due process right to be heard, and to present evidence in a meaningful way, is eliminated. Any remaining due process rights of an injured worker is simply illusory, in that it is highly unlikely that an injured Claimant would possess the necessary legal skills to successfully prosecute a workers' compensation claim. As indicated in the Statement of the Facts, there was testimony to this issue at the hearing before the JCC below.

This Honorable Court in Makemson v. Martin County, 491 So.2d 1109(Fla.1986), held that statutory fee maximums for Court appointed counsel representing Defendants in capital cases "when inflexibly imposed in cases involving unusual or extraordinary circumstances" interfere with a Defendant's Sixth Amendment right to have the assistance of counsel and are unconstitutional when applied in such manner as to curtail the Court's inherent power to ensure the adequate representation of the criminally accused. Inflexible statutory fee caps could result in a confiscation of an attorney's time, energy and talents, Makemson, Supra.

The Makemson rational has been applied by sister courts in workers' compensation attorney's fee cases, Irwin v. Surdyk's Liquor, 599 N.W. 132(Minn 1999), Joseph v. Oliphant Roofing Company, 711 8. 2nd 805(Del. Super. 1997) (Makemson cited).

The necessity of enabling a Claimant to have representation of adequate counsel in a workers' compensation proceeding has long been recognized by this Honorable Court, Lee Engineering, Supra, as well as the decisions from the First DCA, see e.g. Davis v. Keto Inc., 463 So.2d 368(Fla.1st DCA 1985) (without the aid of competent counsel Claimant would have been as helpless as a turtle on its back). Judge Barfield indicated in his concurring opinion in Wood, Supra, that the statute "severely

impairs, if not eliminates, the ability of Claimants to obtain the assistance of counsel", Wood, Supra, at 545.

The First DCA, in Lundy v. Four Seasons, supra, stated that the statute, in limiting fees to a percentage of benefits secured, bears a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the Claimant. However, when the E/C is required to pay a "reasonable attorney fee" to counsel for Claimant, such as in the case at bar, the Claimant receives 100% of his benefits.

The statute is a violation of the Claimant's substantive due process rights, by creating an irrebuttable presumption of a "reasonable fee" which severely restricts a Claimant's attorney's fees in all cases, Recchi America Inc. v. Hall, 692 So.2d 153(Fla.1997) (where this Honorable Court held Claimant's constitutional rights to due process were violated by Workers' Compensation Statute which created an irrebuttable presumption that the Claimant's injury in a drug free work place was occasioned primarily by the Claimant's intoxication if the Claimant had a positive confirmation of drug or blood alcohol level of 10% or more by weight of the time of the injury).

3. The statute is a violation of Claimant's right to access to the Courts, as guaranteed by Article I, Section 21 of the Florida Constitution because it severely impairs, if not eliminates, the ability of a Claimant to obtain the assistance

of counsel, particularly in cases involving small monetary amounts, and as such denies any effective and meaningful access to the Courts. There was testimony as to this issue in the case at bar.

4. The statute is a violation of the separation of powers provisions of Article II, Section 3 of the Florida Constitution because it impermissibly interferes with the Court's inherent power and authority to ensure adequate representation of parties before the Court and to be the final authority over attorney fee determinations, Makemson v. Martin County, supra, Irwin v. Surdyk's Liquor, supra at 141, (" .in order for the legislative guidelines to be constitutionally permissible, we must retain final authority over attorney fee determinations. .").

This issue deserves the attention of this Honorable Court. The issue in the case at bar has a widespread effect upon the ability of injured workers to obtain competent counsel in a workers' compensation claim, and thus a widespread effect on an injured worker's ability to obtain benefits as a result of a compensable injury.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that this Honorable Court grant Petitioner's Notice to Invoke Discretionary Jurisdiction and accept jurisdiction of this appeal.

Respectfully Submitted,

Bill McCabe, Esquire
1450 SR 434 West,
Suite 200
Longwood, Florida 32750
(407)830-9191
Fla. Bar No.: 157067

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this _____ day of May, 2007 to: Brian O. Sutter, 2340 Tamiami Trail, Port Charlotte, Florida 33952, and John R. Darin II, P. O. Box 2753, Orlando, Florida 32802, Susan Fox, 112 North Delaware Avenue, Tampa, Florida 33606, Richard Sicking, 1313 Ponce De Leon Boulevard, Suite 300, Coral Gables, Florida 33134-3343.

Bill McCabe, Esquire
Shepherd, McCabe & Cooley
1450 SR 434 West,
Suite 200
Longwood, Florida 32750
(407) 830-9191
Fla. Bar No.: 157067
Co-Counsel for Petitioner

CERTIFICATE OF TYPE FACE COMPLIANCE

I HEREBY CERTIFY that this Initial Brief on Jurisdiction for Petitioner was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.

Bill McCabe, Esquire
1450 SR 434 West,
Suite 200
Longwood, Florida 32750
(407) 830-9191
Fla. Bar No.: 157067

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

EMMA MURRAY,

Petitioner,

CASE NO.: SC07-244

vs.

Lwr Tribunal: 1D06-475

MARINER HEALTH/ACE USA,

Respondent.

_____ /

APPENDIX

APPENDIX

A-1,2 Opinion of the First District Court of Appeal dated
October 16, 2006.