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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

Bradley Westphal,

Petitioner,

v.

City of St. Petersburg/
City of St. Petersburg Risk
Management, and State of Florida,

Respondents.

Nos. SC13-1930; SC13-1976

Lower Tribunal Case No(s).
1D12-3563; 10-019508SLR

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose trial-lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment-related cases such as the case at bar. With attorney members in Florida representing Florida citizens in workers' compensation cases, AAJ has an interest in the development of Florida's workers' compensation law.

SUMMARY OF ARGUMENT

The en banc First DCA correctly ruled that a worker who is totally disabled and unable to work but still improving medically at the time temporary disability benefits expire is deemed by statute to be at maximum medical improvement and thus is eligible to assert a claim for permanent and total disability. This interpretation of the Workers' Compensation Law is consistent with the statutory text and purpose. Moreover, this interpretation respects the separation of powers because it preserves the statute, does so on a ground consistent with the Legislature's intent, and avoids a constitutional ruling.

Should the Court conclude that the Workers' Compensation Law denies certain totally disabled injured workers who have exhausted temporary total disability benefits any further benefits for an indefinite period of time, then it should rule that the 104-week limitation on temporary total disability benefits

violates the Florida Constitution's right of access to courts. This limited temporary benefit is not a reasonable alternative to the common law and statutory benefits available to injured workers in 1968, when the Declaration of Rights was adopted, and is not justified by any overpowering public necessity. The Florida Constitution demands an adequate substitute remedy in these circumstances. Forcing totally disabled injured workers such as Petitioner Westphal to forgo their common law right to full recovery in return for a system that denies them any benefits for an indeterminate time is wholly inadequate and fundamentally unfair.

STANDARD OF REVIEW

Because the issues in this appeal concern statutory or constitutional interpretation, this Court's review is *de novo*. *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 485 (Fla. 2008).

ARGUMENT

I. The En Banc First DCA Correctly Held that an Injured Worker Who Is Totally Disabled at the Expiration of the 104-Week Limit on Temporary Total Disability Is Deemed by Statute To Be at Maximum Medical Improvement and thus Is Eligible for Permanent Total Disability Benefits.

Under Florida's Workers' Compensation Law, a totally disabled injured worker is eligible for temporary total disability benefits for a maximum of 104 weeks. § 440.15(2)(a), Fla. Stat. (2009) What benefits are available to a worker who remains totally disabled after these temporary benefits cease? In a series of

decisions, the First DCA concluded that only certain workers who remain totally disabled after 104 weeks are then eligible for permanent total disability benefits. In simplified form: Workers who are totally disabled, unable to engage in sedentary employment near their residence, and have reached maximum medical improvement are eligible. Those who are totally disabled and unable to work but have not yet reached maximum medical improvement are also eligible if they can prove that they will remain disabled after they reach maximum medical improvement. But workers who are totally disabled and whose medical condition may yet improve, these decisions hold, are not yet eligible for permanent total disability. *See generally Matrix Employee Leasing, Inc. v. Hadley*, 78 So. 3d 621, 624-26 (Fla. 1st DCA 2011) (en banc); *City of Pensacola Firefighters v. Oswald*, 710 So. 2d 95, 98 (Fla. 1st DCA 1998).

Receding from these decisions, the en banc First DCA in this case concluded that the Legislature did not intend "to create a gap in benefits, during which a disabled worker is not compensated for a disability, even though there is no dispute that the worker is totally disabled." *Westphal v. City of St. Petersburg/City of St. Petersburg Risk Mgmt.*, 122 So. 3d 440, 446 (Fla. 1st DCA 2013) (en banc). Thus, the court held that workers who remain totally disabled at the expiration of temporary total disability but whose medical condition may yet improve are nonetheless deemed to be at maximum medical improvement by operation of law

and therefore are eligible to assert a claim for permanent total disability benefits. *Id*. This holding is consistent with the statutory text and purpose of the Workers' Compensation Law, and avoids constitutional issues.

A. The En Banc First DCA's Interpretation of the Workers' Compensation Law Is Consistent With Its Statutory Text and Purpose.

Consider first the text. Section 440.15 sets forth eligibility requirements for temporary or permanent total disability benefits. As discussed, qualified injured workers are entitled to temporary total disability benefits for only 104 weeks. Six weeks prior to the expiration of these benefits, a doctor must evaluate the disabled worker and assign an impairment rating. § 440.15(3)(d), Fla. Stat. (2009). Although in this subsection the statute uses the phrase "impairment rating," *see id*., a corresponding subsection, which also discusses this mandatory medical evaluation, leaves no doubt that the impairment rating required concerns a "*permanent* impairment." § 440.15(2)(a), Fla. Stat. (emphasis added). "Permanent impairment," in turn, 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." § 440.02(22), Fla. Stat. (2009) (emphasis added). Given this statutory text, the en banc First DCA in this case correctly concluded that "the permanent impairment rating required by

section 440.15(3)(d) is the legal equivalent of a medical finding that the disabled worker has reached maximum medical improvement." 122 So. 3d at 445.

Consider next the purpose of the Workers' Compensation Law. The law abolishes an employee's right to sue her employer and substitutes the right to receive benefits under a compensation scheme. As described by the Legislature itself, this substitute system of redress is intended to ensure the "prompt delivery of benefits to the injured worker." § 440.015, Fla. Stat. (2009). Reading section 440.15(3)(d) to extend eligibility for permanent total disability benefits to workers who are assigned a permanent impairment rating demonstrating that they remain totally disabled at the expiration of temporary total disability benefits, despite the possibility that their medical condition may yet improve, furthers this legislative intent.

By contrast, reading section 440.15(3)(d) to deny totally disabled injured workers any such benefits for an indefinite period is contrary to this stated purpose. The denial of benefits during this period, moreover, is total. The Workers' Compensation Law does not provide any statutory mechanism for awarding benefits retroactively to this class of severely injured workers even if it is later evident that they had achieved a full medical recovery at the expiration of temporary total disability benefits. *Westphal*, 122 So. 3d at 447. This arbitrary and

unreasonable denial of benefits disserves the purposes of the Workers' Compensation Law and thus cannot be what the Legislature intended.

B. Also, This Interpretation Avoids Constitutional Issues and Respects Separation of Powers.

One criticism of the en banc First DCA's statutory interpretation is that it effectively enacts substantive law in violation of the separation of powers. But this charge is unwarranted. The interpretation adopted by the lower court is grounded in a fair reading of statutory text, in particular, the language mandating the assignment of a permanent impairment rating for any such condition existing "after the date of maximum medical improvement." § 440.02(22), Fla. Stat. If anything, this interpretation respects the separation of powers because it preserves the statute, does so on a ground consistent with the Legislature's intent, and avoids a constitutional ruling. *See Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983) ("When two constructions of a statute are possible, one of which is of questionable constitutionality, the statute must be construed so as to avoid any violation of the constitution.").

Another criticism is that the lower court's interpretation invents a new category of benefits—"temporary permanent total disability benefits"—because the medical condition of an injured worker, even if deemed by statute to be at maximum medical improvement, may subsequently change. This criticism is also misplaced. A worker's eligibility for permanent total disability benefits may

always be revisited if circumstances change. *Westphal*, 122 So. 3d at 447. The lower court's interpretation is consistent with this understanding. For example, in *Emanuel v. David Piercy Plumbing*, 765 So. 2d 761, 762-63 (Fla. 1st DCA 2000), the court held that an injured worker was entitled to permanent total disability benefits for the time period between maximum medical improvement and the worker's return to employment. This was not a "temporary" award of permanent total disability, the First DCA later explained in *Florida Transport v. Quintana*, 1 So. 3d 388, 390-91 (Fla. 1st DCA 2009). Rather, it was an appropriate award of permanent total disability benefits to an injured worker who met the statutory requirements for such benefits during an eighteen month period. *See id*.

In this case, Petitioner Westphal was accepted as permanently and totally disabled some nine months after his 104-weeks of temporary total disability benefits expired. *Westphal*, 122 So. 3d at 471 n.16 (Wetherell, J., dissenting). The logical inference, then, is that he was in fact at maximum medical improvement this entire time. Of course, there may be cases in which a totally disabled injured worker's medical condition improves such that she cannot be said to be permanently and totally disabled any longer. But in that event, eligibility may be re-examined.

Rather than denying injured workers any disability benefits for an indefinite period despite their being totally disabled and unable to work, and denying them

any retroactive benefits if it is later evident that they had already made a full medical recovery, the en banc First DCA's interpretation of section 440.15(3)(d) will permit injured workers who are totally disabled and unable to work, but still possibly improving medically, to be deemed at maximum medical improvement by operation of law, and thus be eligible for permanent total disability benefits.[1] Put simply, totally disabled injured workers, who are required by law to give up their common law right to sue for full compensation in return for a prompt assurance of benefits, will in fact be assured benefits promptly. This outcome, again, is grounded in statutory text, advances the overarching purpose of the Workers' Compensation Law, and is preferable because it avoids a constitutional ruling. This Court, therefore, should affirm the judgment below.

[1] This interpretation does not ignore the vocational test for permanent total disability. *See* § 440.15(1)(b), Fla. Stat. (2009). If an employee can engage in sedentary work within 50 miles of her residence, then that employee is not permanently and totally disabled within the meaning of the Workers' Compensation Law. *See id*. But that is not this case. Here it was "uncontroverted" that there was no such sedentary employment available to Petitioner Westphal at the expiration of his temporary total disability benefits. *See Westphal*, 122 So. 3d at 462 (Thomas, J., concurring in result only, and dissenting in part). The only question, then, was whether a totally disabled injured worker under instructions not to work (and for whom no sedentary employment was available) was eligible for permanent total disability benefits at the expiration of temporary total disability benefits, despite the possibility of further medical improvement.

II. If the Workers' Compensation Law Is Read to Create a Gap in Which a Totally Disabled but Still Improving Worker Is Uncompensated, Then the 104-Week Limitation on Temporary Total Disability Benefits Should Be Declared Unconstitutional on the Ground That It Is Not a Reasonable Alternative to the Common Law and Statutory Benefits Available to Injured Workers in 1968 When the Declaration of Rights Was Adopted, and Is Not Justified by Any Overpowering Public Necessity.

As the three-judge panel in this case originally observed, *Westphal v. City of St. Petersburg*, No. 1D12-3563, 2013 WL 718653 (Fla. 1st DCA Feb. 28, 2013) (opinion withdrawn), reproduced in Pet'r's App. to Initial Br. 1-24,[2] the Florida Legislature has, over the last three decades, substantially reduced the benefits available to injured employees under the Workers' Compensation Law. For example, whereas the 1990 Workers' Compensation Law "provide[d] injured workers with full medical care and wage-loss payments for total or partial disability," *Martinez v. Scanlan*, 582 So. 2d 1167, 1172 (Fla. 1991), the law in effect today "provides an injured worker with limited medical care, no disability benefits beyond the 104-week period, and no wage-loss payments, full or otherwise," *Westphal* panel decision (Pet'r's App. to Initial Br. 19). And whereas the Workers' Compensation Law in 1968 provided an injured worker with 350 weeks of temporary total disability benefits, *id*. (Pet'r's App. to Initial Br. 11)

[2] The panel decision is no longer available on Westlaw. When citing the First DCA panel decision of February 28, 2013, this brief will hereinafter use the following abbreviated citation: *Westphal* panel decision (Pet'r's App. to Initial Br. XX).

(citing §§ 440.13(1)-(2), 440.15(2), Fla. Stat. (1967)), the law as amended in 1991 reduced these benefits to 260 weeks, *id*. (citing Ch. 91-1, § 18, at 58, Laws of Fla.) (Pet'r's App. to Initial Br. 11-12). In 1994, the Legislature further reduced these benefits to 104 weeks, *id*. (citing Ch. 93-415, § 20, at 118, Laws of Fla.) (Pet'r's App. to Initial Br. 12), and that remains the law today, *see* § 440.15(2)(a), Fla. Stat. This is a 71% reduction from 1968 levels.

Applying the access-to-courts test set forth in *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973), the panel correctly ruled that a 71% reduction in temporary total disability benefits does not qualify as a reasonable alternative for the redress of injuries.[3] In response, Amici Curiae Associated Industries of Florida *et al*., at 2 (hereinafter "AIF Amici Br."), in the court below, called this conclusion "radical," but that has it exactly backwards: Applying *Kluger* to sustain a 71% reduction in benefits, on the belief that injured workers are somehow nonetheless as well off today as they would have been under the law in effect in 1968, is a radical view the panel properly rejected.[4]

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[3] The right of access to courts is preserved in article I, section 21 of the Florida Constitution.

[4] The case for invalidating the 104-week limit as it applies to Westphal is even stronger considering that Westphal has been deprived of common-law remedies as well, and that medical care and wage-loss payments have (respectively) been reduced and eliminated. *See Westphal* panel decision (Pet'r's App. to Initial Br. 18-20).

This is not even a close call. If a 71% reduction in temporary total disability benefits constitutes a reasonable substitute remedy under *Kluger*, then the constitutional right of access to courts is a hollow guarantee, with no significance whatsoever. Accordingly, should this Court consider this constitutional question, AAJ urges the Court to adopt the First DCA panel's persuasive reasoning.

A. *Kluger*'s Requirement of a Reasonable Alternative Remedy Applies to a Reduction in Temporary Total Disability Benefits.

Both the common law and statutory law predating the adoption of the Declaration of Rights of the Florida Constitution in 1968 provided a right of access to the courts for redress of work-related injuries. *See Westphal* panel decision (describing common-law remedies and statutory benefits available at that time) (Pet'r's App. to Initial Br. 11). The Legislature lacks the authority to abolish this right without providing a reasonable alternative for the redress of injuries, absent overpowering public necessity and a lack of alternatives. *Kluger*, 281 So. 2d at 4.

Florida's Workers' Compensation Law abolishes an employee's right to sue her employer and substitutes the right to receive benefits under a compensation scheme. The panel thus considered whether the substitute remedy available to an injured worker who is totally disabled but has not reached maximum medical improvement and must refrain from working for an indefinite period of time—in this case, 104 weeks of temporary total disability benefits—is reasonable in view of the benefits that were available to such workers in 1968.

Amici Associated Industries, in the court below, argued that reductions in benefits are not subject to *Kluger* analysis because *Kluger* only applies where the Legislature has abolished a cause of action. AIF Amici Br. 3 (citing *Jetton v. Jacksonville Elec. Auth.*, 399 So. 2d 396, 398 (Fla. 1st DCA 1981)). According to Amici, the Legislature did not technically abolish a cause of action in 1994 when it further limited temporary total disability benefits to a maximum of 104 weeks; the cause of action had already been abolished. Thus, Amici maintained, this reduction in disability benefits does not even implicate *Kluger*.

This understanding of *Kluger* is wrong. If the constitutional limitations identified in *Kluger* applied only to the first iteration of a statute that abolished a cause of action, but not to any subsequent amendment that reduced benefits previously available under this same law, then the Legislature could easily accomplish in two steps what it could not constitutionally accomplish in one. Amici's contrary views notwithstanding, the right of access is not a mere privilege that the Legislature can evade at will through such procedural formalities. It is a constitutional right expressly recognized in the Declaration of Rights that inheres in individuals and cabins legislative authority.

The Supreme Court agrees. It has repeatedly applied *Kluger*'s reasonableness standard in considering whether further reductions in workers' compensation benefits deny access to courts. *E.g.*, *Martinez*, 582 So. 2d at 1171

(considering whether "the workers' compensation statute is no longer a reasonable alternative to common-law remedies" "because the cumulative effect of chapter 90-201 is to substantially reduce preexisting benefits to employees without providing any countervailing advantages"); *Sasso v. Ram Prop. Mgmt.*, 452 So. 2d 932, 933-34 (Fla. 1984), *appeal dismissed*, 469 U.S. 1030 (1984); *Acton v. Fort Lauderdale Hosp.*, 440 So. 2d 1282, 1284 (Fla. 1983). Critically, in none of these cases did the Court refuse to consider the reasonableness of a reduction in benefits on the theory advanced here by Amici—that no substitute remedy is required by legislation that merely reduces benefits.

The *Sasso* case in particular is instructive. In that case, an injured worker argued that section 440.15(3)(b)3.d., Florida Statutes (1979), which terminated the right to wage loss benefits when the injured employee reached the age of sixty-five and became eligible for social security benefits, denied him access to courts. The First DCA upheld the statute. *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204 (Fla. 1st DCA 1981). In so ruling, the court stated that it had "placed a narrow interpretation on the *Kluger* rule," whereby "no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action." *Id.* at 210 (citing *Jetton*, 399 So. 2d at 398).

The Florida Supreme Court affirmed in a per curiam opinion that expressly—and exclusively—considered whether the workers' compensation law

nevertheless provided the worker with a reasonable substitute remedy. The Supreme Court's analysis began by noting that the workers' compensation law "abolishes the right to sue one's employer and substitutes the right to receive benefits under the compensation scheme." 452 So. 2d at 933. After discussing *Kluger*'s test for access to courts, the Court proceeded immediately to the question whether, "because [the injured worker] no longer may sue his employer for lost wages, and because wage-loss benefits are denied him because of his age, he has been denied any 'reasonable alternative' to his right to sue, in violation of article I, section 21, of the Florida Constitution." *Id*. The Court found that the existing alternative remedies available under the workers' compensation law remained reasonable. *Id*. at 934.

Thus, the Supreme Court in *Sasso* clearly endorsed the view that reductions in workers' compensation benefits implicate *Kluger* precisely because the Legislature, in enacting the workers' compensation law, abolished the right to sue one's employer. *See id*. at 933. Moreover, the Supreme Court adhered to that understanding of *Kluger* in *Martinez*, in which it again considered whether a reduction in workers' compensation benefits satisfied *Kluger*'s requirement that alternative remedies available under the law remain reasonable. 582 So. 2d at 1171.

Sasso's and *Martinez*'s application of *Kluger* to laws reducing workers' compensation benefits makes eminent sense. As discussed, if *Kluger* applied only to the first iteration of a statute that abolished a cause of action, but not to any subsequent amendment that reduced benefits previously available under this same law, then the Legislature could easily circumvent the right of access to courts so long as it moved in two steps rather than one. This understanding of the right, embraced by Amici, suggests that it exists to punish legislative inattention or reward cunning. It does not. The constitutional right exists to protect the people from laws that abolish longstanding causes of action and their attendant remedial rights, and that fail—initially *or as amended*—to provide a reasonable alternative remedy, which is required absent an overpowering public necessity and a lack of alternatives. *Kluger*, 281 So. 2d at 4.

Because the Legislature in section 440.15(2)(a) reduced the benefits available under a statutory scheme that abolishes a common-law cause of action, the panel was right to examine the reasonableness of the reduction in view of the remedies available in 1968. Moreover, the panel was also right in concluding that a 71% reduction in temporary total disability benefits is not a reasonable substitute remedy.

B. Amici's Criticism of the Panel's Discussion of Natural Justice Is Unwarranted.

In the court below, Amici supporting the City of St. Petersburg argued that the panel's invocation of natural justice demonstrates that the panel's constitutional ruling is simply a reflection of its personal policy preferences. AIF Amici Br. 13. That is not so. The panel's ruling is firmly rooted in established access-to-courts precedent, including *Kluger*, which was correctly applied to invalidate section 440.15(2)(a), as that law applies to Westphal and similarly situated injured workers. Also, Amici's criticisms notwithstanding, the panel decision provides excellent guidance to the Legislature regarding what is not a reasonable substitute remedy under *Kluger*. Whatever the outer bounds of the right of access to court for redress may be, surely a 71% reduction in statutory benefits—the effect of which is to "subject[] the worker to the known conditions of personal ruination to collect his or her remedy," *Westphal* panel decision (Pet'r's App. to Initial Br. 19)—is beyond the constitutional mark when, as here, no overpowering public necessity exists, *id.* (noting that "workers' compensation insurance premiums have declined dramatically in Florida since 2003, falling 56%.") (Pet'r's App. to Initial Br. 20).

Far from representing the personal policy predilections of the panel, the decision's discussion of natural justice accurately described the historical development of the common law. When the U.S. Supreme Court indicated, in *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917), that "legislative

extinguishment of 'core' common law rights was permissible only if the legislature furnished an adequate alternative remedy," Cass R. Sunstein, *Lochner's Legacy*, 87 Colum L. Rev. 873, 879 n.30 (1987), "the common law categories were taken as a natural rather than social construct. The status of the common law as a part of nature undergirded the view that the common law should form the baseline from which to measure deviations from neutrality, or self-interested 'deals,'" *id*. at 879. The right of access to courts in the Declaration of Rights, the panel correctly observed, similarly looks to the common-law and statutory remedies in existence in 1968 as the baseline from which to measure whether a substitute remedy is reasonable. *Westphal* panel decision (citing *Kluger*, 281 So. 2d at 4) (Pet'r's App. to Initial Br. 10). To say, as the panel did, that the 104-week limitation on temporary total disability benefits violates natural justice is simply another way of saying that the statute falls below the constitutional baseline recognized in *Kluger*.

C. National and Florida-Specific Data Demonstrate That Florida Provides Far Less in Temporary Total Disability Benefits Than Other States, Even Though No Overwhelming Public Necessity Justifies Its Doing So.

The panel compared Florida's 104-week limit on temporary total disability benefits with limits in other States, finding that the overwhelming majority of jurisdictions allow injured workers to recover temporary total disability benefits for a time period greatly exceeding Florida's 104-week limit. *Westphal* panel decision (citing Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation*

Law, App. B, Tbl. 6 (2006)) (Pet'r's App. to Initial Br. 14-15). More recent data published by the National Academy of Social Insurance confirm this conclusion. Ishita Sengupta *et al*., *Workers' Compensation Benefits, Coverage, and Costs, 2010*, Nat'l Acad. of Social Ins., App. I, at 88-94 (Aug. 2012) (listing temporary total disability benefits available in each State as of January 2012) (hereinafter "National Academy Report").[5]

For example, twenty-eight States provide temporary total disability benefits for the duration of disability. *Id*. Ten others provide 400 weeks or more, including Arkansas (450), Georgia (400 weeks unless catastrophic injury), Indiana (500), Maine (520), Mississippi (450), Missouri (400), New Jersey (400), New Mexico (700), North Carolina (500 weeks but "can be extended by Commission if employee has sustained a total loss of wage-earning capacity"), and Virginia (500). *Id*. In addition, Kansas (225 to 415 weeks, depending on type of injury) may provide as much; and Utah (312) comes close. *Id*.

Oklahoma (156) and Massachusetts (156) provide far less. And Florida (104), along with California (104), North Dakota (104), Texas (105), West

[5] *Available at* http://www.nasi.org/sites/default/files/research/NASI_Workers_Comp_2010.pdf.

Virginia (104), and Wyoming (104), even less (although California law contains exceptions that may extend benefits to 240 weeks). *Id.*[6]

The National Academy of Social Insurance has also documented "the annual changes in benefit payments by state between 2006 and 2010." National Academy Report, *supra*, at 21. In Florida, benefits decreased 2.4% between 2006 and 2007, decreased again by 3.8% between 2007 and 2008, increased 2.6% between 2008 and 2009, and then decreased significantly between 2009 and 2010, by 10.4%. *Id.* at 22 Tbl. 7.

As benefits decreased, employer costs for workers' compensation also declined in Florida, as well as in almost every State, between 2006 and 2010. *Id.* at 32-33 & Tbl. 11. And, as the panel noted, compensation insurance premiums in Florida have declined substantially—56%—since 2003. *Westphal* panel decision (Pet'r's App. to Initial Br. 20).

In view of this data, the panel was right to conclude that Florida provides far less in temporary total disability benefits than other States, and that no overpowering public necessity exists to justify Florida's dramatic, 71% reduction in temporary total disability benefits as compared with benefits offered in 1968.

[6] Also, Texas is unique in that its workers' compensation system is voluntary; employers who opt out are not protected from tort suits. National Academy Report, *supra*, at 6.

CONCLUSION

For the reasons just discussed, this Court should hold that, under the Workers' Compensation Law, a worker who is totally disabled and unable to work but still improving medically at the time temporary disability benefits expire is deemed by statute to be at maximum medical improvement and thus is eligible to assert a claim for permanent and total disability. Because Petitioner Westphal has already established his eligibility for such benefits through medical and vocational testimony, the case should be remanded with instructions that he be awarded about nine months' worth of permanent total disability benefits.[7]

Should the Court reach the constitutional question, however, it should hold, consistent with the First DCA panel's ruling, that section 440.15(2)(a) denies Westphal and similarly situated claimants the Florida constitutional right of access to courts.

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[7] The en banc First DCA's decision is not entirely clear on this point, and different judges read it differently. *Compare* 122 So. 3d at 451 (Benton, J., concurring) ("I concur in the judgment insofar as it *requires* that Mr. Westphal be awarded approximately nine months' worth of permanent total disability benefits on remand.") (emphasis added) *with id*. at 455-56 (Thomas, J., concurring in result only, and dissenting in part) ("So why remand the case for any purpose other than to enter judgment in favor of Mr. Westphal?"). Should this Court affirm the judgment below, its remand order should clarify that Petitioner Westphal is entitled to about nine months' worth of permanent total disability benefits, and that he is not required to prove what he has already proved—that he was totally disabled and unable to work when his temporary total disability benefits expired.

Date: January 31, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January, 2014, a true and correct copy of the foregoing Amicus Curiae Brief of the American Association for Justice in Support of Petitioner was served via electronic mail delivery to the following counsel:

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