IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BRADLEY WESTPHAL,

Appellant,

v.

CITY OF ST. PETERSBURG/ CITY OF ST. PETERSBURG RISK MANAGEMENT & STATE OF FLORIDA

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-3563

Opinion filed February 28, 2013.

An appeal from an order of the Judge of Compensation Claims.
Stephen L. Rosen, Judge.

Date of Accident: December 11, 2009.

Jason L. Fox of the Law Offices of Carlson & Meissner, Clearwater; Richard A. Sicking, Coral Gables, for Appellant.

John C. Wolfe, City Attorney, and Kimberly D. Proano, Assistant City Attorney, St. Petersburg, for Appellees City of St. Petersburg/City of St. Petersburg Risk Management; and Pamela Jo Bondi, Attorney General, Timothy D. Osterhaus, Solicitor General, Allen Winsor, Chief Deputy Solicitor General, Rachel E. Nordby, Deputy Solicitor General, Office of the Attorney General, Tallahassee, for Intervenor State of Florida.

THOMAS, J.

Bradley Westphal challenges an order denying his claim for **permanent** total disability benefits under the Florida Workers' Compensation Law. Westphal

also challenges the constitutionality of the current system of redress for workplace injuries found in chapter 440, Florida Statutes. We conclude and hold that section 440.15(2)(a), Florida Statutes (2009), is unconstitutional under article I, section 21, of the Florida Constitution, as applied to Westphal and others similarly situated, by limiting him to no more than 104 weeks of **temporary** disability benefits, despite the fact that he was at that time totally disabled, incapable of engaging in employment, and ineligible for any compensation under Florida's Workers' Compensation law for an indeterminate period. We reverse the order below and remand with instructions to grant Westphal additional temporary total disability payments, not to exceed 260 weeks, as would have been provided under the relevant statutory provisions in effect before the 1994 amendment of section 440.15(2)(a), Florida Statutes.

Facts and Procedural History

Westphal, a firefighter and paramedic, injured his back and knee in the course of his employment. Westphal suffered severe injuries, resulting in nerve damage in the legs and requiring spine surgery and other medical treatment. The Employer/Carrier (E/C) accepted the injury as compensable and paid Westphal temporary total disability benefits under section 440.15(2)(a), Florida Statutes.

While recovering from the most recent surgery, and while on a total disability status as declared by his workers' compensation doctors, Westphal's

entitlement to the 104 weeks of temporary total disability benefits expired, as required by 440.15(2)(a).[1] At this point, however, Westphal was incapable of working or obtaining employment, based on the advice of his doctors and the vocational experts that examined him. In an attempt to replace his pre-injury wages that he was losing because of his injuries, approximately $1,500 per week, Westphal, being some three years removed from his workplace accident, filed a claim for permanent total disability benefits—a classification of benefits available to workers who have a disability total in quality and permanent in duration. See § 440.15(1), Fla. Stat. (2009).

Relying on the Court's decision in Matrix Employee Leasing, Inc. v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011), the JCC properly denied Westphal's request for permanent total disability benefits, finding that because Westphal had not reached maximum medical improvement, it was too speculative to determine whether he would remain totally disabled from a physical standpoint after his maximum medical improvement status was reached. As the JCC acknowledged,

[1] According to the payout record attached to the pretrial stipulation, Westphal was paid impairment benefits totaling $14,917.50, translating to 26 weeks of benefits during the gap. Nevertheless, under section 440.15(3)(a), such benefits should not have been paid, in that this section provides "Once the employee has reached the date of **maximum medical improvement**, impairment benefits are due and payable . . . ." (Emphasis added.) And, as noted, Westphal had not reached maximum medical improvement before the expiration of his temporary total disability benefits.

Westphal fell into the "statutory gap" for indemnity benefits: He could no longer receive temporary benefits, and he was not yet eligible for permanent total disability benefits, despite the undisputed severity of his injuries and his inability to obtain employment, which would involve disobeying medical advice. As we stated in Hadley: "[w]here, as here, the employee is not at [maximum medical improvement] at the expiration of the 104 weeks, there is the potential for a 'gap' in disability benefits because [temporary total disability] benefits cease by operation of law after 104 weeks and entitlement to [permanent total disability] benefits is generally not ripe until the employee reaches [maximum medical improvement]." Id. at 624.

The gap in which Westphal fell is the same statutory gap we identified in Hadley, wherein we cited numerous cases in which this court has upheld the rule announced in City of Pensacola Firefighters v. Oswald, 710 So. 2d 95 (Fla. 1st DCA 1998). In Oswald, we attempted to "ameliorate" this gap by allowing a severely injured worker to attempt to prove that he would ultimately be declared permanently and totally disabled, despite the fact that he was still recovering from his workplace injuries and still in need of additional medical treatment. Hadley, 78 So. 3d at 624.

Otherwise, if the doctor chosen by the employer determines that the claimant is still improving medically, a severely injured worker has no legal right to obtain

any other disability benefits. As we recognized in Hadley, the occurrence of a "statutory gap" in disability benefits for a severely injured worker has not been a rare circumstance, and we have adhered to the Oswald rule many times. Id. at 625-26 ("We have consistently applied the rule of law announced in Oswald over the past 13 years . . . .").

We now must answer a question not raised in Hadley, but noted by the dissenting opinion: Whether this "statutory gap" created under Florida's Worker Compensation Law violates article I, section 21 of the Declaration of Rights in the Constitution of the State of Florida. See Hadley, 78 So. 3d at 634 (Van Nortwick, J., dissenting). We emphasize that the constitutionality of the 104-week limitation on temporary total disability benefits was not an issue in that case—the issue presented in Hadley was one of statutory interpretation relative to Hadley's entitlement to **permanent** total disability benefits. See 78 So. 3d at 623 n.2. We now determine that Westphal is precisely the type of severely injured worker who has been denied access to courts and the constitutionally guaranteed right to the administration of justice without denial or delay, in violation of the Florida Constitution.

Standard of Review

A determination concerning the constitutionality of a statute is a question of law reviewed de novo. See Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d

925 (Fla. 1st DCA 2005). Here, we review that provision of the constitution that guarantees Westphal access to the courts, but in addition, also guarantees that he will receive justice **without denial or delay**: "[T]he Courts shall be open to every person for redress of any injury, **and justice shall be administered without sale, denial or delay**." Art. I, § 21, Fla. Const. (emphasis added). To the extent possible, courts have a duty to construe a statute in such a way as to avoid conflict with the constitution. See The Fla. Bar v. Sibley, 995 So. 2d 346 (Fla. 2008), cert. denied, 555 U.S. 1188 (2009). If a statute may be construed in multiple ways, one of which is unconstitutional, courts should adopt the constitutional construction. See D.S. v. J.L., 18 So. 3d 1103 (Fla. 1st DCA 2009). In Hadley, this court, in an en banc decision, concluded that the proper interpretation of the statutory scheme now before us is not "susceptible" to another interpretation, specifically one which removes the "gap" in disability benefits for individuals situated such as Westphal. See 78 So. 3d at 626. We are bound by this conclusion, and thus our constitutional analysis today is based on this court's interpretation of chapter 440 in Hadley.

In conducting our constitutional analysis, we must look to the statutory law in place when this constitutional amendment to Florida's organic law was adopted:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to

> protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).

Thus, we look to the statutory remedies that would have been available to a similarly injured worker in 1968, when Florida's electorate adopted both the right of access to the courts and the timely administration of justice in our organic law. We emphasize there are two different rights contained in the constitutional provision at issue: Both the right to enter the courthouse doors (or a reasonable alternative thereof), and, once inside, the right to the administration of justice "without sale, denial or delay."

Discussion and Analysis

As noted, Westphal was severely injured and disabled while performing his duty as a firefighter in 2009, but he was prohibited by law from suing his employer to recover any damages. Instead, under Florida law, Westphal was required to obtain any and all remedy for his injuries from the City, under the Florida Workers' Compensation Law, codified in chapter 440, Florida Statutes.

Under this law, the City—not Westphal—had the right to select and, if appropriate, de-select, the doctors who would treat his work-related injuries. Through this statutory system of recovery, the City had the right to meet and confer with their selected doctors without Westphal's involvement, and obtain

otherwise-confidential medical information—whether or not Westphal consented to such communications. And the City had the right to make decisions as to whether it would authorize the medical treatment recommended by the doctors of its choosing. For his part, Westphal, removed from his otherwise inherent right to select his medical providers and make unfettered decisions about his medical care, was required to follow the recommendations of the doctors authorized by his employer. Should he fail to do so, he risked losing entitlement to his workers' compensation benefits, his only legal remedy.[2]

As part of his medical care, Westphal required multiple surgical procedures, culminating in a five-level fusion of the lumbar spine. Under chapter 440, Westphal was then required to refrain from working **and go without disability pay or wages**—and **wait**. Westphal had to wait until the E/C's authorized doctors opined that he had reached maximum medical improvement, with no guarantee that such a day would ever come. But, even once he fully recovered, Westphal could not, under normal circumstances, recover disability benefits for the indeterminate waiting period.

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[2] See Lobnitz v. Orange Mem'l Hosp., 126 So. 2d 739 (Fla. 1961) (reversing award of compensation for period when claimant declined available medical treatment which would have ameliorated skin condition); see also Sultan & Chera Corp. v. Fallas, 59 So. 2d 535, 537 (Fla. 1952) ("There can be no question that an injured employee will be denied compensation because of some disability which may be removed, or modified, by an operation of a simple character not involving serious suffering or danger of death.").

We hold that such a result cannot comport with any legal or natural notion of justice. It does not comport with a notion of legal justice, because it violates Westphal's state constitutional right of access to courts, and it violates his right to the administration of justice "without . . . denial or delay," under article I, section 21, of the Florida Constitution. This system of redress does not comport with any notion of natural justice, and its result is repugnant to fundamental fairness, because it relegates a severely injured worker to a legal twilight zone of economic and familial ruin.

Addressing the concept of natural justice first, the Supreme Court of the United States has instructed that in analyzing the constitutionality of a workers' compensation system, a court "cannot ignore" whether the arrangement is unreasonable "from the standpoint of natural justice." See N.Y. Cent. R. Co. v. White, 243 U.S. 188, 202 (1917). In describing the "natural justice" that must be considered in determining the validity of a workers' compensation scheme, the Court in White explained that it is not unreasonable to require an employer to bear the expense of an employee's injury or death, because the employer benefits from the employee's efforts and the employee is thereby subjected to the risks of the employer's trade. Id. at 203-04. And although the employee subject to a workers' compensation scheme must surrender his right to collect full damages that may be attributable to the fault of his employer, natural justice is not offended by a

substitute system of redress because the employee is assured "easily ascertained compensation" under this alternate scheme. Id. at 204.

The concept of fundamental or "natural" justice is not foreign to Florida jurisprudence. Article I, section 21, of the Florida Constitution guarantees that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." At the core of this constitutional guarantee for redress of injury is a promise that "justice shall be administered"—but even more so, without denial or delay. Although reasonable debate might be had on whether a particular system for the redress of injury is sufficiently swift or adequate to meet the constitutional guarantees of article I, section 21, it should be beyond debate that, if a system of redress is so fundamentally unjust as to violate the very tenets of natural justice, it cannot pass constitutional muster.

In accord, the Florida Supreme Court, in arriving at the proper test to be used to determine whether the Legislature can abolish a cause of action or a statutory right to redress for injury, held that the Legislature may do so, but it must provide a **reasonable** alternative to the right being removed or substituted. Kluger, 281 So. 2d at 4. This test, although addressing the reasonableness of the alternative means by which an injury might be redressed, is, of necessity, a recasting of the question of whether a substitute system of redress enacted by the Legislature is a just and adequate substitute for those rights available through

statutory or common law existing upon the adoption of the Declaration of Rights of the Constitution of the State of Florida on November 5, 1968.[3]

Hence, we turn to the rights available to an injured worker eligible for workers' compensation benefits in 1968. On November 5, 1968, Florida statutory law provided an injured worker **full medical benefits**, a right to **veto the carrier's selection in physician**, and notably, **350 weeks of temporary total disability benefits**. §§ 440.13(1)-(2), .15(2), Fla. Stat. (1967). And at common law, in 1968, an individual with the right to sue in tort for injury could recover the full amount of his or her damages, including any lost wages and other non-economic damages, all without legislatively imposed restrictions—rights which are purportedly substituted, and definitely foreclosed, by the workers' compensation system. See generally Smith v. Dep't of Ins., 507 So. 2d 1080, 1087 (Fla. 1987). Here, Westphal has been deprived of substantial common law **and** statutory remedies, to the point where he is denied any disability payment, despite his unchallenged inability to work while he recovers from severe, life-altering injuries.

In 1991, more than twenty years after Florida adopted the Declaration of Rights of the Constitution of the State of Florida, the Florida Legislature reduced injured workers' available temporary total disability benefits from 350 to 260

[3] The Florida Supreme Court has clarified that the "adoption of the Declaration of Rights" referred to in Kluger refers to the November 5, 1968, adoption of the Florida Constitution. See Eller v. Shova, 630 So. 2d 537, 542 n.4 (Fla. 1993).

weeks, a reduction of two years, or 28.5%. See Ch. 91-1, § 18, at 58, Laws of Fla. In 1994, the Legislature again substantially amended chapter 440, and reduced the temporary total benefits available to an injured worker from 260 to 104 weeks, a 60% reduction from 1991 levels, and a 71% reduction when compared to the temporary total disability benefits available in 1968. See Ch. 93-415, § 20, at 118, Laws of Fla.

Just as significantly in the 1994 Law, the Florida Legislature also removed a statutory provision that made it unlawful for an employer or carrier to "coerce or attempt to coerce a sick or injured employee in the selection of a physician . . . ." § 440.13(3), Fla. Stat. (1993). This statute gave employers and insurance carriers the nearly unfettered right to select treating physicians in workers' compensation cases. See Butler v. Bay Center/Chubb Ins. Co., 947 So. 2d 570 (Fla. 1st DCA 2006) (explaining carrier's right to select physicians under chapter 440). Under the law as amended in 1994—applicable here—temporary benefits "cease" at the termination of 104 weeks, regardless of the condition of the injured worker. See § 440.15(2)(a), Fla. Stat. (Supp. 1994). And, under this court's decisional law, an injured worker who is totally disabled and still recovering from his or her injuries at the expiration of 104 weeks of temporary disability benefits is prohibited from obtaining permanent total disability benefits—even if he or she must refrain from working for an indefinite period of time on the advice of those doctors selected by

the employer and its workers' compensation carrier. See Hadley, 78 So. 3d at 622.

Westphal has thus fallen into the class of workers' compensation recipients who are unable to work but are not receiving any disability payments, because they have exhausted their entitlement to temporary benefits before they reached overall maximum medical improvement. In fact, Westphal spent nine months without receiving any disability payments before the E/C agreed that he was entitled to permanent total disability benefits.

Here, we must review the dramatic reduction in temporary total disability benefits provided to severely injured workers in Florida in 1994, in context with 1968 law,[4] and also in comparison with the laws of other states. This is necessary

[4] The State argues that because the 1968 version of the Workers' Compensation Law limited weekly temporary total disability benefit payments to $49, Westphal cannot maintain a constitutional challenge to the benefits currently provided under the law. Thus, argues the State, Westphal has recovered more money than he would have under the 1968 Act. The State's argument in this regard ignores the inflationary factors that explain the difference in amount of the benefits available in 1968 and those currently permitted by statute. In addition, this argument fails to acknowledge that the core function of the workers' compensation remedy is to replace wages for the individual who has been injured. See Nat'l Distillers v. Guthrie, 473 So. 2d 806, 808 (Fla. 1st DCA 1985) ("The workers' compensation statute is designed to replace actual wages which an injured employee formerly received but later lost by reason of a compensable injury."). In workers' compensation jurisprudence, the compensation rate, the weekly benefit amount payable for disability, has always been a product of the injured worker's average weekly wage, limited by the statewide average weekly wage for the year in which the injury occurred. See § 440.12, Fla. Stat. Thus, a reference to the dollar amount of benefits that an injured worker such as Westphal would have received in 1968 is

to evaluate both the legal and natural justice involved with such a change in the law.

When the 104-week limit on Florida's temporary total disability is compared to limits in other jurisdictions, it becomes readily apparent that the current limit is not adequate and does not comport with principles of natural justice.[5] The

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insufficient to answer the question before us, as it can be said with near certainty that Westphal, or another similarly situated injured employee, would not have been earning $1,500 a week in wages in 1968; had he been, however, another substantial issue would likely arise as to whether $49 a week would constitute adequate redress for his injuries. Notably, however, the constitutionality of the limitation on the weekly rate of compensation as provided in section 440.12(2) is not before us. Furthermore, more than forty years ago, the Florida Supreme Court in Thompson v. Florida Industrial Commission, 224 So. 2d 286, 287 (Fla. 1969), recognized the inadequacy of even a 350-week limitation on temporary total disability benefits. The Thompson court, which did not address the constitutional issue presented here, implicitly advised that this shortcoming should be remedied by the Legislature. Id. Rather than heed the recommendation in Thompson, the Legislature cut back temporary disability benefits, exacerbating the "inadequacy" acknowledged in Thompson, and thus, creating the system we now review on constitutional grounds.

[5] The State's brief urges that the reduction in a single classification of benefits (or damages) cannot, presumably under any circumstances, invalidate the constitutionality of the workers' compensation scheme, because there is a right to some recovery by the injured worker under chapter 440. In Smith, the Florida Supreme Court rejected a similar argument, and struck and severed a statutory cap on non-economic damages from the Tort Reform and Insurance Act of 1986, reasoning, in relevant part, as follows:

> [I]f the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1. None of these caps, under the reasoning of appellees, would "totally" abolish the right of access to the courts. . . . There are political systems where constitutional rights are subordinated to the power of the executive or

overwhelming majority of jurisdictions—in excess of forty—allow a minimum of 312 weeks, three times the benefits provided to Florida's injured workers, up to a maximum entitlement of unlimited duration (i.e., for the duration of disability). Only five jurisdictions limit disability benefits to 104 weeks, and one of those has enough exceptions to allow for the receipt of disability benefits for up to seven years. See Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, Appendix B, Table 6 (2006).

But we do not end our analysis there. To ensure a fair and proper examination, we review the duration of temporary total disability benefits available in our sister states, as these states are more likely to face similar economic conditions. This examination reveals Florida to be even more significantly lacking in providing disability payments to severely injured workers, with two sister states

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legislative branches, but ours is not such a system.

507 So. 2d at 1089. We note that the State's argument in this regard is contrary to the doctrine of severability (discussed *infra*). The State seems to suggest that no severable portion of the workers' compensation scheme may be struck on constitutional grounds or on an as-applied basis, so long as the Act is generally fair to other injured workers. This argument seems to reduce an individual's constitutionally guaranteed right of access to the courts for the redress of any injury and to the administration of justice, to something other than the individual right that it is. See Art. I, § 21, Fla. Const. ("[T]he Courts shall be open to **every person** for redress of any injury, and justice shall be administered without sale, denial or delay.") (emphasis added); see generally Holland v. Mayes, 19 So. 2d 709, 711 (Fla. 1944) (interpreting right to access to courts contained in Declaration of Rights as giving "life and vitality" to the maxim "for every wrong there is a remedy").

imposing **no limit** to the payment of temporary total disability payments, and no state providing less than **400 weeks** of this benefit. See Section 25-5-57, Alabama Workers' Compensation Law ("This compensation [temporary total disability benefits] **shall be paid during the time of the disability** . . . ."); Code Section 34-9-261, Georgia Workers' Compensation Law ("The weekly benefit under this Code section shall be payable for a maximum period of **400 weeks** from the date of injury . . . ."); La. R. S. 23:1221(1)(a), Louisiana Workers' Compensation Law ("For any injury producing temporary total disability [compensation **shall be paid** at the rate of] sixty-six and two-thirds percent of wages **during the period of such disability**."); Section 71-3-17, Mississippi Workers' Compensation Law ("In case of disability, total in character but temporary in quality, [benefits] shall be paid to the employee during the continuance of such disability not to exceed **four hundred fifty (450) weeks** . . . ."); G.S. 97-29(b), North Carolina Workers' Compensation Act ("The employee shall not be entitled to compensation pursuant to this subsection [addressing temporary total disability] **greater than 500 weeks** from the date of first disability unless the employee qualifies for extended compensation under subsection (c) of this section."); Section 42-9-10(A), South Carolina Workers' Compensation Law ("In no case may the period covered by the compensation [for total incapacity for work resulting from an injury] **exceed five hundred weeks** except as provided in subsection (C) [addressing permanent total

disability]"); T.C.A. 50-6-207, Tennessee Workers' Compensation Law (providing for payment of temporary disability "during the period of the disability, not, however, **beyond four hundred (400) weeks**") (emphasis added in all citations).

Finally, we look to whether this case is an isolated example, and thus, inappropriate to consider as indicative of a systemic deprivation of justice. We find that our own decisions disprove such a conclusion. See Hadley, 78 So. 3d at 622 (explaining JCC denied claim for permanent total disability after claimant received 104 weeks of temporary benefits even though doctors opined claimant was totally disabled, not at MMI, and would need additional surgeries); see also East v. CVS Pharmacy, Inc., 51 So. 3d 516, 516-17 (Fla. 1st DCA 2010); Crum v. Richmond, 46 So. 3d 633, 636 (Fla. 1st DCA 2010); Fla. Transport 1982, Inc. v. Quintana, 1 So. 3d 388, 389-91 (Fla. 1st DCA 2009); Olmo v. Rehabcare Starmed/SRS, 930 So. 2d 789 (Fla. 1st DCA 2006); Rivendell of Ft. Walton v. Petway, 833 So. 2d 292 (Fla. 1st DCA 2002); Office Depot v. Sweikata, 737 So. 2d 1189, 1191-92 (Fla. 1st DCA 1999); Oswald, 710 So. 2d 95, 98 (Fla. 1st DCA 2011).

This case illustrates a recurrent problem resulting from the 104-week limitation on temporary disability benefits enacted by the Legislature effective January 1, 1994—which limitation was carried over to the 2003 enactment at issue here. When an employee sustains serious injuries that require prolonged or

complicated medical treatment, it is not unusual for that claimant to exhaust entitlement to 104 weeks of temporary disability benefits before reaching maximum medical improvement (the status of full medical recovery)—paradoxically leaving only seriously injured individuals without compensation for disability while under medical instructions to refrain from work that cannot be ignored lest a defense of medical non-compliance be raised.[6] Although this result is anathema to the stated purposes of chapter 440, providing injured workers with prompt medical and indemnity benefits, this court has held on numerous occasions that an award of permanent total disability benefits is premature until an injured worker reaches the stage of full medical recovery. See Anderson & Padgett Sawmill v. Collins, 686 So. 2d 795, 796 (Fla. 1st DCA 1997).

In Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991), the Florida Supreme Court employed the Kluger test to address a challenge to the constitutional validity of the 1990 Workers' Compensation Law. The supreme court struck the law on other grounds, but concluded that chapter 90-201, which reduced available benefits when compared to the predecessor act, was not constitutionally infirm because "[i]t continue[d] to provide injured workers with full medical care and wage-loss payments for total or partial disability . . . ." 582 So. 2d at 1172. We are now

[6] See Lobnitz, 126 So. 2d at 739 (reversing compensation award for period when claimant declined available medical treatment which would have ameliorated skin condition).

presented with a different iteration of the Workers' Compensation Law from that addressed in Martinez—one which 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.[7] And, the lack of disability compensation occurs only because the severely injured worker **has not** reached maximum medical improvement as to the very injury for which redress is guaranteed under the Florida constitution.

The natural consequence of such a system of legal redress is potential economic ruination of the injured worker, with all the terrible consequences that this portends for the worker and his or her family. A system of redress for injury that requires the injured worker to legally forego any and all common law right of recovery for full damages for an injury, and surrender himself or herself to a system which, whether by design or permissive incremental alteration, subjects the worker to the known conditions of personal ruination to collect his or her remedy, is not merely unfair, but is fundamentally and manifestly unjust. We therefore conclude that the 104-week limitation on temporary total disability benefits

[7] Under the 1991 Act, wage-loss benefits were payable to an injured worker who had achieved the status of maximum medical improvement to compensate the worker for an injury that was permanent in duration and partial in quality. See § 440.15(3)(b), Fla. Stat. (1991). The amendments to chapter 440, effective October 1, 2003, removed the availability of such benefits. See § 440.15(3), Fla. Stat. (2003).

violates Florida's constitutional guarantee that justice will be administered without denial or delay.

Further, we hold that there is simply no public necessity, much less an overpowering one, that has been demonstrated to justify such a fundamentally unjust system of redress for injury. In fact, workers' compensation insurance premiums have declined dramatically in Florida since 2003, falling 56%.[8]

Thus, while it may be correct, as the Solicitor General noted in oral argument, that this decline in workers' compensation insurance premiums attests to the effectiveness of reforms limiting benefits to injured workers, this fact would not support a claim of an overwhelming public necessity under article I, section 21, of the Florida Constitution to justify the draconian reduction of temporary total disability payments under Kluger v. White. Thus, the 104-week limitation is not

[8] Florida Insurance Commissioner Kevin McCarty approved a 6.1% workers' compensation insurance rate increase, effective January 1, 2013, but noted that "[e]ven with this increase, Florida's rates are still 56 percent below the rates prior to the 2003 reforms, and are competitive with other states nationally." See Florida Office of Insurance Regulation, 2012 Workers' Compensation Annual Report, 3 (Dec. 2012), http://www.floir.com/sitedocuments/wc2012annualreport.pdf. According to the 2012 Annual Report mandated by section 627.211(6), Florida Statutes, "Based on a comparative analysis across a variety of economic measures, the worker's compensation market in Florida **is competitive.**" Id. (emphasis added). Looking historically, according to the Annual Report issued in 2001, "[c]omparison of cumulative rate changes since 1978 between Florida and the nation as a whole highlights the volatility of state rates. . . . Across all years, however Florida's rates have remained lower relative to 1978 than national rates." See Division of Workers' Compensation, 2001 Annual Report, 70 (2001), http://www.myfloridacfo.com/wc (then click on "Annual Reports" and scroll down to "2001 Annual Reports").

an adequate substitute for the benefits provided to seriously injured workers in 1968, and no public necessity can justify the unjust nature of the system of redress available today.

Severability and Statutory Revival

We must now decide whether chapter 440's unconstitutional limitation on temporary total disability benefits renders the entire workers' compensation system invalid, or whether this limitation can be severed from the Law. Severability is a judicial doctrine—"derived from the respect of the judiciary for the separation of powers"—which acknowledges the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions. See Fla. Dep't of State, Div. of Elections v. Martin, 916 So. 2d 763, 773 (Fla. 2005); see also 10 Fla. Jur. 2d Constitutional Law § 123 (2003). "The portion of a statute that is declared unconstitutional will be severed if: '(1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken.'" State v. Catalano, 37 Fla. L. Weekly S763, S766 (Fla. Dec. 13, 2012) (quoting Lawnwood Med. Ctr., Inc. v.

Seeger, 990 So. 2d 503, 518 (Fla. 2008)). If the legislative intent of the statute cannot be fulfilled absent the unconstitutional provision, the statute as a whole must be declared invalid. Martin, 916 So. 2d at 773. Applying the foregoing test, we hold that severing the 104-week limitation on temporary total disability benefits from chapter 440 is both permissible and necessary, because this limitation can be separated from the remainder of the Act, leaving a complete system of recovery suited to fulfill the express legislative intent contained in section 440.015, Florida Statutes.

Having stricken on constitutional grounds the 104-week limitation on temporary total disability benefits, we now must decide whether the Workers' Compensation Law shall proceed with no limitation on temporary total disability benefits, or whether another remedy can be achieved. Again, at the time of the 1968 adoption of the Declaration of Rights of the Constitution of the State of Florida, injured workers were permitted to recover 350 weeks of temporary total disability benefits. See § 440.15(2), Fla. Stat. (1967). Under the doctrine of judicial revival, "when the Legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional." B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994). This rule generally is applicable only where the loss of the invalid statutory

language will result in an intolerable "hiatus" in the law. Id. In accordance with the foregoing, we hold that the limitation in the Act preceding the 1994 amendments to chapter 440 is revived. Thus, the limitation on temporary total disability benefits available to claimants is 260 weeks, as established in the last version of the Act that does not contain this invalid 104-week limitation, specifically, the Act as enacted on January 24, 1991. See § 440.15(2)(a), Fla. Stat. (1991); Ch. 91-1, § 18, at 58, Laws of Fla.

This opinion shall have prospective application only, and shall not apply to rulings, adjudications, or proceedings that have become final prior to the date of this opinion. See generally Aldana v. Holub, 381 So. 2d 231, 238 (Fla. 1980) (holding statutory medical mediation procedure unconstitutional, but permitting prospective application only); Martinez, 582 So. 2d at 1176 (holding chapter 90-201 unconstitutional, but concluding that holding "shall operate prospectively only").

Conclusion

For the above reasons, we hold that section 440.15(2)(a), Florida Statutes, is unconstitutional as applied, to the extent that it limits entitlement to temporary total disability benefits to 104 weeks, and we revive the repealed portion of the statute to allow for entitlement temporary total disability benefits in an amount not to exceed 260 weeks.

REVERSED AND REMANDED.

DAVIS and PADOVANO, JJ., CONCUR.