

# 1st DCA Declares Statutory Restrictions on Attorney Fees Unconstitutional

A panel from Florida's 1st District Court of Appeal on Wednesday declared the state's statutory limits on the compensation of claimants' attorneys unconstitutional, as applied to an injured police officer who was willing to pay an hourly fee to her counsel.

To the extent that Florida Statutes Sections 440.105(3)(c) and 440.34 limit a worker's ability to retain counsel under a contract that provides for the payment of a reasonable fee for the attorney's services, the court said, the statutes violate the worker's constitutionally guaranteed right to free speech, freedom of association and right to petition for redress.

"Included in the First Amendment's fundamental guarantee of freedom of speech association, and to petition for redress of grievances, is the right to hire and consult an attorney," the court said.

Section 440.34 provides that a claimant attorney is entitled to a fee equal to 20% of the first \$5,000 in benefits secured for a client, 15% of the next \$5,000 secured and 10% of any amount secured in excess of \$10,000.

The statute further provides that a judge cannot approve any other payment arrangement, and Section 440.105(3)(c) criminalizes an attorney's receipt of any payment that has not been approved by a JCC.

The problem with these statutes, according to attorneys Michael Winer and Geoff Bichler, is that workers who weren't likely to get a large award of benefits can't find counsel.

Bichler on Wednesday explained that it simply isn't financially practicable for attorneys to take on clients with these low-value claims because 10% of the recovery wouldn't turn a profit.

He said that's what his firm had to tell Edgewater Police Officer Martha Miles when she came walking in.

Miles was allegedly exposed to toxic chemicals used to make crystal methamphetamine on two occasions in 2011, and she claims these events aggravated her asthma to the point it became disabling.

She filed a comp claim, but after she voluntarily withdrew it, the city filed a motion to recover the \$3,860.82 it said it had expended in preparation to defend itself.

Miles then went to her union for help. The Fraternal Order of Police Lodge 40 said it was willing to pay Bichler's firm \$1,500 for the first 10 hours of work, and Miles agreed to pay the firm \$150 per hour thereafter.

Bichler on Wednesday recalled that "they were in disbelief when I told them, 'I'm sorry, you can't pay me.'"

He said he was willing to accept the deal if a JCC signed off on it, but Judge Mark Massey found Sections 440.105(3)(c) and 440.34 prohibited the payment arrangement being proposed by the union and Miles.

Miles refiled her claim and wound up going to trial without an attorney, where she told the JCC that she hadn't been able to find anyone who "works for free." But she didn't introduce any evidence to support her claim at the trial, so Judge Massey denied it.

Miles then hired Bichler and Tampa-based attorney Mike Winer to appeal the judge's decision. Their argument on appeal was that Sections 440.105(3)(c) and 440.34 violated Miles' free speech right guaranteed under the First Amendment to the U.S. Constitution.

The City of Edgewater did not contest the merits of this argument, but Attorney General Pam Bondi's office stepped into defend the constitutionality of the Florida laws.

The court found that Sections 440.105(3)(c) and 440.34 infringed on Miles' rights by leaving her in the position where "no reasonable attorney would accept the risk of investing their labor into representing (her)."

The court said the state has no interest in "protecting the amount of benefits secured by an injured worker against unreasonable attorney's fee payments, or of protecting the body of workers' compensation benefits from depletion," because such benefits "could not be implicated if securing any benefits was effectively prevented by claimant's inability to secure counsel."

The court acknowledged that the Legislature could have a valid interest in preventing workers from "quixotically" seeking benefits they are unlikely to obtain and discouraging "meritless litigation."

However, "in a free society which attempts to allow individuals the intellectual prerogative to personally weigh the benefits and risk of exercising their statutory right to obtain redress for their injury, we hold that the rational intent to minimize workplace litigation cannot ultimately trump the benefits the public obtains by allowing an injured worker, or one who personally thinks she is injured, to seek redress under law."

Winer said Wednesday that the court's decision was "expected," given "the well-established precedent from the United States Supreme Court saying you can't legislate against unions being able to hire lawyers on behalf of injured on the job."

He said the 1st DCA has "opened the door for people who previously couldn't get lawyers to get lawyers now," by recognizing "everybody has a right to have representation" and to contract to pay that attorney a "reasonable" fee, which can be paid by a union, by "the proverbial rich uncle," by the claimant or out of the recovery that the attorney may obtain.

Winer said he thought the requirement that a JCC approve the fee would provide an adequate safeguard to protect workers from potential over-reaching, and Bichler agreed.

Bichler added that the Florida Bar Rules of Professional Conduct provide a second form of oversight, too, as they say attorneys can "only charge a reasonable fee," otherwise they will be subject to discipline.

Winer and Bichler said neither had heard whether the state will appeal the decision, and Kylie Mason, the press secretary for Bondi's office, said the decision was still being reviewed as of Wednesday afternoon.

Bichler said he wouldn't be surprised if the state were to appeal, especially because the Supreme Court already has three workers' compensation cases involving constitutional challenges pending before it.

Bichler said he thought "having another case at the Supreme Court level would be beneficial to injured workers," because it would provide another means to "frame the current problems with system."

One of the cases that has been pending at the Supreme Court for more than two years, *Castellanos v. The Next Door Co.*, involves a challenge to the Section 440.34's fee caps.

*Westphal v. City of St. Petersburg* has been pending at the Supreme Court even longer. That case involves a dispute about whether the state's 104-week cap on temporary disability is unconstitutional as applied to an injured firefighter who exhausted his benefits nine months before he became medically stationary.

The latest case to go up the the Supreme Court is *Stahl v. Hialeah Hospital*, which centers on the question of whether the legal remedies provided by the Florida workers' compensation system make it an adequate substitute for the civil causes of action that were given up by workers as part of the grand bargain.

Winer said that all of these cases are somewhat related, as they involve workers' compensation issues, but while they "are all in the same pond," they are "different species of fish." He said he hoped the Supreme Court would see things that way, too, and so Wednesday's decision from the 1st DCA won't cause the court to delay the issuance of a decision in *Westphal*, *Castellanos* or *Stahl*.

Alan Pierce, a Massachusetts claimants' attorney who is president of the national Workers Injury Law and Advocacy Group, said the Florida court's decision "helps level the playing field so that injured workers may access counsel in particularly difficult cases," as "there are no similar limitations on attorneys' fees to employers or insurers."

Bichler said that Miles' case promised to be a difficult one, as it is "virtually impossible" to prevail on an injurious exposure claim in Florida. He said his plan all along was to challenge the constitutionality of the standard for compensability for such injuries, but litigating this issue was bound to cost his firm a lot of time and expenses, which was why the statutory attorney fee limits were problematic.

In light of Wednesday's ruling, Bichler said, Miles can now re-file her claim with the assistance of his firm, and perhaps his firm will be able to get another provision of Florida law overturned.

Both Winer and Bichler said they believed that Florida's fee structure was somewhat unique to the state and were not sure whether Wednesday's ruling would have any impact outside the state's borders.

Several states have laws that limit the amount that a claimants' attorney can claim as a fee, including Kentucky, Georgia, West Virginia, Tennessee, Minnesota and Illinois.

North Carolina also has a statutory provision that makes it unlawful for an attorney to accept a fee that has not been approved by the state Industrial Commission. Maine and New Mexico also forbid an attorney from accepting a fee that deviates from the statutory payment structure.

But Winer said he believed it was the trifecta of the low percentage of the fee award available to a Florida attorney, the absolute prohibition on deviating from the statutory fee provision, and the criminalization of such deviation that led to the downfall of the Florida statutes.

"If there's the combination of all those things" elsewhere, Winer said, that "should lead those other states to be concerned."

Bichler said he thought the 1st DCA ruling "creates a baseline for any restrictions on attorney fees, in the state of Florida, or for that matter, anywhere," as the First Amendment arguments he and Winer presented are "certainly applicable nationwide."

Rayford Taylor, a defense attorney with Casey Gilson who practices in Florida and Georgia, said he wouldn't be surprised if the 1st DCA ruling triggers a round of challenges to attorney fee limits in other states.

"Word gets around pretty quickly," he said.

From his review of the court's ruling, Taylor said he didn't think it was going to affect employers and carriers directly, but "it will have an adverse effect on the overall cost of the system at some point."

In most cases, he said, he doubted a worker is going to have a union willing to foot the bill for an attorney, so any fee agreement between a worker and a claimants' attorney is likely going to have the worker "on the hook" for the payment of the attorney's fees.

Taylor said he expected that claimant attorneys are going to start entering into agreements with workers that will provide for the attorney to "collect on the back end," after a case is resolved.

Chris Bailey, the National Council on Compensation Insurance state relations executive for Florida, on Wednesday said the group was looking over the 1st DCA decision to see whether it may have an impact on insurance rates, and if so, what.

David Langham, the deputy chief judge of the Florida Office of the Judges of Workers' Compensation Claims, said during an interview that he thought the 1st DCA decision has given rise to some uncertainty for the system, because the court didn't explain how the JCCs are supposed to go about evaluating the reasonableness of a fee arrangement.

He said it will be up to each individual judge to make a decision as cases arise, but because cases tend to move through the comp system quickly in Florida, Langham said he thought it would be a "reasonably short period of time" for the JCCs to "hash some of this out."

As the judges begin issuing rulings, Langham said, those decisions "will bring predictability to the marketplace," so there only needs to be a brief "adjustment period" until some precedent can be established.