

State: Fla.

1st DCA to Hear Argument on Whether Police Union Can Pay Claimant's Attorney: Top [2015-11-30]

Florida workers' comp practitioners have had their eye on the state Supreme Court for more than a year, awaiting a ruling in [Castellanos v. The Next Door Co.](#) on the constitutionality of the statutory cap on claimant attorney fees.



Now, a separate case coming before the 1st District Court of Appeal is asking for a determination on the validity of another provision of Florida Statutes 440.34(1) that places limits on the way claimant attorneys can get paid.

The statute provides that an attorney can receive a fee based only on a percentage of the "benefits secured" for the client. Judge of Compensation Claims Mark Massey found this language prohibited the Fraternal Order of Police Lodge 40 from paying a retainer to the law firm of Bichler, Kelly, Oliver, Longo & Fox to represent Edgewater Police Officer

Martha Miles.

Miles represented herself on her workers' compensation claim, but she was unable to establish her entitlement to benefits for her alleged injuries from an on-the-job exposure to toxic chemicals.

Attorneys Michael Winer and Geoff Bichler are representing Miles on her appeal. The 1st DCA is set to hear oral argument in *Miles v. City of Edgewater* in January.

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

She later voluntarily withdrew her claims, and the city filed a motion to recover the \$3,860.82 allegedly expended to defend against them. Miles then went to her union for help.

FOP Lodge 40 and Miles reached an agreement with the Bichler firm for its attorneys to re-file and prosecute Miles' exposure claims, and to defend her against the city's motion for costs.

The agreement provided that the union would pay \$1,500 for the first 10 hours of work, and Miles would thereafter pay the firm \$150 per hour.

As required by Section 440.34(1), the firm requested judicial approval of the payment arrangement.

JCC Massey refused to sign off on the deal, saying "the law as it currently exists does not allow for non-

The Bichler firm withdrew as counsel for Miles, explaining it was economically infeasible to continue representing her because of the amount of work and expenses required to prove an exposure case. Miles wound up going to trial without an attorney, telling the JCC she hadn't been able to find anyone who "works for free."

After Massey [denied her claim](#), Bichler and Winer filed an appeal on Miles' behalf.

On appeal, Miles is arguing that Section 440.34(1) violates her rights under the 1st Amendment to the U.S. Constitution. She contends that her right to freedom of speech should allow her to select who speaks on her behalf in a courtroom, and that her right to freedom of association should allow both her and her union to retain counsel of their choosing.

Miles also claims she has a due process right under the Florida Constitution to be represented by an attorney. She says Section 440.34 infringes upon that right by restricting her ability to pay counsel a reasonable fee.

She further contends that the statute violates principles of equal protection, because only claimants' attorneys are subject to Section 440.34's restrictions – defense attorneys are not.

Since Section 440.34 so limits her ability to get an attorney to represent her, Miles says she is effectively denied her right of access to the comp system and that the statute represents an impermissible encroachment of the legislature on the judiciary's power to regulate attorneys.

Attorneys William Rogner of Hurley, Rogner, Miller, Cox & Waranch and George Helm of Bolton & Helm are representing the City of Edgewater. Rogner said Wednesday that the city is taking no position as to the merits of Miles' appeal.

Attorney General Pam Bondi's office is instead defending against the constitutional arguments.

Bondi argues that the challenges raised by Miles have already been rejected by the 1st DCA in *Castellanos* and by the Florida Supreme Court in [Kauffman v. Community Inclusions](#).

In *Kauffman*, the 1st DCA found the payment limits in Section 440.34(1) bore "a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant." The court also said the statute "is not discriminatory, arbitrary or oppressive because it applies to all claimants in a workers' compensation proceeding, and sets forth a definite formula for determining attorney's fees so as to protect the claimant's interest in retaining a substantial portion of the benefits secured."

Thus, the court concluded, Section 440.34(1) "does not deny a claimant equal protection, due process or the right to be represented by counsel."

The 1st DCA's ruling in *Kauffman* was the last word on this issue, as the Supreme Court denied writ review.

Although *Castellanos* is under review at the Supreme Court along with three companion cases, Bondi notes that the [1st DCA's ruling](#) in the case remains binding precedent.

In *Castellanos*, the 1st DCA found that the fee caps in Section 440.34 were constitutional, both on its

The 1st DCA cited to Kauffman in support of its decision in Castellanos, and it relied on the same precedent in two other recent cases challenging Section 440.34 as well.

In a 2013 case called [Elms v. Castle Constructors Co.](#), the court said statute barred a paraplegic worker from paying an attorney a one-time flat fee for a consultation on his case.

Keith Elms had fallen from a scaffold while working for Castle Constructors in September 2011. Castle did not dispute liability, but Elms said he wanted to consult an attorney about his case just the same. He agreed to pay \$100 for the attorney's time, but Judge of Compensation Claims Margaret E. Sojourner nixed the arrangement.

Elms appealed, raising an equal-protection argument, but the 1st DCA said it didn't believe he was being denied counsel of his choice. At most, the court said, he was being denied the opportunity to obtain the services of his chosen attorney under the terms specified in the retainer agreement.

Just over a month after it handed down its decision in Elms, the 1st DCA issued a per curiam opinion in [Serrano v. Del Air](#) saying the rule from Kaufmann also prohibited Judge of Compensation Claims Neal P. Pitts from [authorizing an award](#) of fees to attorney Roland Tan in excess of the statutory maximum.

In June 2013, however, the 1st DCA struck down part of Section 440.34 as unconstitutional in a case called [Jacobson v. Southeast Personnel Leasing Inc.](#)

The court said that the statute could not be applied to bar a worker from paying an attorney to defend him from his employer's motion to recover its costs of defending against his unsuccessful comp claim.

Bichler, speaking with WorkCompCentral last week, said he personally thought "it is hard to limit Jacobson to just the costs setting." He said he didn't see what the same rule shouldn't apply in "any other case where a person wants to hire an attorney and pay."

From what he has seen, Bichler said, there are unions who are willing to pay attorney fees for members to assert comp claims, but "they can't hire legal counsel to speak on their behalf."

He said he believed there are "countless people who can't get benefits and can't make claims because they can't get an attorney to represent them," so it's "impossible to quantify" just how much harm Section 440.34 is inflicting on injured workers in Florida.

Accordingly, Bichler said he believed the Miles case has the potential to go eventually wind up at the Supreme Court.

Aside from the Castellanos case, there are two other challenges to the comp system already at the high court.

[Westphal v. City of St. Petersburg](#), which challenges Florida's 104-week cap on temporary disability benefits, has been pending for well over a year now. The Supreme Court in October also granted review to [Stahl v. Hialeah Hospital](#), which challenges the adequacy of the comp system as a substitute for a civil cause of action.

The court extended the briefing timeline for the Stahl case last week, and so it will not be decided until at

The argument in the Miles case will take place at 9 a.m. on Jan. 21, at the University of Miami.

Miles' appellate brief is [here](#).

Bondi's answer is [here](#).

Miles' reply is [here](#).