>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR, GIVE ATTENTION,
AND YOU SHALL BE HEARD.
GOD SAVE THESE UNITED STATES;
THE GREAT STATE OF FLORIDA
AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> GOOD MORNING, EVERYONE.
WELCOME TO THE FLORIDA
SUPREME COURT.
THE FIRST CASE ON THE DOCKET
TODAY IS CASTELLANOS V.
NEXT DOOR COMPANY.
COUNSEL?
>> YOUR HONOR, MAY IT PLEASE
THE COURT.
I WOULD LIKE TO SAVE THREE
MINUTES FOR REBUTTAL.
I AM RICHARD SICKING FROM
CORAL GABLES, CO-COUNSEL, AND
TRIAL COUNSEL AND CO-COUNSEL
FROM TAMPA.
IN 2003, THE LEGISLATURE
AMENDED THE WORKERS'
COMPENSATION ATTORNEY'S FEE
STATUTE TO DELETE THE LEE
ENGINEERING FACTORS USED TO
MODIFY UPWARDS OR DOWNWARDS
THE SCHEDULE OF FEES THAT WAS
CONTAINED.
AND AT THE SAME TIME,
HOWEVER, THEY LEFT IN THE
WORDS THAT IT WAS A
REASONABLE ATTORNEY'S FEE, A
REASONABLE ATTORNEY'S FEE AND
IT REQUIRED THAT THE JUDGE
AWARD NOT MORE THAN THIS
SCHEDULE.
AND THE CASE CAME TO THIS
COURT AS MURRAY V. MARINER
HEALTH HERE, AND YOU DECIDED
THERE WAS AN AMBIGUITY
BETWEEN THE USE OF THE WORD
REASONABLE ATTORNEY'S FEES

AND THIS SCHEDULE.
AND YOU RESOLVED THAT
AMBIGUITY IN ORDER TO AVOID
THE CONSTITUTIONAL QUESTION
IN FAVOR OF REASONABLE
ATTORNEY'S FEES.
>> I THINK WE KNOW WHAT WE
DID.
THE ISSUE HERE IS YOU'RE
ATTACKING THE 2009 CHANGE OF
ATTORNEY'S FEES REGARDING
UNCONSTITUTIONAL.
YOU'RE NOT ALLEGING IT'S
UNCONSTITUTIONAL ON ITS FACE,
ARE YOU?
>> YES.
>> EVEN THOUGH THERE ARE FOR
LARGER CLAIMS, THERE IS
CERTAINLY ADEQUATE REASONABLE
FEES?
I THOUGHT YOURS WAS AN
UNCONSTITUTIONAL AS-APPLIED
CHALLENGE.
>> IT COULD BE BOTH, IF YOU
LOOK AT IT THIS WAY.
THE LEGISLATURE HAS SAID THAT
THE FEE IS THIS AMOUNT.
IT'S CONCLUSIVE, IT'S
COMPULSORY, IT HAS NO BASIS
IN FACT AND NO WAY TO REBUT
IT.
>> IT'S REALLY NOT PRODUCTIVE
FOR US TO ARGUE THAT THERE IS
MANY SETS OF FACTS WHERE IN
LARGER CLAIM CASES THE FEE IS
REASONABLE, IT IS GOING TO BE
ADEQUATE, AND THERE IS,
THERE'S BEEN NO SHOWING IN
ANY OF THE TESTIMONY THAT WAS
PUT FORTH, THAT IN OTHER THAN
IN SMALL VALUE CASES, THAT
THERE IS A LACK OF ABILITY OF
A CLAIMANT TO OBTAIN A
LAWYER.
SO I'M JUST -- I DON'T SEE
YOUR CLAIM AS BEING A FACIAL
CHALLENGE.
SO EXPLAIN WHAT IS IT THAT IF
IT'S CONCLUSIVE THAT IT'S
REASONABLE, BUT IN MANY CASES

IT IS REASONABLE, HOW IS THAT UNCONSTITUTIONAL, UNDER WHAT THEORY?
YOUR BRIEF HAS LIKE A SHOTGUN APPROACH TO ABOUT LIKE IT'S UNCONSTITUTIONAL UNDER FIVE DIFFERENT BASES.
SO I THINK YOU NEED TO NARROW WHAT YOU REALISTICALLY THINK THIS COURT SHOULD BE LOOKING AT AS A PATH TO YOUR ARGUMENT.
>> THERE'S TWO PARTS TO IT.
THE FIRST PART IS DUE PROCESS.
IN THAT EVEN THE PARTY WHO GETS, LET'S CALL IT ADEQUATE OR CORRECT FEE, THEY WERE PREVENTED BY THIS STATUTE FROM TELLING THE JUDGE WHAT REALLY HAPPENED.
THEY CAN'T DISCUSS THE LEE ENGINEERING FACTORS.
SOMEBODY WHO GETS A CORRECT FEE, THEY DIDN'T HAVE A FAIR AND MEANINGFUL HEARING.
IT'S ONLY A PIECE OF LUCK IT HAPPENS TO COME OUT THAT WAY.
>> EVERY CONTINGENCY CASE THAT IS EVER ENTERED INTO, THAT'S WHAT THE FEE IS.
I DON'T -- SO I UNDERSTAND YOUR ARGUMENT ON DUE PROCESS, BUT I UNDERSTAND IT, BUT I DON'T KNOW THAT IT COMPORTS WITH ANY OF OUR CASE LAW THAT WOULD SUPPORT YOUR ARGUMENT.
>> THE NEXT PROBLEM IS ACCESS TO COURTS.
IF ANYONE IS DISSATISFIED FOR THE FEE, THE CARRIER WOULD THINK THE FEE IS EXCESSIVE.
IF IT WAS A LARGE AMOUNT BECAUSE OF THE PERCENTAGE BUT VERY LITTLE WORK, THAT'S NOT CORRECT EITHER.
SO HOW DO WE FIX THAT?
THE WORKER'S COMP JUDGE, EVERY CASE THAT IT INVOLVES, A CONTESTED ATTORNEY'S FEE

CASE WOULD HAVE TO GO TO THE
FIRST DISTRICT JUST TO HAVE
AN ARTICLE 5 JUDGE DO WHAT
YOU SUGGESTED ON
CONSTITUTIONAL FEES APPLIED.
>> ACCESS TO COURTS, AND HOW
THAT RELATES TO THE PROVISION
OF ATTORNEY'S FEES.
HAVE WE EVER HELD THAT THE
ACCESS TO COURTS PROVISION
REQUIRES THAT THERE BE
PREVAILING PARTY ATTORNEY'S
FEES?
>> I DON'T THINK THAT ISSUE
HAS COME UP.
I DON'T THINK IT HAS.
>> WE'VE NEVER -- THAT'S
NEVER BEEN CONSIDERED.
ANY COURT, ANYWHERE IN THE
COUNTRY, THAT'S DEALT WITH,
THAT HAS A SIMILAR
CONSTITUTIONAL PROVISION THAT
SAYS THAT THE ACCESS TO
COURT'S PROVISION REQUIRES
THAT ATTORNEY'S FEES BE,
PREVENTING PARTY ATTORNEY'S
FEES BE PROVIDED?
>> MINNESOTA IS VERY CLOSE
TO THAT.
IN MINNESOTA THEY HAD A CAP.
THERE'S A DIFFERENCE BETWEEN
A CAP AND THE SCHEDULE
BECAUSE THE SCHEDULE IS ON
THE BUTTON.
A CAP IS SOMETHING AT
THE TOP.
AND COURT HELD IT WAS
FACIALLY INVALID FOR THE
LEGISLATURE TO HAVE THIS CAP
BECAUSE, FIRST OF ALL, IT WAS
THE -- THEY WERE INTEGRATED
BAR AS WE DO, AND SAID IT'S
THE COURT THAT CONTROLS THE
PRACTICE OF LAW, NOT THE
LEGISLATURE, AND SECONDLY,
ALL ATTORNEY'S FEES AND
WORKERS' COMPENSATION CASES
WERE REVIEWED BY THE COURT.
AND THE COURT COULD NOT
PERFORM JUDICIAL FUNCTION OF

REVIEWING THOSE WITH
INTERFERENCE WITH THE
LEGISLATURE.
YES, IT HAS BEEN DONE.
IT'S NOT A COMMON PROBLEM.
>> WAS THAT BASED ON ACCESS
TO COURTS PROVISION?
>> THE APPEAL PART WAS, YES.
BUT HERE'S THE PROBLEM WITH
ACCESS TO COURTS.
THE YEAR THAT THIS WAS
PASSED, THERE WERE 72,000
PETITIONS FOR BENEFITS.
IF THERE WERE EVEN ONLY 10%
OF THOSE HAD, TO APPEALED,
YOU'RE TALKING ABOUT DUMPING
7,000 ADDITIONAL CASES ON THE
FIRST DCA FOR ONE PURPOSE
ONLY, THAT'S THE PURPOSE OF
HAVING AN ARTICLE 5 COURT
LOOKING TO SEE IF THE FEE WAS
EXCESSIVE OR ADEQUATE.
>> I'M NOW VERY CONFUSED WHAT
YOUR ACCESS TO COURTS
ARGUMENT IS.
I THOUGHT THAT ACCESS TO
COURTS RELATED TO THE KLUGER
V. WHITE AND PROGENY AND
WHETHER WHAT IS LOOKED AT IS
WHETHER IT REMAINS A
REASONABLE ALTERNATIVE TO THE
TORT REMEDY AND GIVE WORKERS
THE WORKERS' COMPENSATION
REMEDY.
WHEN YOU TALK ABOUT WHETHER
COURTS HAVE A LOT OF CASES TO
REVIEW, THAT'S NOT -- WE'VE
NEVER SAID ACCESS TO COURTS
AS WHAT YOU'RE SUGGESTING.
SO COULD YOU STICK TO WHAT
KLUGER AND PROGENY REFER TO
AS ACCESS TO COURTS AND HOW,
UNDER YOUR ARGUMENT, THIS
WOULD BE AN ACCESS TO COURTS
ISSUE?
>> THAT IS ANOTHER ACCESS TO
COURTS PROBLEM.
ALL RIGHT, LET'S SEE.
>> THE ONE YOU MENTIONED IS
NEVER ONE, THAT SOUNDS VERY

INTERESTING.
THE REVIEW IS -- REALLY, THERE'S $1500 FOR LOSS OF A BODY PART OR WHATEVER.
THEY DON'T GET REVIEW ON THAT.
THE FACT THERE IS A SET AMOUNT OF A PARTICULAR BENEFIT IN ITSELF IS NOT AN ACCESS TO COURTS ISSUE, IS IT?
WE'VE REJECTED THAT.
>> THERE'S TWO PARTS OF THAT. YOU'RE RIGHT, THERE IS A KLUGER V. WHITE PROBLEM HERE.
>> I DIDN'T SAY THERE WAS. I THOUGHT THAT WAS THE ARGUMENT IF YOU'RE TALKING ABOUT ACCESS TO COURTS, THAT'S THE CASE THAT YOU'VE GOT TO LOOK TO.
>> LEE ENGINEERING WAS DECIDED BEFORE THE 68 CONSTITUTION.
SO WHEN THE PEOPLE WENT TO THE POLLS IN 1968 AND VOTED FOR ACCESS TO COURTS, THEY KNEW WHAT THE REMEDY WAS FOR EMPLOYEES WHO WERE INJURED AT WORK.
THE 1967 WORKERS' COMPENSATION LAW.
AND THE 1967 WORKERS' COMPENSATION LAW DID NOT CONTAIN A SCHEDULE.
IT DID NOT CONTAIN A SCHEDULE.
NOW WE HAVE A SCHEDULE THAT IS ABSOLUTE COMPULSORY AND CONCLUSIVE.
NO ONE CAN PRESENT AT ANY KIND OF HEARING.
THE JUDGE IS NOW A MECHANICAL CALCULATOR, HE CAN'T CONSIDER ANY FACTS THAT PEOPLE HAVE TO LIE BY OMISSION OF WHAT REALLY HAPPENED.
THEY CAN'T TELL HIM ABOUT THE TIME, ABOUT THE COMMUNITY STANDARD, THEY CAN'T TELL HIM

ANY OF THE THINGS THAT YOU
HAVE HELD IN THE RULES
REGULATING THE FLORIDA BARSA
THE WAY A FEE IS SUPPOSED TO
BE DETERMINED.
>> IT IS A DIFFICULTY HERE
THAT THE KEY IS TO ESTABLISH
WHAT ROLE ATTORNEYS PLAY IN
OBTAINING BENEFITS?
AND IF IT WERE THE CASE THAT
THE EMPLOYERS WERE REQUIRED
TO DO X BY A PARTICULAR DATE,
THAT IS TO PAY UP, OR SUFFER
A PENALTY FOR NOT PAYING UP,
YOU HAVE A DIFFERENT
SITUATION.
SO DON'T YOU HAVE TO REALLY,
WHEN YOU'RE LOOKING AT
ATTORNEY'S FEES FOR
SMALL-VALUE CASES LOOK AT THE
WHOLE HOST OF WHAT HAS
HAPPENED SINCE 1967, NOT JUST
FOCUS ON WHETHER LAWYERS ARE
GETTING MORE OR LESS MONEY?
WHICH IN THAT, I DON'T KNOW
THAT YOU MENTIONED TO ME,
THIS ONE-SIDED OFFER OF
JUDGMENT, IS THAT CORRECT,
THAT ONLY THE EMPLOYER CAN
FILE?
>> THAT HASN'T WORKED IN
PRACTICALITY.
WE DON'T SEE IT.
>> WELL, CAN CLAIMANTS FILE
AN OFFER OF JUDGMENT?
>> NOT IN THAT ARRANGEMENT,
NO.
>> WHAT?
>> NOT IN THAT ARRANGEMENT,
NO.
IT'S ONLY BY ATTORNEY'S FEES
PAYABLE BY CARRIER.
>> THEY CAN'T GET MORE.
IF YOU TOOK A CASE AND SAID
IT'S WORTH $800, PAY IT.
THERE'S NO WAY TO GET MORE
ATTORNEY'S FEES FOR THE
CLAIMANT UNDER A BILATERAL
OFFER OF JUDGMENT STATUTE?
>> THAT PROVISION IS STILL

GOVERNED BY THE CAP.
IT DOESN'T GOT ANYWHERE.
THAT'S WHY NOBODY USES IT.
THIS CAP IS UNIQUE IN THE
UNITED STATES, NOTHING QUITE
LIKE IT.
AS A MATTER OF FACT, SOMEWHAT
INTERESTING LAST YEAR, THE
LEGISLATURE CHANGED THE FEE
SCHEDULE FOR EMMINENT DOMAIN
AND UP BY 33.33% IN THE
FIRST 250,000.
SMALL CASES.
YOU KNOW WHAT THEY PUT IN THE
LEE ENGINEERING FACTORS TO
MODIFY, IT UPWARDS OR
DOWNWARDS WHERE IT WOULD BE
APPROPRIATE.
WE'RE OPERATING IN A WORLD
NOW WHERE THIS CONCLUSIVE
PRESUMPTION, CONCLUSIVE
PRESUMPTIONS HAVE NEVER BEEN
TOLERATED BY THIS COURT.
IT HAS NO BASIS IN FACT.
SAYING THIS FEE FOR THIS
SCHEDULE IS CORRECT, IT IS
NOT EXCESSIVE, IT IS NOT
INADEQUATE, IT'S PERFECT.
THEY DON'T HAVE THAT POWER.
>> YOU'VE GOT TO EXPLAIN,
THEN, WHY IS THAT DIFFERENT
FROM A CONCLUSIVE PRESUMPTION
WHAT A PARTICULAR DISABILITY
WILL BRING, WHICH IS A
MONETARY AMOUNT, AND WE
REJECTED I THINK IT WAS IN
MARTINEZ THAT THAT WAS
UNCONSTITUTIONAL?
IN OTHER WORDS, WHY IS IT
THAT ATTORNEY'S FEES ARE IN A
DIFFERENT CATEGORY?
ARE WE TRYING TO PROTECT
ATTORNEYS OR LOOKING TO THE
AFFECT ON THE WORKER?
>> THOSE ARE NOT CALLED
CONCLUSIVE PRESUMPTIONS,
THEY'RE CALLED MANDATES.
THEY CONTROL IN A WAY WHAT A
BENEFIT IS.
THAT IS TRADITIONAL IN

WORKERS' COMPENSATION LAWS.
HERE AGAIN YOU GOT STARTED
WITH ACCESS TO COURTS,
EVERYTHING IS SUPPOSED TO BE
COMPARED TO THE WAY IT WAS
IN '68 WHEN THE PEOPLE VOTED.
AT THAT TIME THERE WAS NO
SCHEDULE.
THE LEGISLATURE --
>> LET ME TAKE YOU BACK TO
KLUGER V. WHITE.
I'VE READ IT, AND IT SEEMS
LIKE TO ME THAT KLUGER V.
WHITE IS ABOUT ABOLISHING
CAUSES OF ACTION THAT
PREVIOUSLY EXISTED.
AND THAT'S NOT WHAT WE'VE GOT
HERE, IS IT?
ISN'T THAT WHAT KLUGER V.
WHITE IS ABOUT?
>> NO.
THE CASE THAT MOST CLEARLY
ILLUSTRATES THAT IS SMITH V.
INSURANCE WHICH IS ACCESS TO
COURTS CASE, THAT IS A
PRECURSOR TO MCCALL FROM LAST
YEAR.
NONECONOMIC DAMAGES IN THE
TORT REFORM ACT WERE
$450,000.
THAT'S SEVERABLE, DOESN'T
HAVE TO BE THE WHOLE ACT, THE
WHOLE CAUSE OF ACTION,
WHETHER COMPARING THE WAY THE
LAW WAS ON THIS PARTICULAR
PROVISION IN 1968, HAS IT NOW
BEEN CLOBBERED?
WE CAN'T FOOL THE PEOPLE.
ACCESS TO COURTS IS NOT THE
CONGAME BAIT AND SWITCH WHERE
WE GET THE PEOPLE TO VOTE FOR
IT AND THE LEGISLATURE TAKES
IT AWAY, TAKES IT AWAY UNTIL
ITS DEATH BY A THOUSAND CUTS.
THIS IS ONE SPECIFIC EXAMPLE
OF THE ENTIRE PICTURE, IT'S
TRUE, BUT IT IS VERY
SPECIFIC.
NO ONE COULD POSSIBLY LOOK AT
THE $1.53 PER HOUR THIS MAN

WAS PAID TO GET BENEFITS FOR SOMEONE.
AND BY THE WAY, AS YOU KNOW, IF THEY DON'T RESIST THE CLAIM AND WRONGFULLY DENY BENEFITS, THEY OWE NOTHING.
THIS ISN'T JUST ON EMPLOYER CARRIER FEES, IT'S ON ALL FEES, WHETHER THE EMPLOYEE FEES OR NOT.
IT'S A COMPLETE IMITATION OF THE LAW.
IT'S NOT REAL AT ALL.
$1.53 PER HOUR, THAT'S CRAZY!
AND THE LAW IS NOT SUPPOSED TO BE CRAZY, IT'S SUPPOSED TO BE REASONABLE.
>> CRAZY DOESN'T ALWAYS TRANSLATE INTO UNCONSTITUTIONALITY.
I WANT TO GO BACK TO THE KLUGER ISSUE.
SEEMS TO ME THAT KLUGER RECOGNIZED BY THAT TIME WORKERS' COMPENSATION ABOLISHED THE RIGHT TO ONE'S EMPLOYER, BUT THE TRADE-OFF WAS THERE HAD TO BE A REASONABLE ALTERNATIVE, AND SO, AND THIS IS GOING TO BE THE QUESTION TO YOUR OPPONENT IS THAT IT DOES SEEM REASONABLE TO LOOK AT WHAT WAS IN PLACE IN 1968, TO LOOK AT IT.
BUT IT'S NOT CLEARLY -- THERE WASN'T A RIGHT TO SUE IN 1968.
SO DON'T WE HAVE TO LOOK AT WHAT WAS THE REMEDY AND WAS IT ADEQUATE AS OF THAT TIME AND IS IT NO LONGER ADEQUATE?
>> NO.
THAT TRADE-OFF WAS APPROVED BY THE U.S. SUPREME COURT IN 1917.
THAT'S DECADES AGO.
DECISION IN THE CASE MADE THAT ABUNDANTLY CLEAR WHAT ACCESS TO COURTS IS, IS

COMPARISON OF WHAT PEOPLE
KNEW THE STATUTORY AND COMMON
LAW WAS IN 1968.
WE CAN'T FOOL THEM BY
CHANGING IT.
>> BUT THERE WAS NO ACCESS TO
COURTS AS OF THAT DATE FOR
WORKERS WHO WERE INJURED ON
THEIR JOB.
THAT'S WHAT JUSTICE CANADY
WAS ASKING YOU ABOUT.
>> THEY'VE BEEN A WORKERS'
COMPENSATION LAWYER IN 1935
AND BEFORE THE REST OF THE
COUNTRY IN 1920.
THAT'S ANCIENT HISTORY.
>> THE POINT IS THIS IS DEALT
WITH IN A CONTEXT THAT'S
OUTSIDE OF THE COURTS.
IT'S A NONCOURT REMEDY THAT'S
CREATED BY WORKERS' COMP.
>> IT BECOMES ENGRACED INTO
THE CONSTITUTION BECAUSE OF
THE '68 VOTE OF THE PEOPLE
REGARDING ACCESS TO COURTS.
>> TALK ABOUT ACCESS TO
COURTS.
>> KLUGER V. WHITE SAYS IT'S
THE COMMON LAW AND STATUTORY
REMEDIES OF THAT TIME THAT
SAYS BOTH.
THE FACT THAT THIS LAW DID
NOT -- THERE'S NO FACT THAT
COULD POSSIBLY RE-PRESENT IT.
NO VARIATION, EVEN WHEN YOU
TALK ABOUT THE VARIOUS KINDS
OF BENEFITS, AND THOSE ARE
NOT CONSIDERED PRESUMPTIONS,
THEY ARE MANDATES.
IF SOMEONE HAS A LIMITATION
OF 100 -- YOU KNOW THAT ONE,
104 WEEKS, THERE MAY BE OTHER
CATEGORIES OF COMPENSATION
WHERE YOU MOVE IN.
THIS IS LOCKED IN THERE, IS
NO WAY OUT.
IT'S A CRIME FOR ANYONE TO
TAKE MONEY THAT ISN'T
APPROVED BY THE JUDGE.
THAT IS UNUSUAL, AND SO FOR

THAT REASON.
>> IT'S A QUESTION I HAVE, AS A PRACTICAL MATTER, LET'S JUST ASSUME THAT THIS WORKER IN THIS CASE HAD ADDITIONAL RESOURCES AND COULD PAY FOR AN ATTORNEY TO REPRESENT HIM, IS AN ATTORNEY ALLOWED TO ENTER INTO THAT AGREEMENT OR DOES THAT HAVE TO BE APPROVED BY THE WORKERS' COMP JUDGE AND IF IT'S OUTSIDE THE STATUTE IS IT PROHIBITED?
>> NO.
>> NO WHAT?
>> THE AGREEMENT COULD NOT BE -- FIRST OF ALL, MY STATUTE IS CONTINGENT, IF THERE'S NO RECOVERY, THERE IS NO FEE, BY STATUTE.
IF THERE IS A RECOVERY, THE FEE IS A PERCENTAGE OF THE BENEFITS OBTAINED REGARDLESS OF THE AMOUNT OF WORK INVOLVED, PERIOD.
NO MATTER WHO PAYS.
>> THEY CANNOT CONTRACT WITH THEIR CLIENT FOR AN ADDITIONAL FEE?
>> CORRECT, THEY CANNOT.
>> OTHER THAN THE ISSUES THAT HAVE COME OUT OF THE FIRST DISTRICT WHERE THEY ARE SEEKING TO DEFEAT AN AWARD OF COST IF THEY DON'T PREVAIL?
THE FIRST DISTRICT HAS SAID THAT'S UNCONSTITUTIONAL.
THAT'S NOT BEEN APPEALED.
>> NO.
IT'S SO LOCKED IN THAT THERE'S NO CHANCE FOR THE EMPLOYEE TO ASK FOR ANYTHING.
IT'S NOT LIKE ANYTHING ELSE THAT THERE'S EVER BEEN.
THIS IS NOT THE FIRST TIME THIS ISSUE HAS BEEN BEFORE THIS COURT.
AND I SEE THAT I'M AT THE END OF MY TIME.
SO I'LL BE BACK.

>> MAY IT PLEASE THE COURT,
RAOUL CANTERO FOR THE
EMPLOYER NEXT DOOR COMPANY
AND AMERISURE.
AS MR. SICKING SAID TODAY,
THEY ARE MAKING A FACIAL
CHALLENGE TO THE STATUTE NOT
AS-APPLIED CHALLENGE.
IN INITIAL BRIEF ON PAGE 40,
I BELIEVE IT WAS IN THE
CONCLUSION, THEY ARGUE THIS
COURT SHOULD DECLARE THE 2009
AMENDMENT TO THE SECTION TO
BE FACIALLY INVALID
PROSPECTIVELY.
THEY DO NOT MAKE AN
AS-APPLIED CHALLENGE.
AS JUSTICE PARIENTE SAID WE
CAN ENVISION SCENARIOS WHERE
THE FEES AWARDED WOULD BE
SUBSTANTIAL AND WOULD BE
ENOUGH TO COMPENSATE THE
ATTORNEY.
SECOND INITIAL POINT I WANT
TO MAKE, THE ISSUE BEFORE
THIS COURT, IN MY OPINION, IS
NOT THE CONSTITUTIONALITY OF
WHAT FEES THE CLAIMANT MAY
PAY HIS ATTORNEY, THAT WAS
NOT THE ORDER UNDER REVIEW,
THE ORDER UNDER REVIEW WAS
AWARDING PREVAILING PARTY
ATTORNEY'S FEES.
THAT WAS NOT THE ISSUE THAT
THE FIRST DCA CONSIDERED AND
NOT THE ISSUE THAT THE FIRST
DCA CERTIFIED TO THIS COURT
WHICH IS WHETHER AN AWARD OF
FEES UNDER THE 2009 AMENDMENT
WOULD BE CONSTITUTIONAL.
I THINK THE ISSUE WE NEED TO
DISCUSS AND PERHAPS WE HAVE
BEEN, A LOT OF THE CASES
INTERMINGLE BOTH THINGS.
>> LET ME ASK YOU THIS, WHEN
YOU SAY AS-APPLIED VERSUS
FACIALLY.
THE CERTIFIED QUESTION WHICH
IT SEEMS THEY PASSED ON, AND
I'VE GOT TO LOOK AT THE

BRIEFS, IS THAT WHETHER THE
AWARD OF ATTORNEY'S FEES IN
THIS CASE IS ADEQUATE AND
CONSISTENT.
>> BUT THAT'S THE AWARD.
THE AWARD.
AND THE AWARD IS WHAT THEY
WERE SEEKING AWARD AGAINST
THE EC.
>> WHY IS THAT NOT AS AN
AS-APPLIED CHALLENGE?
>> I'M SORRY, I THOUGHT YOU
WERE TALKING ABOUT THE
CHALLENGE IN THIS CASE.
>> NO, WHETHER IT CONSTITUTES
A FACIAL CHALLENGE.
I WOULD AGREE WITH YOU I
DON'T SEE THAT UNDER ANY
CIRCUMSTANCE, THERE COULDN'T
BE A REASONABLE FEE, YOU
KNOW?
AS I SEE THIS, YOU'RE SAYING
THAT THEY'VE STUCK ONLY TO A
FACIAL CHALLENGE, NOT AS
APPLIED.
>> THAT'S THE ARGUMENT HERE,
THEY HAVEN'T ARGUED AS
APPLIED HERE.
>> THE CERTIFIED -- SO EVEN
IF WE CAN'T LOOK AT
ALTERNATIVE ARGUMENT?
>> CAN YOU LOOK AT
ALTERNATIVE ARGUMENT BUT THEY
DIDN'T MAKE IT.
>> THEREFORE, WE DON'T HAVE
JURISDICTION, BECAUSE THE
QUESTION ASKED US IS THIS
AWARD ADEQUATE UNDER THE
FLORIDA CONSTITUTION?
>> AND A LOT OF TIMES
QUESTIONS ARE ASKED AND THE
COURT NEVER GETS THE CASE.
AND YOU ARE CERTAINLY NOT
STUCK BY WHAT THE CERTIFIED
QUESTION IS, YOU ARE STUCK BY
WHAT THE ARGUMENTS ARE, THEY
HAVEN'T MADE AN ARGUMENT AS
AN AS-APPLIED CHALLENGE.
THIS CLAIM, IN THE ARGUMENT
THAT THE NOT 2009 AMENDMENTS

HAVE INHIBITED ACCESS TO
ATTORNEYS, IN THE REPLY BRIEF
AT PAGE 15, THE PARAGRAPH
RIGHT BEFORE THE CONCLUSION
OF THE REPLY BRIEF THEY
RESPOND TO ARGUMENTS MADE BY
AMICUS TO THE RESPONDENT.
THE CHAMBER ARGUED ABOUT THE
AVAILABILITY OF LAWYERS TO
REPRESENT CLAIMANTS, AIF MADE
THE SAME ARGUMENT.
THIS IS AN ANSWER FOR WHICH
THERE IS NO QUESTION.
THE PETITIONER DID NOT ARGUE
IN INITIAL BRIEF ABOUT
UNAVAILABILITY OF COUNSEL.
THAT GOES RIGHT TO THE ACCESS
TO COURTS PROVISION.
THEY ARE NOT ARGUING THAT
THIS 2009 AMENDMENT AS TO
PREVAILING PARTY FEES, IN ANY
WAY AFFECTS THE AVAILABILITY
OF COUNSEL TO TAKE THESE
CASES.
>> AND AGAIN, WE'RE GOING TO
HAVE TO GO BACK.
I THOUGHT THE WHOLE GIST OF
WHAT HAPPENED BEFORE THE
JUDGE OF COMPENSATION CLAIMS
IS THAT THE TESTIMONY WAS
UNIFORM THAT NOBODY COULD
TAKE THESE KIND OF CASES WITH
THE FEES, WHERE THERE'S
COMPLEX CASES.
SO YOU'RE SAYING, NO, THAT'S
NOT THE ACCESS TO COURTS
ARGUMENT.
>> THAT'S RIGHT, THEY'VE
DISCLAIMED THAT.
AND I DON'T THINK IT'S IN THE
ORDER EITHER.
I MAY BE MISTAKEN, BUT WHAT I
SAW IN THE ORDER WAS IT IS
HIGHLY UNLIKELY THAT
PLAINTIFF COULD HAVE
SUCCEEDED AND OBTAINED A
FAVORABLE RESULT, HE DID
WITHOUT THE ASSISTANCE OF
COUNSEL, IN PARAGRAPH 3.
UNDISPUTED CLAIMANT'S SUCCESS

REASONABLE ATTORNEY'S FEES
AND COSTS.
4.
5, THE PETITION DOES NOT
IDENTIFY A SPECIFIC STATUTE
AS THE BASIS FOR AWARD OF
ATTORNEY'S FEES.
THOSE ARE --
>> I THOUGHT IN THE FIRST
DISTRICT OPINION, THEY DO
TALK ABOUT BOTH.
I WANT TO GO BACK TO THE
FACIAL VALIDITY QUESTION AND
THE APPLIED QUESTION.
I THOUGHT THAT THE FIRST
DISTRICT ACTUALLY SAID THAT
THEY COULD NOT RULE -- THEY
COULD NOT, BASED ON THEIR
PRECEDENT ACCEPT A
DEFENDANT'S ARGUMENT, AND
THEY SAID, BASICALLY THAT
HOWEVER WE'RE BOUND TO
CONCLUDE THAT THE STATUTE IS
CONSTITUTIONAL, BOTH ON ITS
FACE AND AS APPLIED.
SO IT SEEMS TO ME THAT THE
SECOND -- THE FIRST DISTRICT
WAS ACTUALLY LOOKING AT BOTH
ASPECTS OF THAT
CONSTITUTIONAL CHALLENGE.
>> I DON'T DISPUTE THAT, YOUR
HONOR, WHAT I DISPUTE IS THEY
ARE MAKING THAT SAME ARGUMENT
ON APPEAL HERE.
THEY'RE NOT MAKING AN
AS-APPLIED CHALLENGE HERE.
>> BUT THE FIRST DISTRICT DID
LOOK AT IT IN THAT ASPECT,
AND AS JUSTICE PARIENTE
POINTED OUT, THE QUESTION
THAT THEY OPPOSED TO THIS
COURT SEEMS TO BE AN
AS-APPLIED CHALLENGE.
>> LET'S GET TO THAT ISSUE IN
CASE YOU DO REACH IT.
WHAT'S AS-APPLIED CHALLENGE
HERE?
WHAT CONSTITUTIONAL PROVISION
WOULD PROHIBIT THE
LEGISLATURE FROM LIMITING BUT

NOT ELIMINATING PREVAILING
PARTY ATTORNEY'S FEES.
>> BECAUSE WHAT YOU -- I
GUESS IF THAT'S THE QUESTION,
I GUESS YOU'RE NOT UP HERE
NOW.
>> NO, I REALIZE THAT FOR
SEVERAL YEARS.
[LAUGHTER]
>> I WAS ABOUT TO ANSWER YOUR
QUESTION.
[LAUGHTER]
>> IT WAS A RHETORICAL
QUESTION, AND I THINK THEY
IDENTIFIED NO PROVISION.
AND LIKE YOU SAID, THEY TAKE
A SHOTGUN APPROACH.
THE ONLY PROVISION I CAN
THINK OF THAT COULD POSSIBLY
RELATE TO LIMITING PREVAILING
PARTY FEES IS THE ACCESS TO
COURTS PROVISION.
>> OKAY, SO LET'S TALK ABOUT
THAT, AND LET ME ASK YOU THIS
QUESTION.
IF KLUGER V. WHITE IN THE
1968 CONSTITUTION HAVE
NOTHING TO DO WITH CASES THAT
WERE THE RIGHT TO ACCESS TO
COURTS WERE ESSENTIALLY
ELIMINATED BEFORE 1968.
FIRST OF ALL IS THAT YOUR
ARGUMENT THAT KLUGER AND THE
ACCESS TO COURTS PROVISION
CAN NEVER BE THE BASIS FOR
CHALLENGE IN THE WORKERS
CONSTITUTIONAL ACT?
>> NO.
>> OKAY IN MARTINEZ --
>> NOT MY POSITION.
>> OKAY, SO IT SEEMS THAT THE
ISSUE IS REASONABLE
ALTERNATIVE.
NOW THE PROBLEM WITH WHAT
YOU'RE SAYING AND WHY GOING
BACK AGAIN TO 1935 AND
SUBSEQUENTLY IS THAT
PREVAILING PARTY ATTORNEY'S
FEES HAS BEEN, THE WAY I SEE
IT IN OUR CASE LAW, OHIO

CASUALTY AND ALL THIS, A
LINCHPIN FOR WORKERS WHO
WHERE THE BENEFITS ARE DENIED
TO BE ABLE TO HAVE SOMEWHAT
OF A LEVEL PLAYING FIELD.
SO WOULD YOU AGREE, AT LEAST,
THAT THE ABILITY TO HAVE AN
ATTORNEY AND AWARD ATTORNEY'S
FEES AT LEAST IN FLORIDA, HAS
BEEN A VERY CRITICAL PART AS
RECOGNIZED BY THIS COURT OF
THE WORKERS' COMPENSATION
SYSTEM?
>> BY SAYING I AGREE, I DON'T
AGREE THAT KLUGER APPLIES TO
PREVAILING PARTY FEES.
THAT IS BECAUSE BOTH KLUGER
-- FIRST OF ALL, THE ACCESS
TO COURTS PROVISION TALKS
ABOUT REDRESS OF INJURY, AND
THEN KLUGER INTERPRETS THAT
PROVISION, AND KLUGER SAYS
THAT WE HOLD THAT WE'RE A
RIGHT OF ACCESS TO THE COURTS
FOR REDRESS FOR PARTICULAR
INJURY HAS BEEN PROVIDED BY
STATUTE OR BY COMMON LAW.
THE LEGISLATURES WITHOUT
POWER TO ABOLISH A RIGHT
WITHOUT PROVIDING REASONABLE
ALTERNATIVE.
TWO POINTS ON THAT QUOTE.
NUMBER ONE, PREVAILING PARTY
FEES DOESN'T RELATE TO
REDRESS OF INJURY.
>> HERE'S THE OTHER PART OF
KLUGER THAT WORKERS'
COMPENSATION ABOLISHED THE
RIGHT TO SUE BUT PROVIDED
ADEQUATE, SUFFICIENT, AND
EVEN PREFERABLE SAFEGUARDS
FOR AN EMPLOYEE WHO IS
INJURED ON THE JOB, THUS
SATISFYING ONE OF THE EXCEPT
SHUNS.
SO THE ARGUMENT, AND AGAIN,
THAT IS THAT IN WORKERS'
COMP, WHAT WE'VE COMPARED IS
WHETHER WHAT WAS IN EFFECT AT
THE TIME OF THE PASSAGE OF

THIS AMENDMENT.
NOW IF THERE HAD BEEN NO PREVAILING PARTY ATTORNEY'S FEES, I THINK YOUR ARGUMENT WOULD BE THAT THEY'VE ADDED SOMETHING TO THE LAW THAT WASN'T THERE AT THE TIME, BUT AS WE'VE DISCUSSED, PREVAILING PARTY ATTORNEY'S FEES WAS A CRITICAL PART AS RECOGNIZED BY THIS COURT.
>> I AGREE, YOUR HONOR.
BUT THAT DOESN'T MEAN THAT THE WORKERS' COMP STATUTE AS IT STOOD IN 1968 NEEDS TO BE FROZEN IN TIME AND CAN NEVER BE CHANGED OR TELLS NOW VIOLATES ACCESS TO COURTS.
>> I TOTALLY AGREE WITH YOU ON THAT, IT'S NOT A FROZEN IN TIME, BUT IT'S GOING FROM -- AND THIS IS THE SITUATION -- FROM SOMEBODY WHO WOULD BE PAID $1.53 AN HOUR, IF THEY WIN, THAT ATTORNEY GETS THAT MONEY.
IF THEY LOSE, THEY GET NOTHING AND THE WORKER NOW FACES THE SPECTER OF BEING ASSESSED COSTS, WHEREAS THE EMPLOYER'S ATTORNEY, WHO APPARENTLY GAVE 115 HOURS FOR THE SAME TIME, THAT THERE IS NO LIMIT ON WHAT THE EMPLOYER CAN DO?
SOMEHOW THAT SEEMS THAT IT'S NOT JUST TIPPED THE PLAYING FIELD BUT TURNED IT ON ITS HEAD.
>> WELL, THE FIRST PART OF KLUGER IS, IT HAS TO BE FOR REDRESS OF INJURY.
THIS DOESN'T LIMIT THE REDRESS THAT YOU GET UNDER WORKERS' COMP.
BUT THE SECOND PART IS IT DOESN'T ELIMINATE PREVAILING PARTY ATTORNEY'S FEES, AND AS WE DISCUSSED, THERE ARE CASES IN WHICH THE FEES THAT ARE

AWARDED ARE GOING TO
ADEQUATELY --
>> WHAT IF IT DID?
WHAT IF THE LEGISLATURE
COMPLETELY ELIMINATED
ATTORNEY'S FEES?
IS THAT CONSTITUTIONAL?
>> YOUR HONOR, I WOULD HAVE A
MORE DIFFICULT ARGUMENT TO
MAKE THAN I'M MAKING TODAY.
>> WELL, UNDER THE LAW.
>> IT WOULD BE, UNDER KLUGER,
IT'S THE REDRESS OF INJURY.
IT DOESN'T TALK ABOUT THE
REDRESS OF ATTORNEY'S FEES,
OF KIND OF CORE LARRY PARTS
OF THE STATUTE.
WORKERS' COMP STILL EXISTS --
>> HOW CAN YOU REALLY
REALISTICALLY SEPARATE THE
ATTORNEY'S FEE ISSUES FROM
THE REDRESS OF INJURY?
IT SEEMS TO ME WITHOUT ACCESS
TO AN ATTORNEY WHO WILL
REPRESENT THESE CASES, THAT
YOU DON'T REALLY GET A
REDRESS OF YOUR INJURY.
SO I THINK THAT THE TWO
ISSUES ARE REALLY, THEY COME
TOGETHER AND HAVING AN
ADEQUATE REDRESS OF A
PERSON'S INJURY.
>> YOUR HONOR, THAT'S WHERE
WE GET TO THE POINT WHERE
THEY CONCEDE, THEY'RE NOT
MAKING AN ARGUMENT THAT UNDER
THE STATUTE THEY CAN'T --
THERE'S NO COUNSEL AVAILABLE.
THEY HAD COUNSEL IN THIS
CASE, NO MATTER WHAT DO YOU
IN THIS CASE, IF YOU DECLARE
THE STATUTE UNCONSTITUTIONAL,
MR. CASTELLANOS WOULD NOT GET
ONE MORE PENNY.
THIS IS NOT ABOUT
MR. CASTELLANOS.
HE WOULD NOT RECOVER ONE MORE
PENNY WITHOUT THIS THAN HE
DID WITH IT.
WHAT HAPPENS IS THE ATTORNEYS

WOULD GET MORE MONEY.
MR. CASTELLANOS WOULD NOT GET ANY.
>> WELL, WOULD YOU REPRESENT A CLAIMANT UNDER THESE CIRCUMSTANCES?
MAKING $1.54 AN HOUR.
>> I CAN'T SAY WHETHER I WOULD OR NOT.
>> THEY COULD SELF-REPRESENT, RIGHT?
REPRESENTING THEMSELVES, THEY DON'T REALLY NEED AN ATTORNEY IS WHAT YOU'RE SAYING.
>> THERE ARE A LOT OF ISSUES IN PERSONAL INJURY CASES.
>> THE WORKERS' COMP CASES THEY DON'T NEED AN ATTORNEY, THEY CAN REPRESENT THEMSELVES, THEREFORE IT'S NOT EFFECTIVE.
>> THE LEGISLATURE WAS WITHIN ITS PREROGATIVE TO SAY WORKERS' COMP PREMIUMS ARE THE HIGHEST IN THE COUNTRY OR THE SECOND HIGHEST.
>> WE'RE TALKING ABOUT ACCESS TO COURT HERE.
>> YES.
>> SURE YOU CAN GO INTO COURT, BUT IS IT MEANINGFUL?
>> AND THERE ARE A LOT OF --
>> WITHOUT AN ATTORNEY.
>> WE HAVE SMALL CLAIMS COURTS WHERE CLAIMANTS ARE NOT REPRESENTED BY ATTORNEYS.
>> YOU TAKE A WORKERS' COMP CASE OUTSIDE OF THE SMALL CLAIMS COURT, IT'S OUTSIDE OF THE COURT, RIGHT?
>> MANY PLAINTIFFS HAVE TO GO INTO COURT WITHOUT AN ATTORNEY BECAUSE OF THE SMALL CLAIMS.
>> THEY DON'T HAVE TO DEAL WITH THE COMPLEXITY OF THE WORKERS' COMP STATUTE, DO THEY?
>> NO.
THEY JUST GO INTO TELL THE

STORIES TO PEOPLE'S COURT.
>> THERE ARE A LOT OF
STATUTES THAT ARE LOW-VALUE
CLAIMS THAT THEY'RE SUING
UNDER, EQUALLY COMPLEX.
>> BUT THEY HAVE ACCESS TO
COURT HERE.
THERE IS ESSENTIALLY NO REAL
ACCESS TO COURT BECAUSE IT'S
TAKEN OUT OF WORKERS'
COMPENSATION ARENA.
>> YOUR HONOR, WE'RE MAKING
DETERMINATION AS TO SPECIFIC
BASE ACROSS THE BOARD.
>> I'M TALKING ABOUT LOW,
LOW, LOW, LOW, LOW BENEFIT
CASE, WHERE IT'S LOW IN THE
CONTEXT OF THE BIGGER
PICTURE, BUT TO THAT
INDIVIDUAL, IT MEANS THE
WORLD.
>> AND I UNDERSTAND THAT.
>> THEY'RE TAKING THAT AWAY,
EFFECTIVELY.
>> NO, WE'RE NOT.
THIS PLAINTIFF RIGHT HERE WAS
REPRESENTED, AND THEY WERE
REPRESENTED BY THREE COUNSEL
RIGHT NOW.
THERE'S NO CLAIM HERE THAT I
COULDN'T GET AN ATTORNEY
BECAUSE THIS WAS A LOW-VALUE
CLAIM.
>> I THOUGHT ON APPEAL, WOULD
YOU AGREE THEY'RE NOT
LIMITED, IF THEY PREVAIL,
THAT UNDER THE STATUTE, THERE
IS NO STATUTE OTHER THAN
REASONABLENESS OTHER THAN
WORK AT THE APPELLATE COURT
OR SUPREME COURT?
AS I READ THAT STATUTE, THAT
CAP DOESN'T APPLY TO BEING
REPRESENT HERE.
>> I DON'T KNOW.
I'M NOT SURE WHETHER THAT'S
TRUE OR NOT.
>> WELL --
>> THEY HAVE REASON.
>> YOU SAID SOMETHING, AND I

CONTINUE WAS IN PASSING ABOUT
THIS ISSUE, OF THE PREMIUMS
BEING THE HIGHEST AS OF 2003
IN THE COUNTRY.
AND OBVIOUSLY, IF WE LOOK AT
A KLUGER ANALYSIS, ARE YOU
MAKING THE ARGUMENT THERE WAS
AN OVERPOWERING PUBLIC
NECESSITY TO LIMIT CLAIMANT'S
FEES AS WAS LIMITED IN 2003?
>> WELL, THAT IS A PRONG OF
KLUGER.
>> IT WOULD BE IF IT WASN'T
THAT THE LEGISLATURE ITSELF
SAID THAT SAVING, YOU KNOW,
HAVING THIS CAP WOULD AFFECT
PREMIUMS AT ABOUT A 2%, BUT
AT THE SAME TIME, WE'VE GOT
THE UNDERWRITERS WHO TAKE 11%
OF EVERY, EVERY PREMIUM
DOLLAR, AND WE NOW NO LONGER
HAVE EXCESS PROFITS BEING
RETURNED TO -- TO THE
EMPLOYER, AND WE HAVE
EMPLOYER'S ATTORNEY'S FEES
HAVING EITHER BEEN CONSTANT
OR A GREATER PERCENTAGE OF
EVERY YEAR FROM 2003 TO 2013,
SO TO PICK ON THIS PARTICULAR
ISSUE, WHICH IS LOW-VALUE
CLAIMS, WHERE CLAIMANTS NEED
ATTORNEYS AND SAY THAT WAS
THE REASON THAT'S THE
OVERPOWERING PUBLIC
NECESSITY.
I THINK THE FIGURES SHOWED
THAT REASONING IS FLAWED.
IT SOUNDS GOOD, BUT IT
DOESN'T REALLY HOLD UP IN
ANYTHING THAT'S IN THE PUBLIC
RECORD.
>> NUMBER ONE, I DON'T THINK
THAT -- I'M NOT MAKE THE
ARGUMENT THAT THERE'S ANY
VIOLATION OF ACCESS TO COURTS
AT ALL, THAT YOU NEED TO GO
TO ANOTHER PRONG.
BUT I THINK IF WE START
GETTING INTO THE WEEDS OF
THAT, THEY NEED TO FILE A DEC

ACTION WHERE TESTIMONY CAN BE TAKEN AND THESE THINGS CAN BE HASHED OUT WHETHER THAN ON ADMINISTRATIVE APPEAL WHERE THE RECORD IS LIMITED.
WE'RE TALKING ABOUT AMICA THAT FILED REPORTS AND THINGS LIKE THAT.
IF YOU HOLD ATTORNEY'S FEES PROVISION UNCONSTITUTIONAL, IT SHOULD BE ON A COMPLETE RECORD WHERE THERE IS TESTIMONY BELOW.
WE CAN'T GET ATTORNEYS AT THESE RATES.
WE NEED TO BE UNREPRESENTED.
THERE IS NO RECORD HERE.
THE RECORD HERE IS THE OPPOSITE.
>> DO YOU THINK, AS A COURT, WE CAN'T TAKE JUDICIAL NOTICE THAT SOMEBODY, THAT NOBODY WOULD TAKE A CASE WITH THE CHANCE AGAIN OF LOSING AND GETTING NOTHING THAN ON THE UPSHOT, THE MAXIMUM IS $1, $2 AN HOUR.
>> THE PROBLEM IS YOU'RE ASSUMING THAT THE MAXIMUM IS THAT.
THE MAXIMUM IS NOT NECESSARILY THAT.
HERE, THEY HAD MADE OTHER CLAIMS, SO THAT ATTORNEYS TAKE CASES AND AS HAPPENS IN PERSONAL INJURY AND A LOT OF OTHER CASES.
THE MAXIMUM MAY BE WAY UP HERE.
THE MINIMUM IS ZERO.
BUT SOMETIMES YOU GET SOMEWHERE IN BETWEEN, IN THIS CASE, WHAT HAPPENED IS THEY GOT SOMEWHERE IN BETWEEN.
THEY WERE MAKING OTHER CLAIMS.
SO IT'S NOT THE CASE THAT THE MAXIMUM IS GOING TO BE $822 AND THE ATTORNEY ONLY GETS A CERTAIN AMOUNT.

>> THAT GOES BACK TO THIS
BEING AN AS-APPLIED
CHALLENGE, AND AS CERTIFIED
TO US BY THE FIRST DISTRICT.
>> YES, WELL, YES.
SO AS APPLIED, IT DOESN'T
WORK BECAUSE IN THIS CASE
THEY DON'T MAKE THAT
ARGUMENT, AND ON ITS FACE,
IT'S NOT UNCONSTITUTIONAL
EITHER, BECAUSE WE CAN THINK
OF CASES WHERE THEY ARE
ADEQUATELY COMPENSATED.
>> MR. CANTERO, WOULD YOU
ASSIST ME IN TRYING TO PULL
TOGETHER THE BODY OF LAW IN
ACCESS TO COURTS?
CERTAINLY IN KLUGER, WE DID
NOT LITIGATE OVER FEES, AND
THE QUESTION OF ATTORNEY'S
FEES WAS NOT PART OF THAT
BATTLE.
YET ANY TIME WE NOW, IN
MODERN HISTORY, THAT WE'VE
LOOKED AT ACCESS TO COURTS,
WHETHER IT'S IN THE MEDICAL
MALPRACTICE ARENA OR ANY
OTHER ARENA, IN WHICH THERE
IS AN ATTEMPT TO CHANGE, TO
TORT REFORM, IF YOU WILL, TO
GO AWAY FROM THE COURTS INTO
SOME KIND OF ADMINISTRATIVE
PROCEEDING, WE ALWAYS SEE THE
DISCUSSION THAT WHEN YOU ARE
EVALUATING WHETHER THERE IS
ADEQUATE ALTERNATIVE REMEDY
PROVIDED, THEY START TICKING
OFF, WELL, YOU CAN GO TO
ARBITRATION AND YOU HAVE THE
RIGHT TO AGREE OR DISAGREE.
YOU HAVE FEES THAT YOU WOULD
NOT OTHERWISE HAVE.
THAT'S ALWAYS PART OF THE
ANALYSIS.
SO IF THAT'S PART OF THE
ANALYSIS TO DETERMINE IF IT'S
AN ADEQUATE ALTERNATIVE
REMEDY, WHY IS IT NOT PART OF
THE OVERALL ISSUE AS TO
WHETHER THERE IS ACCESS TO

COURTS?
WHETHER YOU CALL IT UNDER,
WELL, THAT'S NOT REALLY A
CLAIM OR LITIGATION, ONLY FOR
FEES, IT SEEMS TO ME, I'VE
NEVER SEEN A CASE THAT THIS
COMES UP THAT THE ATTORNEY'S
FEES ARE ANALYZED AS PART OF
THE DISCUSSION, THE ANALYSIS
AS TO WHETHER AN ADEQUATE
REMEDY HAS BEEN PROVIDED.
COULD YOU HELP ME WITH THAT?
>> CHIEF JUSTICE, MY TIME
IS UP.
IF I CAN ANSWER THE QUESTION?
YOUR HONOR, THE ACCESS TO
COURTS PROVISION COMES UP IN
FACIAL CHALLENGE WHERE THE
STATUTE IS TAKEN ON ITS FACE
AND LOOK ON THIS INSTANCE OF
ACCESS TO COURTS -- NOT IN
THIS INSTANCE, IN THIS
LEGISLATIVE PROVISION IT
DENIES ACCESS TO COURTS.
IF YOU LOOK AT THIS FACIALLY,
THERE ARE CIRCUMSTANCES WHERE
THE ATTORNEY IS GOING TO BE
ADEQUATELY COMPENSATED, AND
THEY HAVE NOT MADE ANY
ARGUMENT THAT THEY COULD
OBTAIN ANY MORE BENEFITS FOR
THE CLAIMANT WHICH IS WHAT
WORKERS' COMP IS ABOUT.
IT'S NOT ABOUT THE ATTORNEYS,
IT'S ABOUT THE CLAIMANT, THEY
WOULD BE ABLE TO ACHIEVE ANY
MORE BENEFITS FOR THE
CLAIMANT WITH A FULL
PREVAILING PARTY ATTORNEY'S
FEES AS OPPOSED TO TO THE
LIMITED PARTY ATTORNEY'S
FEES.
MY ARGUMENT IS SHOULDN'T
PROVIDE ACCESS TO COURT,
UNDER ACCESS TO COURT IT
SATISFIES THAT PROVISION.
>> BUT YOU DO AGREE THAT
WHETHER FEES ARE AVAILABLE OR
NOT IS ONE ELEMENT OF THAT
DISCUSSION?

>> YES.
>> OKAY.
>> YES.
I'M JUST SAY THAT THE
LEGISLATURE CAN, BY LIMITING
AND NOT ELIMINATING IT, THEY
DO NOT VIOLATE THE ACCESS TO
COURTS.
>> THIS IS STATE ACCESS,
STATUTE WHICH THE LEGISLATURE
MAKES IT HAPPEN.
WHAT DO THEY MAKE HAPPEN?
>> OPPOSING COUNSEL HAS
SUGGESTED YOU HAVE NOT MADE
AN AS-APPLIED CHALLENGE.
WHERE IN YOUR INITIAL BRIEF
DID YOU MAKE AN AS-APPLIED
CHALLENGE.
>> I DID NOT.
>> SO THERE IS NONE?
>> YES, THERE IS, THIS CASE
IS A CONSTITUTIONAL LAW CASE
AND AS SUCH BEFORE THIS COURT
DE NOVO.
YOU CAN DECIDE ANY ISSUE
INCLUDING ONES WE DON'T RAISE
AT ALL, THAT'S WHAT DE NOVO
MEANS.
>> YOU'RE SAYING WE CAN
REVERSE THE DISTRICT COURT,
AS THIS COMES UP HERE, YOU'RE
THE APPELLANT AND WE CAN
REVERSE THE DISTRICT COURT ON
THE BASIS OF ISSUES YOU HAVE
NOT RAISED?
>> THAT IS CORRECT.
>> INTERESTING VIEW.
>> THE LEGISLATURE HAS SET
THE FEE.
THAT'S NOT A LEGISLATIVE
FUNCTION.
THEY HAVE SET IT EXACTLY.
WHETHER THAT'S ADEQUATE,
INADEQUATE OR EXCESSIVE, AND
THEY SAID THE JUDGE CAN'T
LOOK AT WHETHER THAT'S
EXCESSIVE OR INADEQUATE.
THEY SAID THE DISTRICT COURT
OF APPEAL CAN'T LOOK AT IT
AND SEE IF IT'S EXCESSIVE OR

INADEQUATE, AND THERE ARE
TENS OF THOUSANDS OF CASES.
WONDERFUL WE ALL AGREE $1.53
IS INADEQUATE AS APPLIED BUT
CANNOT ADDRESS 72,000 CASES A
YEAR ON THAT SAME QUESTION
WITH THE JUDGE WHO CAN'T
DECIDE IT.
BECAUSE THE JUDGE WON'T
CONDUCT A HEARING ON THAT.
>> WHETHER LEGISLATURE COULD
ELIMINATE FEES, ATTORNEY'S
FEES COMPLETELY?
>> THE ANSWER IS NO.
>> WHY NOT?
>> BECAUSE IN 1968, WHEN THE
PEOPLE VOTED FOR ACCESS TO
COURTS, THEY KNEW WHAT THE
WORKERS' COMP LAW AND KNEW IF
EMPLOYEE HAD BENEFITS
WRONGFULLY WITHHELD, HE WOULD
BE MADE WHOLE.
HE WOULDN'T HAVE TO REACH
INTO HIS OWN POCKET.
OR IF HE DIDN'T HAVE IT, THEY
WOULD BE OUT OF LUCK.
THE FACT OF THE MATTER IS,
THE LEGISLATURE CAN TINKER
BUT CAN'T CLOBBER, THAT'S
CLOBBERING AND THIS IS
CLOBBERING.
IT'S ABOLISHING, THAT'S WHAT
IT IS.
>> WAY BACK WHEN.
>> WAY BACK WHEN.
>> BACK IN THE DAY, THERE
WERE NO ATTORNEY'S FEES IN
THE WORKERS' COMP STATUTE,
WHEN IT WAS FIRST ORIGINATED,
RIGHT?
>> THAT'S RIGHT.
IN 1941 IT WAS ADDED AS
ANTI-UNION MEASURE SO PEOPLE
DIDN'T HAVE TO JOIN THE
UNION, THEY GD HAVE THE BAR
DO IT FOR THEM.
>> IN TALKING ABOUT THE
FREEZE IN TIME-TYPE ARGUMENT.
>> YES.
>> IF YOU HAVE NO BENEFITS

PROVIDED INITIALLY, AND THEN
WE HAVE BENEFITS AND NOW THE
LEGISLATURE HAS CHANGED WHAT
BENEFITS ARE AVAILABLE ALONG
THE WAY, DO YOU HAVE TO LOOK
AT 1968 AND LOOK AT THOSE
BENEFITS AT THAT POINT IN
TIME AND REALLY
CONSTITUTIONAL REFREEZE THEM
IN TIME?
IS THAT THE PROPER LEGAL
ANALYSIS?
>> THAT'S WHAT YOU HAD IN THE
SHOVER CASE.
1968 IS THE TOUCHSTONE, THE
GOLDSTONE, WHERE THINGS
START.
WE CAN'T FOOL THE PEOPLE AND
GIVE THEM ACCESS TO COURTS
AND THE LEGISLATURE CHANGES
IT.
TINKERING YES.
CLOBBERING NO.
THAT'S WHAT THE LEGISLATION
SUGGESTS AND WHAT YOU SUGGEST
MORE SO.
TODAY'S PROBLEM IS TOTALLY
TRULY UNWORKABLE IN THE SENSE
THAT WE CANNOT ONLY THINK OF
THE CASES TO COME, POSSIBLY
ALLOW THE JUDGE OF
COMPENSATION CLAIMS WOULD NOT
BE ALLOWED TO MAKE FINDINGS
OF FACT BECAUSE THE
LEGISLATURE SAID THEY ARE
IRRELEVANT.
THE LEGISLATURE CONCLUSIVELY
PRESUMED THAT'S NOT
SEPARATION OF POWERS BECAUSE
THEY SET THE FEE WITHOUT A
DUE PROCESS HEARING.
ONLY HE CAN CONDUCT A DUE
PROCESS HEARING AND CAN ONLY
DO THAT IF YOU ALLOW HIM TO.
THE 2009 AMENDMENT IS
FACIALLY INVALID SO THAT HE
CAN CONDUCT A DUE PROCESS
HEARING, WHICH IS WHAT HIS
JOB IS SUPPOSED TO BE AND
PEOPLE CAN HAVE A REASONABLE

ATTORNEY'S FEE, WHICH YOU
SAID MUST BE DETERMINED BY
THE JUDGE.
THANK YOU.