>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEAD,
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 SUPREME
COURT OF FLORIDA.
PLEASE BE SEATED.
>> WELCOME TO THE FLORIDA
SUPREME COURT.
THE FIRST CASE FOR THE DAY IS
WESTPHAL VERSUS CITY OF
ST. PETERSBURG.
YOU MAY BEGIN.
>> YOUR HONORS, MAY IT PLEASE
THE COURT.
I'M RICHARD SICKING FROM CORAL
GABLES FOR PETITIONER
BRADLEY WESTPHAL.
BRADLEY WESTPHAL WAS A
FIREFIGHTER HIRED BY THE CITY OF
ST. PETERSBURG.
IN SEPTEMBER OF 2009 HE WAS
INJURED FIGHTING A FIRE, FAIRLY
SEVERELY.
IN FOLLOWING THE ACCIDENT HE HAD TWO
SURGERIES, ONE TO THE BACK AND
ONE TO THE SPINE.
HE HAD A LUMBAR FUSION.
HE WAS TOTALLY UNABLE TO WORK
DURING THIS PERIOD OF TIME.
AND SO HE WAS PAID TEMPORARILY
TOTAL DISABILITY.
BUT AT 104 WEEKS IT STOPPED.
AND THE REASON IT STOPPED IS
BECAUSE IN THE ORIGINAL WORKERS
COMPENSATION LAW OF 1935.
THERE WERE 350 WEEKS AVAILABLE
FOR TEMPORARY DISABILITY.
IN 1991 IT WAS REDUCED TO 260
WEEKS.
AND IN 1993, 204 WEEKS.
HE FILED A CLAIM FOR INITIAL
TOTAL DISABILITY WHICH THE TRIAL
JUDGE DENIED.

HE APPEALED TO THE FIRST
DISTRICT COURT OF APPEAL AN
AMONG OTHER THINGS ARGUED THAT
THE 104-WEEK LIMITATION ON
TEMPORARY TOTAL DISABILITY WAS
INADEQUATE.
>> AT 104 WEEKS, THE TEMPORARY
BENEFITS STOP AT, NO ONE, IN THE
STATE, NO MATTER HOW INJURED
THEY ARE CAN GET TEMPORARY
BENEFITS BEYOND 104 WEEKS.
BUT AS TO THE WAY THAT THE FIRST
DISTRICT INTERPRETED THE LAW
BEFORE THIS RECENT CASE WHAT
WERE THE OPTIONS?
IN OTHER WORDS, WHAT ELSE WAS
AVAILABLE TO MR. WESTPHAL?
>> AT THAT POINT THERE WAS ONLY
ONE OPTION AVAILABLE AND THAT
WAS FOR THE BENEFITS TO STOP
BECAUSE THE DISTRICT COURT HAD
EARLIER IN A DECISION, MATRIX
EMPLOYEE LEASING VERSUS HADLEY,
DECIDED THAT WHEN THE
LEGISLATURE WROTE 104 WEEKS,
THEY MEANT 104 WEEKS AND IT
STOPS.
HE WOULD HAVE TO WAIT UNTIL HE
ACTUALLY, FACTUALLY REACHED
MAXIMUM MEDICAL IMPROVEMENT AND
THEN BENEFITS COULD BEGIN AGAIN.
>> THAT IS WHAT I WAS TRYING TO
SAY.
EVEN IF HE, IF A DOCTOR HAD SAID
AT THAT POINT, EVEN THOUGH HE
HASN'T REACHED MAXIMUM MEDICAL
IMPROVEMENT HE STILL WILL BE
PERMANENTLY DISABLED, WHAT WOULD
HAVE HAPPENED THEN IF THE
WORKERS COMP JUDGE HAD ACCEPTED
THE TESTIMONY OF THE INDEPENDENT
EXAMINING DOCTOR?
>> WELL, IF HE HAD THE BELIEVED
SOME OF THE EVIDENCE WHICH HE
DID NOT BELIEVE, THAT HE HAD
REACHED MAXIMUM MEDICAL
IMPROVEMENT THEN HE COULD HAVE
AWARDED PT.
>> NO MATTER HOW WELL HE GOT, HE
WAS STILL GOING TO BE

PERMANENTLY DISABLED.
HE COULD GET BETTER WITH HIS BACK OR LEG, IF THAT WAS THE TESTIMONY BUT NO MATTER HOW BAD IT WAS HE WOULD BE PERMANENTLY DISABLED WHAT WOULD HAVE HAPPENED THEN?
>> THE JUDGE COULD HAVE AWARDED PERMANENT TOTAL DISABILITY BUT HE DID NOT BELIEVE THAT THAT IS THE --
>> THAT IS NOT AN OPTION.
WAS THERE ANY OTHER OPTION AVAILABLE?
IN OTHER WORDS, IF THE, IF THEY HAD SAID, WELL HE IS NOT AT MAXIMUM MEDICAL IMPROVEMENT BUT HE IS GOING TO BE 50% DISABLED, WHAT WOULD BE, WOULD HE BE, WHAT I'M TRYING TO FIND OUT ABOUT THIS PT, WAS THERE ANY OTHER OPTIONS IN ORDER TO AVOID THE GAP OF GETTING NOTHING UNTIL YOU REACH MAXIMUM MEDICAL IMPROVEMENT?
>> WELL THERE IS A CURIOSITY HERE AND THAT IS THAT THE STATUTE REQUIRES THE DOCTOR SIX WEEKS BEFORE MAXIMUM MEDICAL IMPROVEMENT TO RATE THE PERMANENT IMPAIRMENT EVEN IF HE HAS NOT,
EMPLOYEE HAS NOT REACHED MAXIMUM MEDICAL IMPROVEMENT AND THEORETICALLY THAT IS IMPOSSIBLE BUT HE IS, DOES GET RATINGS AND THEY DID PAY IMPAIRMENT BENEFITS.
THAT IS LESS PER WEEK AND ALSO ONLY SOME OF THE WEEKS INVOLVED.
IT WOULD NOT FILL THE WHOLE GAP.
AND NOT EVERYBODY IS GAPPED.
SOME PEOPLE WHEN THEY REACH MAXIMUM MEDICAL IMPROVEMENT, IN FACT WEEKS OR MONTHS LATER MIGHT RETURN TO WORK.
IT ISN'T THAT EVERYBODY BECOMES A PERMANENT TOTAL.
>> OF COURSE NOT.
>> IN THIS CASE YOUR CLIENT DID

IN FACT DO SOMETHING PRIOR TO
THE END OF THE 104 WEEKS,
CORRECT?
DID HE IN FACT ATTEMPT TO GET TO
SHOW THE, I GUESS THE
ADMINISTRATIVE LAW JUDGE THAT HE
WAS IN FACT TOTALLY DISABLED?
>> HE TRIED BUT THE TRIER OF
FACT DID NOT ACCEPT THAT.
>> I UNDERSTAND THAT BUT I'M
SAYING HE DID THAT AND THIS WAS
PRIOR TO THE EXPIRATION OF THE
104 WEEKS.
>> NO, IT WAS AFTER.
>> IT WAS AFTER THE 104 WEEKS.
>> YOU CAN'T CLAIM SOMETHING
UNTIL YOU'RE --
>> THE ADMINISTRATIVE LAW JUDGE
DID NOT ACCEPT ANY KIND OF
DISABILITY ON HIS BEHALF?
>> THAT'S CORRECT.
>> THAT'S WHAT HAPPENED IN THIS
CASE?
>> THAT IS CORRECT.
>> SO WHY --
>> IF I UNDERSTAND CORRECTLY,
THE STATUTORY SCHEME IS POSSIBLE
FOR THE JUDGE TO DECLARE SOMEONE
TO BE PERMANENTLY TOTALLY
DISABLED WITHOUT REACHING
MAXIMUM MEDICAL IMPROVEMENT?
>> NO.
PREVIOUSLY THE DISTRICT COURT
HAD GRAPPLED WITH THAT WHEN THEY
FIRST GOT THE 104 WEEK PROBLEM.
IN THE OSWALD CASE THEY HELD
THAT IF THE EMPLOYEE COULD PROVE
THAT IN THE DISTANT FUTURE HE
WOULD BE A PERMANENT TOTAL, THAT
THE JUDGE COULD AWARD THE
PERMANENT TOTAL DISABILITY
PREMATURELY.
BUT THEN IN HADLEY THEY WITHDREW
FROM THAT.
IT DOESN'T WORK.
NOBODY HAD BEEN ABLE TO DO THAT.
IT IS TOO DIFFICULT.
>> HYPOTHETICALLY, IF I FALL OFF
A ROOF, BREAK MY BACK, I'M NOT
PERMANENTLY TOTALLY DISABLED YET

ACCORDING TO MY TREATING
PHYSICIAN AND WHEN MY 104 WEEKS
RUNS OUT, UNTIL I'M DECLARED
MMI, WHAT OPTIONS DO I HAVE?
WHO CAN I APPEAL IN FRONT OF?
WHAT COURT CAN I ARGUE A CASE IN
FRONT OF?
ADMINISTRATIVE JUDGE, WORKERS
COMP JUDGE, ANYONE I CAN APPEAL
IN FRONT OF TO PLEAD MY CASE THAT
I CAN'T WORK AND I CAN'T GET OUT
OF BED?
ELECTRICAL COMPANY IS CUTTING
OFF MY POWER.
I'M NOT GETTING ANY SALARIES.
MY CHILDREN ARE STARVING,
WHATEVER, WHO CAN I ARGUE THAT
BEFORE?
>> ACCORDING TO THE DISTRICT
COURT IN HADLEY IT'S OVER.
YOU HAVE TO WAIT.
NO MATTER HOW LONG IT IS.
>> UNTIL I REACH MMI?
>> YES.
>> THAT COULD BE HOW LONG? A
YEAR, TWO, SIX MONTHS?
>> WHICH IS WHY THEY CAME UP
WITH, WHAT THE MAJORITY -- THE
PANEL DECISION WASN'T 104 WEEKS
IS INADEQUATE AND TEMPORARY
TOTAL DISABILITY WOULD CONTINUE.
THAT IS THE VERY SIMPLE AND
STRAIGHTFORWARD SOLUTION.
>> THE PANEL FOUND IT
UNCONSTITUTIONAL?
>> I'M SORRY, WHAT?
>> I THINK THE PANEL DECISION IN
THIS CASE FOUND THE GAP WAS
UNCONSTITUTIONAL BECAUSE JUST AS
JUSTICE LABARGA SAID, ONCE THAT
104 WEEKS ENDS, UNTIL YOU REACH
MAXIMUM MEDICAL IMPROVEMENT YOU
HAVE NO RIGHT TO ANY BENEFITS.
>> ONLY UNDER THE STATUTE.
THE QUESTION IS, IS THAT
ADEQUATE IN TERMS OF KLUGER
VERSUS WHITE.
YOU HELD IN THOMPSON --
>> DIDN'T, DID THE PANEL
DECISION NOT HOLD THE STATUTE

UNCONSTITUTIONAL AS APPLIED?
>> AS APPLIED THEY HELD THE 104 WEEKS WAS UNCONSTITUTIONAL AS APPLIED.
>> WHY IS IT THAT YOU DON'T LIKE THE, THE STATUTORY REWRITE OF THE FIRST DISTRICT IN WESTPHAL? DOESN'T THAT GIVE YOU YOUR CLIENT WHAT HE NEEDS TO, UNTIL HE REACHES MAXIMUM MEDICAL IMPROVEMENT?
>> NO.
FIRST OF ALL THE CITY HAS CROSS NOTICED HE IS ENTITLED TO NOTHING BUT 104 WEEKS IS 104 WEEKS.
IT ENDS, IT ENDS.
BEYOND THAT ALL THE COURT SAID HE WAS ENTITLED TO CLAIM IT.
NOT THAT HE WAS ENTITLED TO RECEIVE IT.
OF COURSE THE TRIAL JUDGE PREVIOUSLY DENIED IT NOT ONLY LEGALLY ALSO FACTUALLY SO THAT IS VERY DANGEROUS.
NO, THAT WAS NOT EXACTLY A WIN BY ANY MANNER OR MEANS ON THAT ACCOUNT BUT CERTAINLY THAT IS THE POSTURE OF THE CASE TODAY.
>> BUT YOU CAN'T WIN FACTUALLY HERE.
>> NO, I UNDERSTAND THAT.
THAT'S WHY IT WAS DANGEROUS.
THE FACT OF THE MATTER 104 WEEKS IS INADEQUATE.
WHEN YOU DECIDED THE THOMPSON CASE, WELL, YOUR PREDECESSORS, YOU SAID 350 WEEKS, YOU SAID 350 WEEKS WAS INADEQUATE YOU COMMENDED TO THE LEGISLATURE WOULD INCREASE IT.
WOULD CORRESPOND TO THE REST OF THE UNITED STATES.
ONLY TWO STATES THAT HAVE 104 WEEKS.
>> EVEN THOUGH YOU SAY 104 WEEKS IS INADEQUATE, AND I TOTALLY AGREE WITH YOU IN CIRCUMSTANCES WHERE SOMEONE IS STILL DISABLED AND CAN'T, BUT THEY HAVEN'T

REACHED MAXIMUM MEDICAL
IMPROVEMENT BUT HOW DOES THE
FACT THAT IT'S INADEQUATE
ACTUALLY MAKE THIS STATUTE
UNCONSTITUTIONAL?
>> ONLY THE PORTION OF IT.
THAT, THE CLEARLY THIS COURT HAS
THE POWER, AND YOU DID THIS IN
THE SMITH CASE WITH THE TORT
REFORM ACT, TO LOOK AT A SINGLE,
SEVERABLE PROVISION OF THE
WORKERS' COMPENSATION LAW OR ANY
OTHER TORT STATUTE THAT COMPARES
WITH THE 1968 REMEDIES THAT
EXISTED AT THAT TIME AND IF IT'S
INADEQUATE, IF YOU BELIEVE IT
IS INADEQUATE AND 104 WEEKS IS
INADEQUATE, YOU SAID THAT
BEFORE, THAT NUMBER, 104 CAN BE
DECLARED TO BE INVALID AS
APPLIED.
>> WHAT IS THE BASIS FOR
REDUCING IT FROM, IT WAS
PREVIOUSLY 260 WEEKS, WASN'T IT?
>> YES.
>> WHAT WAS THE BASIS FOR
REDUCING IT FROM THE 260 TO 104?
>> YOU MEAN WHY DID THE
LEGISLATURE DO IT?
>> YEAH.
I MEAN WAS THERE ANY, ANY,
REASONING IN THE STATUTE?
ANY LEGISLATIVE HISTORY?
WHAT?
>> THERE WAS SUPPOSEDLY A COST
CRISIS YOU SEE BUT THAT
DISAPPEARED AT LEAST IN THIS
CENTURY BECAUSE IN 2009 WHEN
THE, THEY CONSIDERED THE
AMENDMENT TO 440.34 THE HOUSE
STAFF REPORTED THAT THE PREMIUMS
WERE DOWN MORE THAN 60%.
AND THE PANEL DECISION IN THE
INSURANCE REPORT SHOWED IT WAS
DOWN 56%.
WHAT YOU SAID IN MCCALL, CRISIS
IS NOT PERMANENT.
EVEN IF THERE WERE A CRISIS AT
THAT TIME IN COST IT IS SIMPLY
DOESN'T EXIST ANYMORE.

IT HASN'T FOR A LONG TIME.
>> WE DON'T MAKE A JUDGMENT, THE WHOLE WORKERS COMP SCHEME FOR MANY RATIONAL, LOOKING AT IT IS NOT ADEQUATE FOR SOMEBODY THAT IS SEVERELY INJURED.
THEY DON'T GET THE KIND OF MONEY, YOU THAT YOU WOULD THINK WOULD BE REASONABLE BUT THAT IS LEGISLATIVE CHOICE.
WHAT TAKES IT IS INADEQUATE TO IT'S UNCONSTITUTIONAL?
>> OKAY.
WHEN THE PEOPLE VOTED FOR ACCESS TO COURTS IN 1968 THEY KNEW WHAT THE WORKERS' COMPENSATION LAW WAS, WHAT THEY REMEDY FOR EMPLOYEES INJURED AT WORK WAS, THE 1967 WORKERS' COMPENSATION LAW.
IF YOU COMPARE THE '67 WORKERS' COMPENSATION LAW WITH TODAY'S, THE CURRENT LAW, EVERYTHING HAS BEEN TAKEN AWAY.
>> BUT NOW YOU'RE SAYING, YOU TOLD JUSTICE QUINCE YOU JUST WANTED US TO LOOK AT THE 104.
IN YOUR BRIEF YOU GO AND EXPLAIN THE WHOLE SCHEME IS INADEQUATE.
SO YOU'RE NOW SAYING WE HAVE TO LOOK IN ORDER TO HOLD IT UNCONSTITUTIONAL AT THE WHOLE PANOPLY OF BENEFITS OR LACK THEREOF.
SO HOW DO YOU, SO CAN YOU EXPLAIN THAT?
>> YES, WOULD I BE HAPPY TO.
I WAS ASKED A QUESTION ONLY ABOUT THE 104 WEEKS.
THE FACT OF THE MATTER IN ALL THE REEF CASES WHICH YOU'VE DEALT WITH CHANGES IN INDEMNITY OR REDUCTIONS IN INDEMNITY, BUT WE HAVE FULL MEDICAL.
WE DON'T HAVE FULL MEDICAL ANYMORE.
WE NOW HAVE MAJOR CONTRIBUTING CAUSE WHICH PEOPLE HAVE COMPENSABLE ACCIDENTS BUT THEY CAN'T PROVE THAT AN ACCIDENT WAS

THE MAJOR CONTRIBUTING CAUSE OF THEIR NEED FOR TREATMENT AND DISABILITY BY EXPERT MEDICAL OPINION EXCLUDING LAY EVIDENCE, THAT IS THE STATUTE, THEY GET NOTHING.
NOW THAT IS CERTAINLY INADEQUATE.
AND THE PEOPLE WHO GET, HAVE MORE THAN, CAN PROVE MORE THAN 50 BUT LESS THAN 100 THEY HAVE TO PAY FOR THEIR OWN MEDICAL EXPENSES THAT IS NOT A WORKERS' COMPENSATION LAW.
>> YOU LIVE THE LIFE OF WORKERS' COMPENSATION.
LET'S SLOW DOWN HERE.
>> OKAY.
>> I THOUGHT YOU SAID ALL YOU'RE ATTACKING AT THIS POINT IS 104 WEEKS.
BUT NOW YOU'RE SAYING IN ORDER FOR US TO DECIDE WHETHER THE 104 WEEKS IS UNCONSTITUTIONAL WE HAVE TO LOOK AT EVERY OTHER ASPECT OF THIS STATUTE TO SEE IF THERE IS NOTHING INADEQUATE ABOUT THE STATUTE.
SO CAN YOU EXPLAIN --
>> ALTERNATIVES, ONE IS THE NARROW VIEW OF THE PANEL.
104 WEEKS IS INADEQUATE BECAUSE YOU SAID IN THE THOMPSON CASE IS INADEQUATE.
IT IS INADEQUATE WHAT EVERYONE ELSE IN THE UNITED STATES DOES WHICH IS MORE THAN THAT BUT ONE OTHER STATE AND IT JUST DOESN'T MAKE ANY SENSE.
IT WOULD BE JUST AS INADEQUATE IF IT WAS 10.4 WEEKS.
104 WEEKS IS NOT ENOUGH, BUT --
>> TO THIS CASE, NOT TOTALLY AS APPLIED, UNCONSTITUTIONAL AS APPLIED TO MR. WESTPHAL.
WE'RE NO THE DECLARING IF THAT WERE TO HAPPY, NOT THAT, ONLY, IT IS ONLY INADEQUATE BECAUSE OF MR. WESTPHAL'S SPECIFIC SITUATION?

>> YES. HOWEVER --
>> IF I HEAR YOU CORRECTLY, I THINK WHAT YOU'RE SAYING IS THAT THE BENEFITS SHOULD, SHOULD CONTINUE UNTIL YOUR CLIENT REACHES MMI?
>> THAT --
>> NO LIMITATIONS AT ALL, NO 104, NO 260 WEEKS, IT SHOULD CONTINUE UNTIL HE REACHES MMI. THEN HE IS IN A POSITION TO ARGUE WHETHER HE IS PT OR NOT. UNTIL HE IS MMI, WHAT YOU'RE SAYING I THINK THERE SHOULD BE NO GAP AT ALL, I GUESS IS THE BEST WAY TO SAY IT?
>> THERE SHOULD BE NO GAP WHETHER SOMEBODY IS PT RATED GAMES OR NOT.
104 WOULD BE UNCONSTITUTIONAL TO EACH CASE THAT OCCURS THAT MEANS THE 260 LIMITATION WHICH IS ENOUGH AT LEAST IN THIS CASE WOULD BE, YOU KNOW THE LAW BECAUSE OF THE AMENDMENT WOULD BE CONSIDERED UNCONSTITUTIONAL.
THE POINT HOWEVER WAS, IN ALL THE CASES DEALING WITH REDUCTIONS IN INDEMNITY LIKE 104 AND ANYTHING ELSE YOU ALWAYS WENT THROUGH THE EXPLANATION THAT THAT LIMITATION WAS OKAY BECAUSE IT WAS A MATTER OF THE GREATEST GOOD FOR THE GREATEST NUMBER OF PEOPLE.
WE DON'T HAVE ANYMORE.
WE HAVE THE LEAST GOOD FOR THE GREATEST NUMBER OF PEOPLE BECAUSE IT IS NOTHING BUT TAKE-AWAYS.
ACCESS TO COURTS IS NOT SUPPOSED TO BE BAIT AND SWITCH AND GET PEOPLE VOTE TO ACCESS TO COURTS KNOWING WHAT THE WORKERS COMPENSATION LAW AND LEGISLATURE TAKES EVERYTHING AWAY SO IT DOESN'T RESEMBLE THAT ANYMORE.
THAT IS INADEQUATE.
WE DON'T HAVE A WORK PLACE SAFETY ACT ANYMORE.

THAT IS INCREDIBLE.
WE DON'T HAVE FULL MEDICAL ANYMORE.
THAT'S INCREDIBLE.
FOR THE BLIND, AMPUTATED,
PARALYZED GOT COMPENSATION FOR
LIFE, CUT OFF AT AGE 75.
WHAT ARE THEY SUPPOSED TO DO
AFTER THAT?
SECTION AFTER SECTION, IF YOU
COMPARE THEM, NO COMPARISON TO
THE 1967 LAW, NONE.
>> ASSUMING THAT YOU DON'T WANT
A GAP, WHAT EXACTLY IS YOUR
CONCERN WITH JUDGE PADAVANO'S
POSITION THAT YOU REACH MMI AS A
MATTER OF LAW ONCE THE 104 WEEKS
EXPIRED?
WHAT IS YOUR PROBLEM WITH THAT?
>> THAT IS THE CERTIFIED
QUESTION.
AND FROM THAT WAS THEIR
INTERPRETATION OF 440.15-2-A.
THERE ARE TWO WAYS YOU CAN LOOK
AT THAT THEY REVIEW THAT AS
CREATING STATUTORY MAXIMUM
MEDICAL IMPROVEMENT.
THAT THE LEGISLATURE DECREED AS
A MATTER OF LAW THAT ALL
EMPLOYEES REACH MAXIMUM MEDICAL
IMPROVEMENT AS A MATTER OF LAW
AT TWO YEARS.
THAT HAS NO BASIS IN FACT.
IT IS CONTRARY TO THE FACTS OF
THIS CASE AND THERE IS NO
OPPORTUNITY TO REBUT IT WITH THE
TRUTH.
>> ISN'T IT, THEY'RE TRYING TO
MAKE CONSTITUTIONAL WHAT
OTHERWISE WOULDN'T BE.
ISN'T THAT PART OF OUR STATUTORY
CONSTRUCTION?
>> NOT IF YOU MAKE IT WORSE.
FIRST OF ALL THEY --
>> HOW IS IT WORSE?
>> SEPARATION OF POWERS TO
CREATE A CATEGORY --
>> HOW IS IT WORSE REMAINS TO
YOUR CLIENT?
>> DOESN'T WORK VERY WELL AT ALL
BECAUSE ALL HE WOULD BE ABLE TO

DO IS GO BACK AND CLAIM AND TRY
AND TRY TO SHOW, CONVINCE THE
JUDGE THE JUDGE WAS WRONG BEFORE
IN FINDING THAT THE FACTUALLY HE
HAD NOT.
THAT'S A DANGEROUS SITUATION.
YOU KNOW, WE'RE BACK TO THAT.
>> WOULD HE HAVE TO DO THAT, IT
SEEMS TO ME THAT UNDER THE
MAJORITY OPINION IF HE HAS NOT
REACHED MAXIMUM MEDICAL
IMPROVEMENT AT THIS 104, I MEAN,
HE IS PRESUMED TO HAVE REACHED
IT AT THIS 104 WEEKS, IF HE'S
STILL DISABLED.
I THOUGHT THAT WAS THE POINT OF
THE MAJORITY OPINION?
>> YEAH.
BUT HOW WOULD, HOW DOES THE
LEGISLATURE DETERMINE THAT?
BUT IF YOU DECIDE --
>> WELL, THIS IS, I'M TALKING
ABOUT THE OPINION OF THE FIRST
DISTRICT, NOT WHAT THE STATUTE
SAYS.
>> WELL, THAT WAS THEIR
INTERPRETATION OF THE STATUTE.
NOBODY MADE BEFORE THAT THE
LEGISLATURE HAS MADE EVERYBODY
GET WELL AS EVER THEY'RE GOING
TO GET AT TWO YEARS AND BASED ON
REQUIREMENT THAT THE DOCTOR DO
SOMETHING IMPOSSIBLE WHICH IS
RATE THE PERMANENT IMPAIRMENT
EVEN THOUGH IT IS NOT
PERMANENTLY DETERMINABLE AT SIX
WEEKS EARLIER THEN THE EMPLOYEE
CAN CLAIM PERMANENT TOTAL
DISABILITY AT THAT TIME BUT IT'S
NOT THAT.
THEY GAVE IT A NEW NAME BECAUSE
IT'S A NEW CATEGORY.
TERRI PERMANENT DISABILITY AND
THE STATUTORY REQUIREMENT THAT
THE PEOPLE WHO ARE NOT BLIND,
AMPUTATED OR PARALYZED DOESN'T
MAKE A WORK SEARCH DOESN'T
APPLY.
THEY ONLY SHOW THEY CAN'T WORK
AT THAT TIME AND EXPLODE THE

WORLD INTO PTs.
JUDGES WILL NOT BE DOING THAT
HANDING OUT TOTAL PERMANENT
DISABILITY WILL ANY NILLY.
CARRIERS WILL NOT BE PAYING IT
THAT IS TOTALLY UNREALISTIC.
THE QUESTION OCCURS THAT 104
WEEKS IS INADEQUATE.
I THINK YOU HAVE CHOICE VERY
NARROW INTERPRETATION THAT 104
WEEKS IS INADEQUATE AS THIS CASE
APPLIED OR LOOK AT THE WHOLE
PICTURE TO SEE EVERYTHING IS
INADEQUATE.
I SEE I'M INTO MY REBUTTAL TIME.
THANK YOU VERY MUCH FOR YOUR
QUESTIONS AND I WILL BE BACK,
THANK YOU.
>> MAY IT PLEASE THE COURT.
MY NAME IS KIMBERLY PROANO.
I REPRESENT THE EMPLOYER
SELF-INSURED IN THIS CASE, THE
CITY OF ST. PETERSBURG.
I WILL BE FOCUSING ON THE FIRST
DCA EN BANC DECISION.
I LIKE TO POINT OUT ALL THE
PARTIES ARE IN AGREEMENT THAT
THE, REFERENCED AS WESTPHAL II,
THE EN BANC DECISION, ALL THE
PLAINTIFFS ARE IN AGREEMENT THAT
WESTPHAL II IS THE CORRECT
INTERPRETATION.
WHERE THE PARTIES DIFFER
MR. WESTPHAL BELIEVES THE HADLEY
DECISION RENDERS THE STATUTE
UNCONSTITUTIONAL.
>> QUESTION.
QUESTION ON THE MAJORITY
INTERPRETATION.
I'M SURE THE FIRST DISTRICT
FEELS BADLY THAT NO ONE HERE
AGREES WITH THEM.
SIX WEEKS BEFORE THE 104 WEEKS
EXPIRED, SOME PERIOD OF TIME
BEFORE, AND IMPAIRMENT RATING,
WHAT IS IT CALLED?
WHAT HAS TO BE DONE SIX WEEKS
BEFORE?
>> IT'S THE IMPAIRMENT RATING
FOR PERMANENT IMPAIRMENT

BENEFITS.
HOWEVER --
>> SO WHAT IS, WHAT THEY WERE
DETERMINING IS THAT, WHAT IS THE
PURPOSE, THAT THE LEGISLATURE
WOULD PUT THAT PROVISION IN, IF
IT WEREN'T TO MAKE SURE THERE
WAS NOT A GAP IN BENEFITS
SOMEONE RECEIVED?
I THINK THAT IS HOW THEY CAME UP
WITH THIS?
WHAT IS THE MEANING OF IT THEN,
IF UNDER THE CIRCUMSTANCE THAT
UNLESS SOMEONE IS PERMANENTLY
DISABLED AND HAS REACHED MAXIMUM
MEDICAL IMPROVEMENT, IT MEANS
NOTHING?
IF SO WHAT IS YOUR RESPONSE
ON THAT -- WHAT'S YOUR
RESPONSE ON THAT?
>> MY RESPONSE IS THAT THE
IMPAIRMENT RATING IS NOT
THE SAME AS DISABILITY.
WHAT THEY'RE DOING ALLOWING NOT
END OF 104 WEEKS WHAT PERMANENT
IMPAIRMENT IS, ONCE THE CLAIMANT
REACHES MAXIMUM MEDICAL --
>> I'M ASKING WHAT WAS PURPOSE
OF THAT PURPOSE OF THE PROVISION
THE LEGISLATURE PUT IN?
IF IT IS NOT GIVEN SOME MEANING
AND WE DON'T, WE ASSUME THAT THE
LEGISLATURE IS NOT GOING TO PUT
A USELESS PROVISION IN,
ESPECIALLY WORKERS COMP LAW
WHICH IS HEAVILY LOBBIED AND
CONSIDERED OVER THE YEARS.
SO WHAT, IF IT'S NOT THAT,
WHAT'S THE PURPOSE OF --
>> THE PURPOSE IS FOR IMPAIRMENT
BENEFITS.
AS YOU WILL SEE IT IS UNDER A
DIFFERENT STATUTE.
>> SO HE DOES GET, SO AFTER
104 WEEKS WHAT
WAS HIS IMPAIRMENT RATING SIX
WEEKS BEFORE THAT THE JUDGE
ACCEPTED?
>> AT THAT POINT HE WAS
ACTUALLY, BECAUSE PEOPLE CAN

COME OUT OF MAXIMUM MEDICAL
IMPROVEMENT AND WHAT A DOCTOR
OPINES AND GO FURTHER FOR
SURGERY, ORIGINALLY IN
MARCH 2011 HE HAD 12% IMPAIRMENT
RATING.
SO WE DID PAY OUT IMPAIRMENT
BENEFITS.
IMPAIRMENT BENEFITS AND
PERMANENT TOTAL.
YOU DON'T GET THE --
>> WHAT IS HIS IMPAIRMENT BENEFITS
AFTER 104 WEEKS, WHAT IS THE
AMOUNT?
>> DEPENDS WHAT THE DOCTOR
PROJECTS.
>> WHAT IS THIS CASE?
>> IT WAS 12% AT THAT TIME,
BECAME IN LITIGATION WHAT THE
PERMANENT TOTAL DISABILITY
BENEFITS WERE.
SO IN THIS PARTICULAR CASE --
>> THERE'S A GAP, THERE IS NOT A
DISCONTINUATION OF BENEFITS.
>> THAT'S CORRECT.
IN USUAL CASES IF THERE IS 104
WEEKS EXHAUSTED TEMPORARY
BENEFITS BUT THEY'RE NOT AT
MAXIMUM MEDICAL IMPROVEMENT THEY
CAN GET IMPAIRMENT BENEFITS
BASED ON WHATEVER RATING DOCTOR
GIVES THEM.
>> ISN'T THAT IMPORTANT, FROM
YOUR POINT OF VIEW AND THE
CONSTITUTIONAL ISSUE AND I SORT
OF SAW THAT IN THERE, BUT FROM A
PRACTICAL POINT OF VIEW, CAN YOU
TELL US IN THIS CASE WHEN IT
MEANT AT 104 WEEKS, WHAT WAS HE
GETTING PER WEEK AND THEN WITH
THE 12%, WHAT DID HE THEN GET?
>> AT THIS POINT, WITH THIS
PARTICULAR CASE HE --
>> THAT'S WHAT --
>> BECAUSE, WHAT HAPPENED IS
THAT HE IS AT 104 WEEKS DURING
THE LITIGATION.
WE HAD SOME DISPUTE WHETHER OR
NOT HE WAS TEMPORARILY TOTALLY
DISABLED.

WHAT WE HAD IN THIS CASE --
>> YOU JUST CUT HIM OFF?
>> NO.
AT THE TIME --
>> NOT YOU.
>> WE PAID OUT HIS IMPAIRMENT BENEFITS AT THE TIME HE REACHED THE ORIGINAL MMI WHICH WAS, WHICH WAS THE 12% IMPAIRMENT RATING WHICH CAME OUT TO A CERTAIN AMOUNT OF BENEFITS THAT HE GOT.
IT IS NOT THE FULL BENEFITS HE WOULD HAVE GOT UNDER PTD BUT STILL WAS SOMETHING THAT HE WOULD HAVE RECEIVED.
>> WELL, NOW, BREAK THIS DOWN IN NUMBERS, IN DOLLARS, WHAT ARE WE TALKING ABOUT 12% VERSUS WHAT HE WOULD HAVE GOTTEN OTHERWISE?
HOW MUCH ARE WE TALKING ABOUT?
YOU'RE SAYING 12% OF WHAT?
>> OF, LOSS OF --
>> I KNOW, JUST GIVE ME A NUMBER.
WHAT DOES 12% EQUAL IN TERMS OF DOLLARS?
>> I'M NOT TOO SURE WHAT THE EXACT NUMBER DOLLAR FIGURE IS.
>> BALLPARK.
>> I HONESTLY DON'T HAVE THAT INFORMATION.
I KNOW THAT IT IS NOT AS MUCH AS HE WOULD GET UNDER THE TEMPORARY TOTAL DISABILITY.
>> HOW MUCH FOR THE TEMPORARY TOTAL DISABILITY?
>> 66 AND 2/3 OF THEIR AVERAGE WEEKLY WAGE.
GOT 765 BIWEEKLY.
>> 12% HE WOULD GET 12% OF, WHAT DOES THAT MEAN?
>> THAT JUST GOES TO A PERCENTAGE RATING, WHAT THEY ALLOCATE.
>> I UNDERSTAND.
HOW MUCH DOES THAT EQUATE INTO DOLLARS?
CAN HE LIVE OFF OF THAT?
>> I DON'T KNOW IF HE WOULD

NECESSARILY BE ABLE TO LIVE OFF
OF THAT BUT HE WAS ALSO
RECEIVING DURING THAT GAP PERIOD
OF TIME, IT WASN'T LIKE HE WAS
OUT IN THE COLD.
HE WAS RECEIVING SOCIAL SECURITY
DISABILITY BENEFITS.
>> THAT IS WHAT I'M SAYING
RIGHT.
>> AND DISABILITY BENEFITS.
RIGHT.
BUT WITH THIS PARTICULAR CASE HE
WAS ALSO RECEIVING 16,000 DURING
THAT GAP AS RESULT OF A
SETTLEMENT WITH THE TEMPORARY
TOTAL DISABILITY BENEFITS THAT
WE HAD.
>> THIS IS, YOU DIDN'T PAY HIM
WHAT HE THOUGHT HE SHOULD GET IN
TEMPORARY TOTAL DISABILITY AND
ACTUALLY THIS WAS A SETTLEMENT
OF THE DIFFERENCE?
>> CORRECT.
THAT WAS A SETTLEMENT.
>> THIS WAS REALLY HIS BENEFIT
FOR THOSE 104 WEEKS, THE 16,000,
RIGHT?
>> RIGHT.
>> OKAY.
>> THE, YOU SPOKE EARLIER ABOUT
THE STATUTE PROVIDES FOR I
GUESS, COULD BE CALLED A
PROJECTED DISABILITY RATING ONCE
HE REACHES MMI.
NOW IS WHAT YOU'RE SAYING THAT,
THE STATUTE PROVIDES THAT THE
TREATING PHYSICIAN CAN PROJECT
WHAT THE DISABILITY RATING WILL
BE ONCE THE PERSON REACHES MMI
AT SOME TIME IN THE FUTURE.
ALL RIGHT, NOW, ARE DOCTORS ABLE
TO DO THAT IN EVERY CASE?
>> IN EVERY CASE?
>> YES.
>> YES.
>> IN EVERY SINGLE CASE A DOCTOR
CAN SAY ONCE 104 WEEKS RUNS OUT
OR ABOUT TO RUN OUT SIX WEEKS
BEFORE A DOCTOR CAN PROJECT A
DISABILITY RATING WILL BE

WHATEVER?
>> YEAH.
BUT NOT AT TIME OF 104 WEEKS.
THEY'RE PROJECTING HE REACHES
MMI ASSET FORTH IN THE STATUTE.
I THINK FOCUS NEEDS TO BE ON
THIS CASE IS ABOUT PERMANENT
TOTAL DISABILITY WHICH IS
SEPARATE SECTION OF THE STATUTES
THAN TEMPORARY TOTAL DISABILITY.
>> MY FOCUS IS INSTANCES WHICH
DOCTORS CAN NOT MAKE THAT
PROJECTION, WHAT CHOICES DOES
THE PERSON HAVE?
>> WELL HE HAD A CHOICE BECAUSE
IN THE HADLEY COURT DECISION
EN BANC, WAS TWO YEARS PRIOR TO
THE WESTPHAL II DECISION THEY
CREATED OSWALD EXCEPTION, A
CLAIMANT CAN PROVE IN THEY'RE
NOT AT MAXIMUM MEDICAL
IMPROVEMENT AS DEFINED IN THE
STATUTE IF THEY HAVE A DOCTOR TO
SAY, AND EXHAUSTED 104 WEEKS
HAVE A DOCTOR SAY THEY REACH MMI
THEY WOULD BE TOTAL DISABLED
THEY CAN ASSERT A CLAIM FOR PTD
AND GET AWARDED PTD BENEFITS.
>> BUT ISN'T THAT, THAT'S WHAT
YOU WOULD ADVOCATE IN THIS CASE,
THAT THAT'S, THAT HADLEY WAS THE
CORRECT INTERPRETATION?
>> CORRECT.
>> WHERE DO THEY COME UP WITH
THAT ONE WHERE THE, THE THAT
EVEN THOUGH THE LEGISLATURE SAYS
MMI IS WHAT IS THE TRIGGER FOR,
WHETHER HE IS PERMANENTLY
DISABLED OR NOT, THAT IT CAN BE
OPINED, YOU KNOW, EARLIER THAN
THAN THE DATE OF MMI?
>> I BELIEVE THE HADLEY COURT
LOOKED AT THE PERMANENT
IMPAIRMENT STATUTE AND SAID
THERE WAS PROJECTIONS THAT WAY,
TO PROVIDE FOR AN IMPAIRMENT
RATING ONCE THEY REACH MMI.
SO THAT THEY ALSO LOOK THE SAME
WAY, TO BE CONSISTENT WITH THE
STATUTE.

I THINK THAT, THE COURT IF THEY ANSWER THE CERTIFIED QUESTION IN THE POSITIVE, WHAT THEY'RE DOING ESSENTIALLY REWRITING THE STATUTES.
AND AGAIN, IF WE'RE FOCUSING ON THE GAP IN BENEFITS, THAT OSWALD EXCEPTION AMELIORATES THE GAP.
IT REMEDIES THAT.
>> THE HADLEY RULE IS WHAT JUDGE BENTON RELIED ON IN HIS OPINION, RIGHT, HIS SEPARATE BENEFIT.
>> A FEW OF THE JUSTICES RELIED ON IT.
>> HE TALKED ABOUT THAT PARTICULAR RULE.
DO YOU SUPPORT JUDGE BENTON'S POSITION?
>> PART OF IT.
I DON'T SUPPORT THE POSITION WHERE HE SAID HE SHOULD BE AWARDED PERMANENT DISABILITY BENEFITS.
I BELIEVE THIS CASE IS ABOUT PTD AND WHETHER OR NOT MR. WESTPHAL MET HIS BURDEN OF PROOF IF HE IS NOT AT MAXIMUM MEDICAL IMPROVEMENT WHETHER OR NOT SHOWED HE WAS TOTALLY DISABLED ONCE HE REACHED MMI.
>> YOU DON'T THINK THE FACTS IN THIS CASE SUPPORT THE ANALYSIS IN HIS OPINION, IS THAT RIGHT?
>> AS FAR AS THE FACTS IN THIS CASE, IT IS SIMILAR TO THE HADLEY DECISION.
THAT YOU HAD A CLAIMANT THAT EXHAUSTED HIS 104 WEEKS.
THAT WAS TOTALLY DISABLED AT THAT. BY HIS AUTHORIZED TREATING DOCTOR, BUT TOO SPECULATIVE TO FIGURE OUT WHAT HIS WORK STATUS OR MMI OR WORK RESTRICTIONS ARE GOING TO BE ONCE HE REACHED WHEN THE DOCTOR IS SAYING HE WILL BE AS GOOD AS HE IS GOING TO GET.
WE HAVE THE SAME THING IN WESTPHAL.
WESTPHAL BROUGHT EVIDENCE OF HIS IME DOCTOR AND TO THE JCC AND

JCC HEARD THE TESTIMONY OF
DR. McKERIKS AUTHORIZED
TREATING PHYSICIAN AND AS THE
FACT-FINDER HE WEIGHED THE
EVIDENCE THAT DR. MCCALEB WAS
MORE PERSUASIVE SAID IN HIS
FINAL ORDER AS ONE WHO MOST
RECENTLY DID HIS SURGERY I
CHOOSE TO RELY ON DR. MCCALEB.
>> YOU'RE OUT OF TIME.
>> THANK YOU.
>> GOOD MORNING, MAY IT PLEASE
THE COURT.
I'M ALAN WINSOR ON BEHALF OF
THE ATTORNEY GENERAL.
CASES HERE ON CERTIFIED QUESTION
FROM THE FIRST DISTRICT AND THE
COURT DOES HAVE THE BENEFIT OF
COMPLETE AGREEMENT AMONG THE
PARTIES WHAT THE RIGHT
INTERPRETATION IS.
>> THEN WE HAVE LIKE FIVE
DIFFERENT CHOICE, NONE OF WHICH,
AND I ASSUME YOU LIKE THE CHOICE
OF WEATHERALL?
>> WE LIKE THE CHOICE THAT
UPHOLDS THE STATUTE AND THAT, WE
AGREE WITH JUDGE WEATHERALL'S
INTERPRETATION.
WE AGREE WITH THE INTERPRETATION
THAT THE DISTRICT COURT EMBRACED
15 YEARS AGO IN OSWALD AND
REAFFIRMED --
>> THERE IS A LOT OF CONTROVERSY
AMONG THE JUDGES BECAUSE THEY
HAD HAD AN UNBROKEN PRECEDENT
SINCE OSWALD, HADLEY.
TO MAKE SURE, THIS IS THE FIRST
TIME THIS COURT IS LOOKING AT
THE CONSTITUTIONALITY OF THE
WORKERS COMPENSATION STATUTE
UNDER THE, WHAT YEAR WAS THIS
PASSED?
>> THE MOST RECENT AMENDMENTS
WERE 2003.
THE AMENDMENT AT ISSUE HERE WAS
1993.
>> SO WE REALLY HAD, SO WE HAD
THE FIRST DISTRICT DECIDING ALL
THESE ISSUES.

WERE THERE CONSTITUTIONAL
CHALLENGES PRIOR TO THIS PRESENT
ONE?
>> THE FIRST DISTRICT DIDN'T
CONSIDER THE CONSTITUTIONALITY
OF THIS STATUTE.
SO WE HAD, THE PANEL DECISION
DID BUT THE PANEL DECISION IS
NOT IN FRONT OF THIS COURT.
>> I ASKED BEFORE THAT, BEFORE,
BECAUSE PRECEDENT OBVIOUSLY IS A
BIG ISSUE FOR THE FIRST DISTRICT
BUT FOR THIS COURT EVEN THOUGH
THE LAW WENT INTO EFFECT IN
1993, THE WAY THAT THIS, IT'S
SET UP WHERE THE FIRST DISTRICT
ESSENTIALLY HAS PLENARY POWER
OVER THE WORKERS COMP UNLESS
THEY HOLD SOMETHING
UNCONSTITUTIONAL OR CERTIFY A
QUESTION, WE DON'T GET A CHANCE
TO LOOK AT IT.
IS THAT CORRECT?
>> THAT'S RIGHT.
THIS IS THE FIRST TIME THIS
ISSUE IS IN FRONT OF THIS COURT.
CERTAINLY THIS COURT IS NOT
BOUND BY HADLEY OR ANY OF THE
OTHER FIRST DISTRICT DECISIONS
BUT WE DO BELIEVE THE THAT
DECISION IS THE CORRECT
INTERPRETATION.
>> WITH THE OSWALD EXCEPTION?
>> YES, YOUR HONOR.
WHEN YOU SAID WHAT YOU LIKE,
JUSTICE POLSTON, WHAT ABOUT WHAT
JUDGE BENTON SAID, THIS
PLAINTIFF ACTUALLY CALLED FOR
THE OSWALD EXCEPTION?
>> THIS, THERE WAS DISPUTED FACT
BELOW.
WE TAKE NO POSITION WITH RESPECT
TO FACTS IN THIS CASE AND WHAT
JUDGE THOMAS SAID AND JUDGE
BENTON FOLLOWED ON A LITTLE
DIFFERENTLY. WHAT JUDGE THOMAS
SAID HE DID QUALIFY BECAUSE HE
WAS PERMANENTLY DISABLED ALL
ALONG.
EVEN AMONG THE PRIOR

INTERPRETATION OF OSWALD, IF
THAT WERE THE CASE AND THAT WERE
THE FINDING HE WOULD BE ENTITLED
TO PERMANENT DISABILITY AT THE
EXPIRATION OF TEMPORARY
DISABILITY BECAUSE HE DID HAVE A
PERMANENT DISABILITY OF THE
PROBLEM WITH THE NEW
INTERPRETATION IS IT AFFORDS
PERMANENT DISABILITY BENEFITS TO
PEOPLE WHO DO NOT HAVE PERMANENT
DISABILITIES.
WHAT THE STATUTE THAT PROVIDES
THE PERMANENT DISABILITY
BENEFITS SAYS, THIS IS FOR
PEOPLE WHO HAVE BEEN ADJUDGED TO
HAVE PERMANENT DISABILITIES.
IF, WHAT YOU, ONCE YOU IMPROVE
YOU'RE NOT PERMANENTLY DISABLED,
YOU'RE NOT PERMANENTLY
DISABLED THAT IS THE PROBLEM
WITH THE INTERPRETATION IN FRONT
OF THIS COURT, THE WESTPHAL
MAJORITY INTERPRETATION.
>> THIS IS PERSON, NOT TALKING
ABOUT SOMETHING THAT HAD A NECK
SPRAIN OR, YOU KNOW WAS FAKING
IT.
WE'RE TALKING ABOUT SOMEONE THAT
HAD A SIGNIFICANT INJURY AND
YET, BECAUSE THE DOCTOR WAS
OPTIMISTIC THAT MAYBE HE COULD
GET SOMEWHAT BETTER, BUT HOW,
IN TERMS OF IT, IN TERMS OF HIS
DENIAL OF ACCESS TO THE COURTS,
HOW IS IT NOT, AFTER THE CUTOFF,
104 WEEKS, HE HAS NO OPTION TO
GET ANYMORE, EITHER TEMPORARY
BENEFITS OR PERMANENT BENEFITS?
THAT IS REALLY WHAT WE'RE
TALKING ABOUT.
SO EXPLAIN HOW THAT IS NOT
UNCONSTITUTIONAL UNDER OUR
PREVIOUS CASE LAW.
>> FIRST HE DOES HAVE THE,
PERMANENT IMPAIRMENT IS ANOTHER
OPTION THAT THE STATUTE PROVIDES.
>> NOW MAYBE YOU CAN TELL US.
THAT IS THE 12%.
>> SURE, MY UNDERSTANDING THAT

WAS THE FINDING HERE BUT WHAT
THE STATUTE PROVIDES --
>> CERTAINLY MUCH LESS THAN,
EVEN THOUGH THIS GUY, 104 WEEKS,
AS BAD AS HE WAS AT 105 WEEKS HE
GETS SOME OTHER TYPE OF BENEFIT.
>> THERE WAS A FACT FINDING IN
THIS CASE IT WASN'T A PERMANENT
INJURY.
>> I DON'T THINK THERE WAS EVER,
HE WASN'T --
>> THAT HE HADN'T PROVEN A
PERMANENT INJURY.
THAT WAS THE JCC'S --
>> I THOUGHT IT WAS IT WAS TOO
SOON TO TELL.
>> THAT'S RIGHT.
>> THAT IS A PRETTY BIG
DIFFERENCE.
IF THIS WAS PERSONAL INJURY
CASE, BELIEVE ME THIS GUY WOULD
HAVE, HE MIGHT NOT BE, WELL HE
COULD NEVER WORK AGAIN BUT HE
WOULD BE SIGNIFICANTLY DISABLED
FOR FUTURE PAIN AND SUFFERING,
PAST PAIN AND SUFFERING, MEDICAL
BENEFITS AND THE LIKE.
>> THERE ARE LIMITS IN THE
WORKERS COMPENSATION STATUTE AS
THERE ALWAYS HAD BEEN.
YOU ASKED ABOUT THE
CONSTITUTIONAL CHALLENGE.
THERE HAS NEVER BEEN UNDER
ACCESS TO COURTS, SOME A
ABSTRACT IDEA WHAT IS
INADEQUATE.
THE KLUGER ANALYSIS GOES TO WHAT
WAS AVAILABLE STATUTORILY OR
UNDER COMMON LAW IN 1968 AND
ASKS WHETHER IT IS AVAILABLE
KNOW AND ASK WHETHER THE
LEGISLATURE ABOLISHED THAT
ACTION.
EASY WAY TO RESOLVE THE
CONSTITUTIONAL CLAIM IN THIS
CASE TO RECOGNIZE THAT HE
RECEIVED MORE BENEFITS UNDER THE
CURRENT STATUTE THAN HE WOULD
HAVE IN 1968.
>> I'M A LITTLE PUZZLED BY YOUR

STATEMENT THAT THE LAW HAS NEVER
CONTEMPLATED ADEQUACY OF REMEDY.
DID I HEAR YOU SAY THAT?
>> IN THE KLUGER TEST WHICH
GOVERNS ACCESS TO COURTS IN THIS
TIME TYPE OF CLAIM THE ANALYSIS
WHETHER THE LEGISLATURE HAS
ABOLISH AD CAUSE OF ACTION THAT
EXISTED IN 1968.
THAT IS THE QUESTION --
>> WHETHER THERE IS ADEQUATE
ALTERNATIVE REMEDY, THAT IS THE
KLUGER STANDARD.
>> WELL IF THE COURT HAS
ABOLISHED THEN ASKS THE NEXT
QUESTION.
THE FIRST QUESTION IF THEY BOMB
LIKED THE CAUSE OF ACTION.
>> PART OF INQUIRY WHETHER THERE
IS ADEQUATE ALTERNATIVE REMEDY.
>> THAT IS THE NEXT INQUIRY.
IF YOU FIND THAT --
>> ANY REMEDY CALLS INTO
QUESTION THE ADEQUACY OF THE
REMEDY RIGHT?
I'M IN TOTAL DISAGREEMENT WITH
YOUR STATEMENT OF WHAT THE LAW
IS.
>> WHAT THE LAW IS, IF THE
LEGISLATURE ABOLISHES A CAUSE OF
ACTION --
>> OR PARTIALLY DESTROYS IT.
>> MUST PROVIDE AN ADEQUATE
ALTERNATIVE.
>> RIGHT.
>> SO FIRST YOU LOOK AT WHAT HE
WOULD HAVE HAD IN 1968 AND THE
PETITIONER TALKS ABOUT WEEKS IN
ABSTRACT.
I WOULD HAVE HAD THIS MANY WEEKS
AND NOW I HAVE ONLY THIS MANY
WEEKS.
BUT DOLLARS IS MEASURE OF
RECOVERY.
IN 1968 HE WOULD HAVE HAD UP TO
350 WEEKS AT $49 PER WEEK.
NOW APPLYING THE $765 PER WEEK
LIMIT THAT PREVAILS TODAY THE
TOTAL NUMBER OF DOLLARS IS SOME
TENFOLD.

EVEN IF YOU APPLY --
>> YOU'RE SAYING IT IS AN
ADEQUATE ALTERNATIVE REMEDY, NOT
THAT YOU DO NOT LOOK WHETHER IT
IS OR NOT?
>> WELL, IF THE COURT WERE TO
BELIEVE THAT THE COURT HAS, THE
REDUCTION FROM 350 TO 104 IS THE
ABOLITION OR LIMITATION OF A
REMEDY THEN CERTAINLY IT WOULD
BE AN INADEQUATE SUBSTITUTE.
I THINK THERE ARE TWO WAYS OF
LOOKING AT IT.
YES, YOUR HONOR.
WHEN THE LEGISLATURE CHANGES LAW
BUT PROVIDE AN ADEQUATE REMEDY
THERE IS NO KLUGER VIOLATION.
>> EVEN IF THE ANALYSIS IS
WHETHER IT'S ADEQUATE.
>> EVEN IF THE COURT --
>> WE HAVE TO GET THERE, TO ME,
THIS SEEMS LIKE THE CLASSIC
EXAMPLE OF EACH OF THESE
WELL-QUALIFIED, ARTICULATE AND
EXCELLENT JUDGES ALL SAYING THAT
MY INTERPRETATION IS CORRECT AND
I'M NOT REWRITING, I'M JUST
INTERPRETING BUT THE WAY THE
OTHER GUY INTERPRETS IS A
REWRITING.
>> THAT'S RIGHT.
>> THAT IS EXACTLY WHAT WE RUN
INTO THAT NUMBER OF JUDGES,
EVERYBODY IS GOING LIKE THIS.
>> OBVIOUSLY THE COURT HAS AN
OBLIGATION TO INTERPRET
IT IN ACCORD
WITH LEGISLATIVE INTENT AND
THERE WAS DISAGREEMENT AND VERY
CLOSE DISAGREEMENT IN THE
LEGISLATIVE COURT BY WHAT THE
INTENT WAS.
TALK OF VIOLATING SEPARATION OF
POWERS IS ANOTHER WAY TO SAY THE
COURT NEEDS TO INTERPRET THE
STATUTE AND THERE IS
DISAGREEMENT.
>> IN DETERMINING ACCESS TO
COURT --
>> YES.

>> YOU SAY ACCESS IN 1968.
DON'T WE HAVE TO GO BACK TO WHEN
WORKERS COMP FIRST ABOLISHED
TOUR ACTIONS FOR WORKERS AND
LOOK AT THAT POINT, WE SAID,
WELL THIS WAS,
THIS WAS, THEY GAVE ADEQUATE
ALTERNATIVE.
IF IT BECOMES, TO ITS, YOU SAY
IT IS REALLY STILL TERRIFIC WHAT
WORKERS GET AND I THINK THERE
ARE A LOT OF WORKERS THAT WOULD
DISAGREE WITH YOU, AND DON'T WE
NEED TO, WHY DO WE, JUST GO TO
1968, NUMBER ONE?
AND TWO, IF MR. WESTPHAL COULD
NOT HAVE SUED IN TORT BECAUSE
HE, IT WAS HIS, YOU KNOW, HE HAD
LIFTED FURNITURE, AND THIS IS,
WHY IS THERE AN ACCESS TO COURT
ISSUE TO BEGIN WITH BECAUSE HE
COULDN'T HAVE A LAWSUIT?
>> THE ANSWER THAT I SEE, I'M
ALMOST OUT OF TIME, THE ANSWER TO
THE QUESTION, IN ELLA, THE
COURT HELD KLUGER ANALYSIS WAS
KEYED OFF WHAT WAS AVAILABLE
COMMON LAW OR STATUTORILY IN
1968.
WE KNOW IN 1968 HE HAD NO TORT
REMEDY.
SAME REASONS YOU ARTICULATED.
THERE IS NO FINDING OF FAULT.
THERE IS SOVEREIGN IMMUNITY
DEFENSE.
HE HAD IN 1968 THERE IS
STATUTORY RIGHT TO TEMPORARY
TOTAL DISABILITY.
JUST LIKE TODAY.
THE DIFFERENCE HE HAD MORE WEEKS
IN 1968.
FEWER DOLLARS IN 1968.
WHETHER YOU SAY IS NOT ABOLITION
OR ALTERATION OR REASONABLE
SUBSTITUTE, EITHER WAY IT
SATISFIES KLUGER EVEN IN THE
ABSTRACT IS SEEMS INADEQUATE.
THIS COURT SAID IN MAHONEY,
SOMETIMES PEOPLE GET LESS THAN
SEEMS LIKE THEY SHOULD BUT THOSE

ARE DETERMINATIONS FOR THE
LEGISLATURE.
AS YOU POINTED OUT JUSTICE
PARIENTE, IT'S A SYSTEM FILLED
WITH LIMITATIONS.
THERE IS NOT GOING TO BE THE
SAME KIND OF RECOVERY THERE
MIGHT BE IN A TORT ACTION BUT
THE BENEFIT IS, THERE IS
RECOVERY FOR ALL WORKERS WHO ARE
INJURED AND IN WORKPLACE
ACCIDENTS.
SO WE WOULD ASK THE COURT TO
ANSWER THE CERTIFIED QUESTION IN
THE NEGATIVE AND REJECT THE
CONSTITUTIONAL CHALLENGE.
>> REBUTTAL?
>> YOU ASKED WHAT WAS THE
PURPOSE AND THE PURPOSE WAS TO
REDUCE BENEFITS IN ORDER TO
REDUCE COSTS.
IMPAIRMENT BENEFITS ARE
MINISCULE AND IT'S TAKING THE
COMP RATE OF 765 AND REDUCING IT
BY 25%.
SO WE WENT FROM 765 TO 422.
THAT IS THE MATH.
AND FOR A LOT, TWO WEEKS OF
COMPENSATION FOR EACH 1%.
SO, HE CONVERTS FROM TEMPORARY
TOTAL DISABILITY AT 104 WEEKS TO
A MINISCULE AMOUNT.
THEY GET CREDIT FOR IT BUT WHAT
DID THEY DO?
THEY ABOLISHED COMPENSATION FOR
LOSS OF EARNINGS AND TURNED IT
INTO IMPAIRMENT AS MINISCULE
AMOUNT.
EVERYTHING IS INADEQUATE.
>> AT THE IMPAIRMENT RATE, HOW
LONG CAN YOU STAY ON THAT?
OR DO YOU STAY ON IT UNTIL YOU
CAN DEMONSTRATE YOU ARE IN FACT
PERMANENTLY, I DON'T UNDERSTAND
HOW THAT --
>> 5% RATING WOULD GET HIM 10
WEEKS OF COMPENSATION.
>> VERY SMALL AMOUNT.
>> VERY SMALL AMOUNT.
>> I DON'T THINK THAT WAS CLEAR

AT LEAST FOR US.
SO WHATEVER THE IMPAIRMENT IS IT IS NOT WEEKLY THING UNTIL YOU GET TO --
>> MINISCULE ALL YOU CAN CALL IT.
104 WEEKS IS 71% LESS THAN 350.
THAT'S ENORMOUS.
WE'RE BACK TO THE SAME QUESTION.
IN ALL OF THE CASES IN THE PAST IN WHICH YOU ADDRESSED THE KLUGER VERSUS WHITE ANALYSIS OF WORKERS COMP, THE FIRST THREAD RIGHT OUT FOR ANY CHANGE WAS WE HAVE FULL MEDICAL.
AND THAT'S ABOUT SAYING WELL IT'S A GOOD THING FOR OTHER THINGS.
WE HAVE NOTHING GOOD ANYMORE.
THERE IS NOTHING LEFT IN IT.
IT DOESN'T, THE COMPARISON IS NOT THE COMMON LAW.
THE COMMON LAW REMEDIES HAVE ABOLISHED 100 YEARS BEFORE TAX WHEN THE PEOPLE VOTED FOR ACCESS TO COURTS THAT IS THEY KNEW THE REMEDY FOR EMPLOYEES WAS.
THAT ALREADY HAD BEEN ABOLISHED AND DECADES AND CENTURIES, 1917.
SO THAT IS NOT WHAT THEY THINK EMPLOYEES ARE GOING TO GET.
NOW THEY KNOW WHAT EMPLOYEES GET.
THEY GET THE SHORT END OF THE STICK.
AND THAT.
>> MR. STICKING, THE ATTORNEY GENERAL MAKES THE ARGUMENT THAT IN THE CONSTITUTIONAL ANALYSIS THAT UNDER KLUGER ANALYSIS, THAT IT DOES NOT ABSOLUTELY, TOTALLY AN COMPLETELY FREEZE ALL STATUTORY TYPE PROVISIONS FOR ALL TIME.
AND WHAT IS YOUR RESPONSE TO THAT STATEMENT?
HE SAYS, WELL, WE HAVE TO UNDERSTAND THAT IT CAN STILL BE INADEQUATE ALTERNATIVE REMEDY EVEN THOUGH THERE ARE

ADJUSTMENTS TO A STATUTORY
SCHEME THAT WAS IN PLACE AT THE
TIME WE BEGIN OUR ANALYSIS?
>> TWO THINGS.
FIRST OF ALL IT WAS TO REDUCE
COSTS FOR A CRISIS THAT NO
LONGER EXISTS AND HASN'T EXISTED
IN THIS CENTURY.
IT IS WAY DOWN.
BUT THE REASON WHY THAT IS NOT
THE CORRECT ANALYSIS, IS QUITE
SIMPLY, 1968 IS WHAT THE PEOPLE
KNEW IT TO BE.
THIS ISN'T THAT ANYMORE.
AND SO LONG AS IT IS COMPLETELY
INADEQUATE COMPARED TO IT
DOESN'T MATTER.
IN SMITH VERSUS THE DEPARTMENT
OF INSURANCE WHAT I'M ASKING TO
YOU DO IN THAT REGARD IS EXACTLY
WHAT YOU DID, JUST BY PRECEDENT
AND IT'S COMMON SENSE.
IF YOU GO THROUGH ANY AMENDMENT,
WHICH IN THIS INSTANCE IS 93 AND
BO IN SECTION BY SECTION BY
SECTION.
THIS ONE IS VALID, THIS IS
INVALID.
THEY'RE SEVERABLE.
ANYTHING SEVERABLE IS INVALID, I
KNOW IT'S A JOB YOU ABOUT YOU
SHOULD COMPARE '68 ACCORDING TO
THE KRUEGER VERSUS WHITE, WHAT
IT IS TODAY AS YOU MAKE THE
COMPARISON.
IT GOES IF IT IS ADEQUATE, IT
STAYS.
WE ASK YOU TO MAKE THAT DECISION
APROPOS YESTERDAY'S LINES
FROM MOVIES, I'D LIKE TO FINISH
WITH LINE FROM "STAR WARS."
YOU ARE MY ONLY HOPE.
THANK YOU, YOUR HONORS, THANK YOU
FOR YOUR TIME AND ATTENTION.
>> THANK YOU ALL FOR YOUR
ARGUMENTS TODAY.