IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 64,809

MARY ELLEN O'NEIL,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION and CRAWFORD & COMPANY,

Respondents.

_____/

BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

In this Brief, the Petitioner will be referred to as "Claimant" and the Respondents referred to as "Employer/Carrier". The term "R" refers to the Record on Appeal in this cause. The term "A" refers to the Appendix of the Petitioner.

STATEMENT OF THE CASE AND FACTS

The Employer/Carrier adopts the Statement of the Case and Facts contained in the Claimant's Brief with the following addditions and clarifications:

1. The Claimant worked as a toll collector on the 11:00 - 7:00 a.m. shift for an entire eight (8) year period and during this period, although she stood at times, she usually was sitting down. (R34,42,124).

2. Dr. Hoffeld testified that the Claimant was not restricted from "all" walking as asserted by the Claimant in her Brief. (R70).

ISSUES PRESENTED

I. WHETHER THE DEPUTY COMMISSIONER ERRED IN FINDING THAT THE CLAIMANT WAS NOT PERMANENTLY, TOTALLY DISABLED.

II. WHETHER SECTION 440.15(3)(b)3.d., FLORIDA STATUTES (1979), IS UNCONSTITUTIONAL.

III. WHETHER SECTION 440.15(3)(b)3.d., FLORIDA STATUTES (1979), VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT CONFLICTS WITH THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. §621, ET SEQ. (1976).

ARGUMENT

I. THE DEPUTY COMMISSIONER DID NOT ERR IN FINDING THAT THE CLAIMANT WAS NOT PERMANENTLY TOTALLY DISABLED.

First of all, the Employer/Carrier submits that this issue is not a proper issue for review by this Honorable Court. The First District Court of Appeal affirmed per curiam the Order of the Deputy Commissioner. Consequently, since this per curiam affirmance established the law of the case, the law of the case precludes relitigation of all issues necessarily ruled upon by the First District Court of Appeal, which issues include the issue of permanent total disability and the constitutionality of Section 440.15(3)(b)3.d, Florida Statutes (1979). See Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976); State v. Stabile, 443 So.2d 398 (4th DCA 1984) and cases cited therein.

The Employer/Carrier submits that, in light of the written decision of the First District Court of Appeal in this particular case, the review power of this Honorable Court is limited to the certified question presented by the First District Court of Appeal. As this Honorable Court stated in Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961), "it is not the question of great public interest in a decision that we are concerned with, but the decision that passes upon such a question." In the instant case, the decision of the First District

Court of Appeal only passed upon the question of whether Section 440.15 (3)(b)3.d., Florida Statutes(1979) is unconstitutional under the Supremacy Clause because it violates the Federal Age Discrimination in Employment Act (ADEA). See O'Neil v. Department of Transportation, 442 So.2d 961 (1st DCA 1983). Therefore, the scope of review by this Honorable Court is properly limited to this question, which in fact is the certified question. It is clear that the First District Court of Appeal made no mention of the issue of permanent total disability or the constitutionality of the applicable wage loss statute in its per curiam affirmance or its decision on the Claimant's motion for rehearing. Thus, as stated above, the First District Court of Appeal necessarily ruled upon these issues. The Claimant had her full right of appeal as to these issues. To allow the Claimant to relitigate these issues before this Honorable Court would be to allow the Claimant to have "two bites out of the apple". Hence, these issues (Points I and II of the Claimant's Brief) should properly not be reviewed by this Honorable Court. As recognized by this Honorable Court in Trushin v. State, 425 So.2d 1126 (Fla. 1982), the function of the District Courts of Appeal is as "courts of final jurisdiction". Id. at 1130. Notwithstanding, in an abundance of caution, the Employer/Carrier will address these issues for the benefit of this Honorable Court.

This Honorable Court has long held that, in reviewing findings of fact made by a Deputy Commissioner, an appellate court is limited

to determining whether or not those findings are supported by competent, substantial evidence, and it may not substitute its judgment for that of the Deputy Commissioner. Andrews v. C.B.S. Division, Maule Industries, 118 So.2d 206 (Fla. 1960); Calvert v. Coral Gables First National Bank, 119 So.2d 33 (Fla. 1960). Furthermore, the findings of the Deputy Commissioner in a compensation proceeding are entitled to great weight and should not be lightly set aside unless there appears to be no competent, substantial evidence to support the findings. Harris v. Lenk, 224 So.2d 283 (Fla. 1969). In the Andrews case, supra, this Honorable Court cited the case of United States Casualty Company v. Maryland Casualty Company, 55 So.2d 741 (Fla. 1951), wherein this Honorable Court stated as follows:

> "We are of the opinion that the 'substantial evidence' rule should be invoked in all cases. Even in cases which must be resolved upon a true appraisal of testimony of medical experts, the deputy commissioner's findings of fact should be upheld unless there is no competent, substantial evidence, which accords with logic and reason to sustain them." Id. at 745. (Emphasis supplied).

In the case sub judice, the Deputy Commissioner's Order is clearly supported by competent and substantial evidence. Notwithstanding the Claimant's contention as to the burden of proof relative to available work, the Employer/Carrier submits that the Claimant and not the Employer/Carrier had the burden of proof with respect to the Claimant's permanent total disability claim, which burden was not met in the instant case.

The Claimant's doctor, Dr. Hoffeld, candidly admitted in his testimony that the Claimant, although perhaps limited, could, in fact, perform certain various physical activities, to-wit: standing (R106), bending (R43,106), lifting (R43,106) and walking, as stated by the Claimant herself. (38,86-87,90-92). Furthermore, at the final hearing, the Claimant testified that she could, in fact, drive an automobile (R55-56). She further testified that the last time she was treated by any doctor for her left leg was in July of 1981, approximately three (3) months prior to the October hearing date. (R44,62,82-83). Dr. Hoffeld, the Claimant's physician, testified at his deposition that the Claimant had a numerous amount of pre-existing physical problems, to-wit: arthritis, hypertension, colonic diverticular disease, varicose veins, and exogenous obesity. (R71). Finally, and most importantly, Dr. Hoffeld, as previously stated, candidly testified that the Claimant could, in fact, do sedentary work, albeit part-time or with some restrictions. R84-99). In this regard, the Employer/Carrier submits that Dr. Hoffeld is most competent to testify concerning the Claimant's physical ability to perform various sedentary employment positions. See Stanley v. Master Masonry, 287 So.2d 67 (Fla. 1973).

Moreover, in light of the foregoing, as well as the fact that the Deputy Commissioner had the opportunity to observe the Claimant's demeanor at the hearing and expressly found, as a matter of law, that the Claimant did not have a good faith or bona fide desire to

return to work, the Employer/Carrier submits that there was not shown by competent and substantial evidence that the Claimant was unable to be gainfully employed in some respect. Consequently, the Deputy Commissioner did not err in denying permanent total disability benefits to the Claimant.

As stated by the Deputy Commissioner in his Order herein (R123-128), it is well-established that in order to justify an award of permanent total disability, a claimant must affirmatively show that he/she has made an effort to test his/her employability in the open labor market after having reached maximum medical improvement. See Exxon Company v. Alexis, 370 So.2d 1128 (Fla. 1978); Mahler v. Lauderdale Lakes National Bank, 322 So.2d 507 (Fla. 1975). Furthermore, as has been repeatedly held, this effort on the part of the claimant to return to work must be a conscientious one made in good faith and not a mere gesture. Palm Beach Newspapers, Inc. v. Roston, 404 So.2d 174 (1st DCA 1981); Commercial Carrier Corp. v. Bennett, 396 So.2d 847,848(1st DCA 1981); Tallahassee Coca-Cola Bottling Company v. Parramore, 395 So.2d 276 (1st DCA 1981); Walter Glades Condominium v. Morris, 393 So.2d 665 (1st DCA 1981). In the instant case, the Deputy Commissioner simply and expressly found, as a matter of law, that the Claimant did not make the required conscientious, good faith or bona fide effort to return to work. (R126-127). In the absence of substantial medical evidence showing that the Claimant was unable to work, as was the case herein, she could not establish

entitlement to permanent total disability benefits merely be testifying, as she did, that she did not accept employment since she did not feel that she was able to do any work. (R52-55). Cf. Martin Marietta Corp. v. Johnson, 7 FCR 355,356 (1973), cert. den. 283 So.2d 557 (Fla. 1973); Walter Glades Condominium v. Morris, supra. Therefore, the Employer/Carrier contends that the Deputy Commissioner's Order herein was clearly supported by substantial, competent evidence and clearly consonant with reason and logic.

II.

SECTION 440.15(3)(b)3.d., FLORIDA STATUTES (1979), IS CONSTITUTIONAL.

Again, for the reasons set forth in Point I, the Employer/Carrier contends that the above issue is not a proper issue for review before this Honorable Court. Moreover, this issue has already been presumably fully briefed and orally argued before this Honorable Court in the recent case of Sasso v. Ram Property Management, 431 So.2d 204 (1st DCA 1983). In the instant case, the lower tribunal cited the Sasso case in support of its per curiam affirmance. Furthermore, the constitutional argument relative to the access to the courts provision vis-a-vis the statute in question has already been decided by this Honorable Court in Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983). Finally, in the instant case, the Deputy Commissioner never ruled upon this constitutional issue and it was acknowledged that he was without jurisdiction to do so. (R13). Consequently, since this constitutional issue was never resolved by a lower tribunal, it cannot properly be raised here. In Re: Beverly, 342 So.2d 481 (Fla. 1977). Notwithstanding the above, the Employer/Carrier shall nonetheless respond to the Claimant's argument relative to this issue.

Under Workmen's Compensation Law, the theory of negligence as the basis of liability is discarded and the employer is subject to liability without regard to neglect or default. However, it is a

two-way street and the employee must surrender his right to bring suit. The United States Supreme Court addressed the issue in New York Central R.R. Co. v. White, 243 U.S. 188 (1917), when it said, "The common law bases the employer's liability for injury to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation". Id. at 198. Yet the Claimant argues that the statute is an unconstitutional denial of her due process.

Before Workmen's Compensation statutes were enacted, it was very unusual that an injured employee could require his employer to compensate him for lost time and medical expenses. The reason for this was the employer was entitled to the common law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant. With the advent of Workmen's Compensation Laws, the common law defenses were abrogated. The Florida Bar, Florida Workmen's Compensation Practice (2nd Ed. 1975) §1.4.

In most jurisdictions, the same contention as Claimant asserts has been unsuccessful. The certain remedy afforded by the compensation act is deemed to be a sufficient substitute for the doubtful right accorded by common law. Tipton v. Atchison, Topeka & Santa Fe Ry. Co., 298 U.S. 141 (1936).

The United States Supreme Court considered three coordinated cases involving the constitutionality of the Workmen's Compensation Laws in New York, Iowa and Washington in New York Central R.R. Co. v. White, 243 U.S. 188 (1917), Hawkins v. Bleakly, 243 U.S. 210 (1917)

and Mountain Timber Co. v. Washington, 243 U.S. 219 (1917). All statutes were considered constitutional. Similarly, Georgia's Workmen's Compensation statute was upheld in Massey v. Thiokol Chemical Corp., 368 F.Supp.668 (S.D. Ga. 1973), and West Virginia'a act in Kaznoski v. Consolidated Coal Co., 368 F.Supp.1022 (W.D. Penn 1974). Moreover, the Due Process clause pertains only to "vested rights" and a vested right to any specific remedy at common law does not exist. National Surety Co. v. Architectural Decorating Co., 26 U.S. 276 (1912).

This Honorable Court has held that the legislature is without power to abolish a right without providing a reasonable alternative to protect the rights of the people to redress for injuries "unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shownn" Kluger v. White, 281 So.2d 1,4 (Fla. 1973). This Court there went on to say that workmen's compensation, although abolishing a right, provided an adequate and sufficient safeguard. It must be remembered that legislative enactments are presumptively valid and, when reasonably possible, all doubts as to validity of a statute are to be resolved in favor of its constitutionality. State v. Cormier, 375 So.2d 852 (Fla. 1979).

For the foregoing reasons, it is submitted that F.S. §440.15 (3)(b)3.d. is valid under the due process clause of the Florida and United States Constitutions.

The Claimant also argues that the statute violates the equal protection clause of the Florida and United States Constitutions. A basic principle in considering the validity of legislation attacked under the equality provision is that the state enjoys a wide range of discretion in exercising its power to make classifications for the purpose of enacting laws. State ex rel Clarkson v. Philips, 70 Fla. 340, 70 So. 367 (1915). All legislation involves classification. Ex parte Lewinsky, 66 Fla. 324, 62 So. 577 (1913). There is merely a requirement that a law should affect alike all persons in the same class and under similar conditions. Davis v. Florida Power Co., 64 Fla. 246, 60 So. 759 (1913).

Clearly, F.S. §440.15 (3)(b)3.d. (1979) meets the requirements set by these decisions. A sixty-five year old who is receiving Social Security is not in the same class as a younger person who doesn't qualify for these benefits. The Claimant argues that she is blanketly discriminated against because of her age. That argument is devoid of merit.

Age is not a "suspect classification" and it is subject to only the rational relationship rest rather than the strict scrutiny test. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The Supreme Court, dealing with the issue of mandatory retirement age for police, said, "Old age does not define a 'discreet and insular' group in need of 'extraordinary protection from the majoritarian political process'". Id. at 313. (quoting United States v.

Carolene Products Co., 304 U.S. 144,152-153, n.4(1938).

In In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), this Honorable Court set forth the guidelines for testing such legislation: "The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that the statute bear reasonable relationship to a legitimate state purpose. That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity." Id. at 42. In Greenberg, supra, this Court stated that a statute may be held unconstitutional only if it causes "different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary". Id. at 42.

The legislature has the authority to determine upon what differences a distinction may be made for the purpose of statutory classification. A classification can be made between objects which otherwise have resemblances so long as the distinction has a reasonable basis. Graham v. Richardson, 403 U.S. 365 (1971). Equal protection is not denied merely by reason of the fact that a regulation works an inconvenience or even a hardship, if the regulation is reasonable. Fuller v. Watts, 74 So.2d 676 (Fla. 1954).

An examination of the historical general principles of Workmen's Compensation Law show that F.S. §440.14(3)(b)3.d.(1979) serves a legitimate purpose. The Florida Industrial Commission in its preface to the Florida Act addressed the goal of such legislation, stating, "It has often been erroneously said that the object of the compensation

law was to place on industry and society the loss occasioned by accidental injuries and death. This is only partially true. In every instance the employee bears part of the loss." Albert and Murphy, Fla. Worker's Compensation Law, Sec 1-2 (3rd Ed. 1978) at 30.

"The crucial nature of the problem is seen by the effects, even today, where Social Security benefits are combined with Workmen's Compensation awards. In some forty states, the result is that benefits received for the same injuries can exceed the inidvidual's average weekly wage." L. Alpert & J. Alpert, Florida Workmen's Compensation Law (2nd Ed. 1975) at §30-6.

It is evident then that the legislature was attempting to avoid the situation where an individual, who is injured, receives duplicate benefits under Workmen's Compensation and Social Security. This is an legitimate state interest and the legislature has enacted a statute whereby people who are not similarly situated are not treated the same, and no one is unjustly rewarded for being unable to work.

An overview of F.S. 440.15 enables us to realize that the legislature had more than just age in mind when they drafted this section. Just as F.S. §440.15(3)(b)3.d.(1979) prevents a duplication of benefits to those receiving Social Security, so too F.S. 440.15 (11)a and (b) either denies or restricts benefits to those who are receiving unemployment compensation and F.S. §440.15(10) reduces the Workmen's Compensation benefits when the injured party is elegible for benefits under 42 U.S.C. §423.

The burden is on the party attacking the classification to show that it lacks a rational relationship to a legitimate state objective. Liquor Store v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949). The Claimant was unable to show this. Accordingly, the Act should be upheld as it fully meets Due Process and Equal Protection standards.

III.

SECTION 440.15(3)(b)3.d., FLORIDA STATUTES (1979) DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION SINCE IT DOES NOT CONFLICT WITH THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. SECTION 621, ET SEQ.(1976).

No conflict exists between the Florida Worker's Compensation Law and the Federal Age Discrimination in Employment Act (hereinafter referred as the "ADEA"). Therefore, there is no violation of the Supremacy Clause of the United States Constitution. O'Neil v. Department of Transportation, 442 So.2d 961 (1st DCA 1983).

While both federal and state law address employment-related issues, this Honorable Court has recognized in Phillips v. General Finance Corp., 297 So.2d 6 (Fla. 1974), that:

> "It has long been a principle of law that both the federal government and the state may exercise concurrent powers and enact legislation concerning the same subject matter, and the action of the state is valid and operative in all respects in which there is no direct and positive conflict with the action of the federal government." Id. at 8.

States are free to regulate in any manner not inconsistent with federal law. Aronson v. Quick Point Pencil Co., 440 U.S. 257, 99 S.Ct. 1096(1979).

The Florida law provides that wage loss benefits terminate when the injured employee reaches age sixty-five (65) and becomes eligible for Social Security retirement benefits. Section 440.15(3)(b)3.d., Florida Statutes (1979). However, the ADEA does not prohibit all

age-related distinctions. Section 623(a) of the ADEA is expressly limited by its title to apply only to "employer practices". 29 U.S.C. §623(a)(1976); O'Neil, 442 So.2d at 962.

It is true, as the Claimant argues, that when the State hires employees, its dealings with its workers are subject to the provisions of the ADEA. Equal Employment Opportunity Commission v. Wyoming, ____U.S.____, 103 S.Ct. 1054, 75 L.Ed.2d 18(1983). However, when Florida created the Worker's Compensation Law, it did not act as an employer establishing policies for the benefit of its employees. Rather, the Florida Legislature enacted the law pursuant to the police power of the State to protect the health, safety and welfare of all employees, not only its own. O'Neil, 442 So.2d at 962. Worker's Compensation is simply not an "employer practice" subject to regulation under the ADEA, but rather a governmental function which is not covered by the federal act.

The Claimant states that there is "no question" whether wage loss benefits under Chapter 440 of the Florida Statutes constitute "compensation, terms, conditions or privileges of employment" within the meaning 29 U.S.C. §623. The First District Court of Appeal, however, has answered this question by holding that they are not. O'Neil, 442 So.2d at 963. Moreover, the Code of Federal Regulations interprets this statutory language. And, Florida's worker's compensation benefits fall clearly outside this interpretation.

"Compensation" is "...remuneration paid to or on behalf of or received by an employee for his employment." 29 C.F.R. §860.50(b)(1983)(emphasis supplied). Wage loss benefits are paid only when an injured employee suffers a loss of employment.

The Department of Labor defines "terms, conditions or privileges of employment" as job-related factors such as job security, advancement and benefits. 29 C.F.R. §860.50(c)(1983). Examples of employee benefits that fall under ADEA protection are the following: promotion, disciplinary action, hours of work, leave policy, career development, seniority and merit systems. 29 C.F.R. §860.50(c)(1983). The examples given are all "employer practices" which share the common characteristic of being policies that are directly controlled by the employer, rather than being imposed and regulated by state law. O'Neil, supra, 442 So.2d at 962.

Notably omitted from the examples given in 29 C.F.R. §860.50(c)(1983) are job-related programs which are provided by state or federal government. The Department of Labor recognized that some benefits traditionally provided by employers may, in some cases, be provided by the Government. It further acknowledged the fact that the availability of government benefits may be based on age distinctions. 29 C.F.R. §860.120(e)(1983); O'Neil, supra, 442 So.2d at 962. However, there is no indiction that the age-based distinctions imposed by these government providers violate the ADEA. The federal law impliedly exempts them from its coverage.

Florida's Worker's Compensation Law is not an employer practice constituting compensation, terms, conditions or privileges of employment under 29 U.S.C. §623(a)(1). Assuming arguendo that it is, §440.15(3)(b)3.d., F.S.(1979), would not conflict with the ADEA because it differentiates between injured workers on the basis of a reasonable factor other than age, to-wit: the availability of an alternative source of compensation. 29 U.S.C. §623(f)(1)(1976).

The 1980 Amendment to §440.15(3)(b)3.d., Florida Statutes, provided that wage loss benefits terminate when an injured worker reaches age sixty-five (65) and receives Social Security retirement benefits. In Sasso, supra, The First District Court of Appeal held that the 1980 Amendment served merely to clarify the language of the 1979 statute. Coverage under the 1979 version is identical to that of the 1980 Amendment. Although the Claimant argues otherwise, the 1979 law affects only those workers who are at least sixty-five (65) years old and who are also receiving Social Security retirement benefits. Sasso, supra, 431 So.2d at 218.

The factor which determines whether an injured employee will continue to collect wage loss benefits is not age. The sixty-five (65) year old worker who does not receive Social Security retirement benefits will continue to be compensated under Florida law, while a Social Security recipient of the same age will not.

The difference between age and an age-related alternative income source was recognized in the cases of City of McKeesport v.

International Association of Firefighters, 399 A.2d 798 (Pa. 1979) and Brown v. Goodyear Tire & Rubber Co., 3 Kan.App.2d 648, 599 P.2d 1031 (1979), aff'd, 277 Kan.645, 608 P.2d 1356(1980), appeal dismissed, 449 U.S. 914, reh. denied, 449 U.S. 1068 (1980). In Sasso, supra, the First District Court of Appeal noted that approximately 7% of those persons aged sixty-five (65) and over are ineligible for Social Security retirement benefits. 431 So.2d at 218, n.17. This discrepancy between the number of persons who would be affected if age was the distinquishing factor and the number actually affected by the statute's alternative compensation factor further illustrates that the differentiation is based upon a factor other than age, and so, is expressly exempted from the federal law. 29 U.S.C. §623(f)(1)(1976).

Florida's Worker's Compensation scheme is not the type of employee benefit plan that is covered by the ADEA. However, even if it were, it would be lawful under the bona fide employee benefit plan exception stated in 29 U.S.C. §623(f)(2)(1976).

The Department of Labor defines an "employee benefit plan" as one which provides "fringe benefits". 29 C.F.R. §860.120(b)(1983). "Fringe benefits" include payments made by an employer to a fund maintained on the employee's behalf which are made to avoid the risk that the employer would have to provide the benefit in the future, "...such as compensation for injury or illness." Trinity Services Inc. v. Marshall, 593 F.2d 1250,1257 (D.C. Cir. 1978). Worker's

compensation benefits fall squarely under this definition.

As stated in the Code of Federal Regulations, "The legislative history of 29 U.S.C. §623(f)(2) indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." 29 C.F.R. §860.120(a)(1983). The overall goal of the wage loss termination provision of the Florida statute is to reduce the cost of workers' compensation premiums. Sasso v. Ram Property Management, 432 So.2d at 220. Since older workers are more prone to on-the-job injuries, employers' disability costs are increased when they are included in coverage. Equal Employment Opportunity Commission v. Wyoming, ____ U.S. ____, 103 S.Ct. 1054, 1070, 75 L.Ed.2d 18 (1983); Sasso v. Ram Property Management, supra.

In order to meet the elements of the employee benefit plan exception, an employee benefit plan must be bona fide, the terms of the plan must be observed and the plan must not be a subterfuge to evade the ADEA.

A plan which is otherwise valid is not a "subterfuge" if the lower levels of benefits are justified by age-related cost considerations. 29 C.F.R. §860.120(d)(1983). The disproportionate cost of providing worker's compensation wage loss benefits to workers over the age of sixty-five (65) has been recognized by the Florida Legislature and by the First District Court of Appeal in the Sasso case. 430 So.2d at 220.

A plan is considered "bona fide" if its terms have been acurately described in writing and if the plan actually provides benefits in accordance with its written terms. Marshall v. Hawaiian Telephone Co., 575 F.2d 766 (9th Cir. 1978); Brennan v. Taft Broadcasting Co., 500 F.2d 242 (5th Cir. 1974); 29 C.F.R. §860.120(b)(1983). The terms of the 1979 Florida Worker's Compensation Law were set out in Chapter 440 of the Florida Statutes (1979).

The Claimant contends that Florida's Worker's Compensation plan is not "bona fide" because, in this particular case, it did not provide for benefits to be paid out of its fund. In determining whether benefits are paid under an employee benefit plan, collateral benefits from other sources which are contemplated under the plan are to be considered. Slusher v. Hercules, Inc., 532 F.Supp. 753 (W.D.Va. 1982). The Social Security retirement benefits received by the Claimant in lieu of wage loss benefits constitute a "modest, but adequate income." Sasso, supra, 431 So.2d at 219. The fact that a plan pays no benefits to a particular claimant does not affect its "bona fide" status. Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.) cert. denied, 456 U.S. 975 (1982).

Finally, an employee benefit plan is considered to have been observed where the lower benefits actually provided to older workers are required by the terms of the plan. 29 C.F.R. §860.120(1983). Section 440.15(3)(b)3.d., F.S.(1979), clearly mandates the termination of wage loss benefits in the Claimant's case.

The Florida Worker's Compensation law does not conflict with the ADEA for the following reasons:

1. The Florida law is not an "employer practice" covered by the ADEA;

2. Wage loss benefits are not "compensation, terms, conditions or privileges of employment" subject to the provisions of the ADEA;

3. Wage loss benefits are terminated on the basis of a factor other than age; and

4. Wage loss benefits are provided pursuant to a bona fide employee benefit plan.

"[S]ince no conflict exists between the Florida law and the federal ADEA, no violation of the Supremacy Clause of the United States Constitution is involved." O'Neil, supra, 442 So.2d at 963.

Under this Honorable Court's test for determining whether federal legislation supersedes state law, where there is no conflict we need not reach the issue of whether the Florida law frustrates the Congressional purpose behind the ADEA. Phillips, supra, 297 So.2d at 8.

Conflicts in legislation should not be sought out where none exist. Simpson v. Alaska State Commission for Human Rights, 423 F.Supp. 522 (D. Alaska 1976) (citing Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966)). However, even if the state and federal laws in question were perceived by this Court to contain an inconsistency, it would not be the type which requires the state law to yield.

"[T]he question of whether federal law pre-empts state law 'involves a consideration of whether that law stands as an obstacle

to the accomplishment and execution of the full purposes and objectives of Congress.' If it does not, state law governs." Aronson v. Quick Point Pencil Co., 440 U.S. 257,262(1979)(quoting from Hines v. Davidowitz, 312 U.S. 52(1941); See also McColloch v. Maryland, 17 U.S. (4 Wheat) 316(1819).

This Honorable Court has adopted the following test:

> "Where there is conflict with the federal law, the test in determining whether the state law has been superseded by the federal law is whether the state law frustrates the operation of the federal law and prevents the accomplishment of its purpose. If this occurs, only then must the state law yield." Phillips, supra, 297 So.2d at 8.

Under either of the above tests, the salient factor is whether the state law stands in the way of the accomplishment of the Congressional purpose. Congress has stated the purpose behind the ADEA as follows:

> "It is therefore the purpose of this chapter to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621(b)(1976).

While Claimant quotes this language in her Brief, she does not provide the Court with a single example of how Florida's termination of wage loss benefits to sixty-five (65) year old Social Security recipients would frustrate any one of these Congressional purposes. And, indeed, there are none.

Congress has clearly expressed its intent to omit government-provided benefit programs from the provisions of the Act. 29 U.S.C. §623. Congress further provided exceptions for bona fide benefit plans and for

distinctions based on reasonable factors other than age. 29 U.S.C. §623(f)(1)(2). Because the Florida wage loss law in question would be exempted from federal regulation under both these provisions, there is no conflict between the Florida and federal laws.

In short, §440.15(3)(b)3.d., F.S. (1979), simply does not retard, impede, burden or otherwise stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the ADEA. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316(1819). Thus, Florida's law and the federal ADEA can co-exist without any violation of the Supremacy Clause of the United States Constitution.

CONCLUSION

Based upon the foregoing argument and authorities, the Employer/Carrier respectfully requests that this Honorable Court answer the certified question of the First District Court of Appeal in the negative. Further, should this Honorable Court decide that the other issues raised by the Claimant are proper for review before this Honorable Court, the Employer/Carrier respectfully requests that this Honorable Court uphold Section 440.15(3)(b)3.d., Florida Statutes (1979) as constitutional and otherwise affirm in all respects the Deputy Commissioner's Order entered herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondents has been mailed by regular U.S. mail to L. BARRY KEYFETZ, ESQUIRE, 44 West Flagler Street, Suite 2400, Miami, Florida, 33130 on this the 9th day of April, 1984.

D. J. Glaid

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