FLORIDA SUPREME COURT

USS AGRI-CHEMICALS,
a Division of USX CORPORATION,

Petitioner,

v. CASE NO.: 72,245

JOHN WADDELL,

Respondent,

and

STATE OF FLORIDA, DEPARTMENT
OF LABOR AND EMPLOYMENT SECURITY,
DIVISION OF WORKERS' COMPENSATION,

Statutory Respondent.

_____/

RESPONDENT'S BRIEF

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SUMMARY OF ARGUMENT

This brief argues that this case should not be before this court on the certified question because the case can be, and should be, decided on grounds other than the certified question. Specifically the case should be decided on the grounds that Section 440.15(3)(b)3.a., Florida Statutes does not apply because no two-year period when benefits were not payable for at least three consecutive months ever occurred and because even if such a period had elapsed, the employer. by its voluntary conduct in paying benefits after such a period reinstituted the claim.

Finally the brief argues that the First District Court of Appeal was correct in deciding this case because any other ruling would put the workers' compensation adjudicatory system in the business of punishing behavior as opposed to assisting injured workers.

STATEMENT OF THE CASE AND OF THE FACTS

The employee accepts the Statement as set out by the employer but must make the following additions.

It is absolutely misleading for the employer to say Mr. Waddell last received benefits for June, 1983 and June and July, 1985. (AB 2) The record clearly establishes that Mr. Waddell received benefits for August, 1983. (RP 9, 64, 93 and 407) This point is critical to the case because the employer states that the two year period for the purposes of Section 440.15(3)(b)3.a., Florida Statutes starts running on July 1, 1983, but in fact it starts September 1, 1983. It is hard to imagine how the August, 1983 wage loss payment could have been overlooked in writing the brief, but it is critical to the determination of this case.

It should also be noted that the employer has changed for purposes of its argument, the question certified. This brief will use the actual question certified and, in the parts directed to the certified question will respond to the question posed by the First District Court of Appeal and not the questions formulated by the employer.

ARGUMENT

DOES A TERM OF INCARCERATION AFFECT THE RUNNING OF THE TWO-YEAR PERIOD SET FORTH IN SECTION 440.15(3)(b)3.a., FLORIDA STATUTES (1981)?

Before arguing the question itself, it should be noted that the certified question should not be answered by this Court because the case can and should be decided without regard to the certified question. Under the old appellate rules Fla. R. App. P. 4.2 there was a means for certifying a question to a higher court. One of the specific requirements for such certification was that the question "could be answered without regard to other issues in the cause." 2 Fla. Jur. Sec. 433, p. 824 and Forsyth v. Southern Bell Telephone & Telegraph Company, 162 So.2d 916 (Fla. 1st DCA 1964)

That rule had the salutory affect of not burdening the courts with certified questions that would not actually resolve the case. It was also perfectly in line with the cases holding that courts will not pass on the constitutionality of a statute if the case can be resolved without reference to the constitutionality of the statute. Gordon v. Norris, 90 So.2d 914 (Fla. 1956), State Road Department of Florida v. Nobles, 96 So.2d 593 (Fla. 1957) and Goodnight v. Capiello, 340 So.2d 980 (Fla. 2d DCA 1976).

There is no constitutional issue in this case. Totally leaving aside the considerations of Mr. Waddell's stay in jail, there still was no two year period when Mr. Waddell earned more than he was earning at the time of his injury.

The attorney for the employer, the deputy commissioner and the honorable judges of the District Court have all struggled with legislative intent and constitutionality of a statute when a simple counting of months will show that Mr. Waddell never earned more than his pre-injury earnings for 24 months even if he had not been jailed. To demonstrate this assertion requires only a small chart. A calendar was placed in evidence that shows the same information as the chart below. (RP 81) The statute, Sec. 440.15(3)(b)3.a., Florida Statutes provides,

> "As of the end of any 2-year period commencing at any time subsequent to the month when the injured employee reaches the date of maximum medical improvement, unless during such 2-year period wage-loss benefits shall have been payable during at least 3 consecutive months;"

Therefore our chart starts at maximum medical improvement which was reached on January 27, 1983. (RP 701)

January 27, 1983	Maximum medical improvement reached
February 1, 1983 to June 30, 1983 and August, 1983	wage loss paid

September, 1983 to August, 1984	Claimant was employed at wages higher than pre-injury earnings
August, 1984 to October 22, 1984	Claimant was unemployed. (The unemployment occurred when the employee informed his employer that he might be jailed. (RP481)
October 22, 1984 to December 1984	Claimant was in jail.
January, 1985 to June, 1985	Claimant was looking for work and filing wage loss claims.
June and July, 1985	Claimant was paid wage loss
August, 1985 to present	Claimant has claimed wage loss but benefits have been denied because the position taken by the employer that Sec. 440.15(3)(b)3.a., Florida Statutes terminates its responsibility to this injured worker.

The chart presents in graphic form why this is not a case for decision under Sec. 440.15(3)(b)3.a., Florida Statutes. No two year period as called for in that statute ever elapsed. Wage loss benefits were paid for August, 1983. Wage loss benefits were paid for June, 1985. No two years ever elapsed.

Mr. Waddell was paid wage loss for January through June, 1983 and for August, 1983. He was again paid for June and July, 1985. (RP 9 and 81). Therefore, the record clearly indicates that there was no period 24 months where wage loss benefits were not payable. If the employer's argument is

correct and the 24 month period begins July 1, 1983 then it ends July 1, 1985. However, wage loss benefits were paid for August, 1983, June and July, 1985 and were claimed for August, 1985. June, July and August, 1985 make up a consecutive three month period where benefits were payable and so no 24 month period exists when benefits were not payable for three consecutive months. Mr. Waddell argues that the 24 month period cannot start until September 1, 1983. If the employer is right and the 24 month period starts July 1, 1983, the calendar clearly shows the 24 months did not elapse before Mr., Waddell became entitled to wage loss once again. Since no cases have been found concerning interpretation of this section, other than Bonner, ordinary canons of interpretation must be relied on. The workers' compensation statute is to be liberally construed in favor of the employee.

The statute of non-claim argued for here by the employer is not a 24 month statute. To illustrate that statement, the Court's attention is invited to the calendar placed in evidence and found at (RP 81). The employer argues that the 24 month period begins July 1, 1983 and consequently ends June 30, 1985. The employer argues that during that time at least three consecutive months of wage loss must be payable. The employer then argues that even if wage loss was paid for June, 1985, the 24 month period still expired without three consecutive months of wage loss being payable. By this interpretation of the statute, the employer has moved the 24

month term called for in the statute back to 22 months. (RP 39) Obviously if we accept the employer's argument that the 24 month period begins to run on July 1, 1983, then after April 30, 1985 the employee has lost his wage loss entitlement. That is because after April 30, 1985 it is no longer possible to put together three consecutive months before the 24 month period chosen by the employer has expires. Therefore, by that argument, the employer has re-written the statute so it no longs reads 24 months but now reads 22 months. As was pointed out to the Deputy Commissioner, no period of 24 months ever elapsed.

The obvious intent of this section was to eliminate stale claims when the injured employee had returned to work at his pre-injury earnings. It was not the intent of the legislature to cause an employee to forfeit his claim based on a strained interpretation of the states that equates 22 months with 24 months. If the employer's interpretation of the statute is correct, the employee could reach maximum medical improvement, work for two months at his pre-injury earnings, be unemployed for one month because of his industrial injury, then work two months, be off one month because of the injury and so on for 24 months and his claim would be extinguished, there not having been three consecutive months when wage loss was payable. In that hypothetical, the employee would have been paid a total of 16 months of wage loss in the 24 month period and would still be denied any further wage loss. That interpretation is no more sustainable then the employer's

interpretation here which transforms the statute from 24 months to 22 months.

The entire discussion above is probably moot anyway since the employer waived any right to claim a termination of benefits under Sec. 440.15(3)(b)3.a., Florida Statutes when it paid July, 1985 wage loss. July, 1985 was clearly outside the two year period that the employer claims terminated the wage loss benefits. It has been the consistent position of this court and of the First District Court that voluntary payment after a statute of non-claim has expires operates to reinstate the claim. Daniel v. Holmes Lumber Co., 490 So.2d, 1252 (Fla. 1986) So far this ruling seems to have been applied only to Sections 440.13 and 440.19 Florida Statutes. There is certainly no reason why it should not be applied to the non-claim provision of Section 440.15(3)(b)3.a., Florida Statutes. The same considerations apply here as apply in those cases. As this court said in Daniel,

> "Florida's workers' compensation laws are remedial in nature and the courts should resolve any doubts as to statutory construction in favor of providing benefits to injured workers. (490 So.2d 1952 at 1256)

In this case a statutorily unwarranted and insurmountable barrier was erected.

The employer paid July, 1985 wage loss voluntarily. The voluntariness of the payment of July, 1985 is amply demonstrated by the fact that the order of Deputy Commissioner

Hurt awarding wage loss for July, 1985 was appealed and no where in the appeal was the Fist District Court asked to overturn the decision on the grounds that payment of wage loss for July, 1985 would be in violation of Sec. 440.15(3)(b)3.a., Florida Statutes.

Perhaps if there had at least been an appeal on that ground the employer could now say to this Court that the payment of July, 1985 was not voluntary. But that is not the case. The appeal was strictly on the grounds that Mr. Waddell had become unemployed through misconduct and was therefore no longer entitled to wage loss benefits.

The payment of July, 1985 wage loss reactivated the entitlement to claim wage loss just the voluntary payment of any benefit under Secs. 440.13 or 440.19 reactivates entitlement to other benefits.

As pointed out at the outset of this brief, the court does not have to answer the certified question to deal completely with this case. This case does not deal with a situation where the two year rule ever came into effect. Even if the two year period came into effect, the entitlement was reactivated by the employer's voluntary payment of benefits after the expiration of the two year period.

However, counsel for for Mr. Waddell would be remiss if the certified question was not at least touched on.

When the legislature vested all appeals of workers' compensation cases in the First District, that court was able

to acquire a substantial expertise in that branch of law. This expertise gives the court great insight into the realities of workers' compensation claimant's lives as opposed to the theoretical or idealized situations the legislature may have had in mind.

The crux of the employer's argument as to denial of benefits is that Mr. Waddell should be punished some more. The employer says, in effect, that the incarceration was insufficient punishment and Mr. Waddell should be penalized more. The First District has consistently refused to double up punishment for misdeeds. Apparently the first case to reach the District Court on issue of denial of wage loss benefits because because of the claimant's alleged misconduct was Lasher Milling Co. v. Brown, 427 So.2d 1034 (Fla. 1st DCA 1983). In that case, Brown had become employed after his accident but was fired for failure to follow a company policy. The award of wage loss benefits was upheld on the grounds that there was no support for any conceivable contention that claimant's conduct amounted to "voluntary limitation of income."

That, of course, is the same position by the employer here. USS Agri-Chemicals wants this Court to say that a person incarcerated for three months for driving under the influence loses and forfeits all further right to wage loss benefits. The employer is not satisfied with the penalty exacted by the County Court, but wants the workers' compensation system to kick the injured employee while he is down. No one disputes

the serious problem of drinking drivers, but that problem has its court and has its punishment. Workers' Compensation judges should not be enlisted to apply additional punishment. Sec. 440.15(3)(b)3.a., Florida Statutes does not call for such punishment. It is not a punitive section. It is a statute of repose to end certain stale claims where the employee has returned to work at or about his pre-injury earnings and looks to be able to continue in that state. To provide a repose for stale claims was the clear intent of the legislature.

Exhaustive research has apparently led to the single case of Monroe Furniture Co. v. Bonner, 509 So.2d 1264 (Fla. 1st DCA 1987) as dealing directly with Sec. 440.15.(3)(b)3.a., Florida Statutes. However, Bonner is not an aberration given the consistent rulings by the First District that the most important consideration following a return to work and subsequent unemployment is whether an adequate job search was made. Here obviously an adequate job search was made because the employee was awarded benefits and those benefits were paid. In fact there was a specific ruling that the job search undertaken was more than adequate. (RP 704)

"Payable" as used in Sec. 440.15(3)(b)3.a., Florida Statutes has never been adequately interpreted but clearly does not mean that the employee must not be fired for misconduct (Brown) that the employee cannot suspend a job search to tend her ill fiancee, [Lykes Bros v. Jackson, 461 So.2d 24 (Fla. 1st DCA 1984)], or because of excessive absenteeism and tardiness

[Williams Roofing Co. v. Moore, 447 So.2d 68 (Fla. 1st DCA 1984)] or for discharge for a just cause unrelated to the injury [Whalen v. US Elevator, 486 So.2d 670 (Fla. 1st DCA 1986)].

Sec. 440.15(3)(b)3.a., Florida Statutes clearly contemplates a situation where the employee has returned to work at or above his pre-injury earnings and does not contemplate any other situation. As the District Court said, "

> "A reasonable interpretation of the statutory language, referring to benefits 'payable', found in Section 440.15(3)(b)3a - although most assuredly not the only interpretation - is that subsection (3)(b)3.a., when considered in pari materia with the provisions of subsection (3)(b)(i), permits termination of wage loss benefits to occur only if the claimant has demonstrated a capacity to earn as much or more than his pre-injury earnings, and not, when, due to circumstances beyond the claimant's control, he is unable to collect benefits. (509 So.2d 1264 at 1266 emphasis in original)

Since placing an interpretation on the statute to deny benefits because of incarceration would doubly penalize the injured employee, the District Court decided to issue a ruling fully in conformity with the spirit of the Workers' Compensation Act. The decision was that having served his punishment he should be allowed to resume his normal life. That includes his privilege to receive wage loss benefits if

he can show that he is unemployed because of his industrial injury.

Finally it should be noted that R. E. Dailey Co. v. Dorman, 509 So.2d 377 (Fla. 1st DCA 1987) and Cenvill Dev. Corp. v. Candelo, 478 So.2d 1168 (Fla. 1st DCA 1985) are not on point because they both deal with an inadequate job search. Here the job search was declared adequate.

The decision in Bonner and in the present case is well considered, fair to all parties and in keeping with the purpose of the Workers' Compensation Act which is to aid injured workers and not to add additional punishment for misconduct.

CONCLUSION

This case does not belong in the Supreme Court because the case can be decided without reference to the certified question.

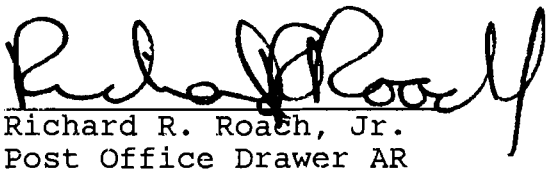
First there was never a two year period when benefits were not payable for at least three consecutive months. There was at most a 22 month period followed by three consecutive months when such benefits were payable.

Second, the voluntary payment of benefits for July. 1985 represented a voluntary payment of benefits after the statute of repose had expired. Therefore, the claim was reactivated by that payment and once again there is no need

to answer the certified question.

Finally, the District Court is correct in determining that wage loss benefits, "....will be terminated if during the three month term the worker's post injury income equals or exceeds his pre-injury income." (509 So.2d 1264 at 1267)

For all three reasons above, the Deputy Commissioner's Order should be vacated and the benefits claimed at the hearing should be awarded.



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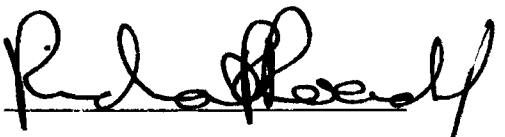
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Brief has been furnished by U.S. Mail this 31 day of May, 1987 to Charles E. Bentley, Esq., Post Office Drawer BW, Lakeland, Florida 33802 and to the Florida Department of Labor and Employment Security, Division of Workers' Compensation, 1321 Executive Center Drive, East, Tallahassee, Florida 32301, Statutory Respondent/



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