

IN THE SUPREME COURT OF FLORIDA

USS AGRI-CHEMICALS,
a Division of USX
CORPORATION,

Petitioner,

vs.

CASE NO. 72,245
1st DISTRICT - NO. BR-411

JOHN W. WADDELL,

Respondent,

and

STATE OF FLORIDA, DEPARTMENT
OF LABOR AND EMPLOYMENT SEC-
URITY, DIVISION OF WORKERS'
COMPENSATION,

Statutory Respondent.

PETITIONER'S BRIEF ON THE MERITS

ON APPEAL FROM THE OFFICE OF THE
DEPUTY COMMISSIONER, DISTRICT "F"
FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY

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PRELIMINARY STATEMENT

Petitioner, USS Agri-Chemicals, a Division of USX Corporation, files its Brief on the Merits in this proceeding to review the decision of the First District Court of Appeal rendered on March 25, 1988 in Waddell v. USS Agri-Chemicals, 13 F.L.W. 769 (Fla. 1st DCA 1988), a copy of which is set forth in the appendix. In this Brief, Petitioner will be referred to as "Employer;" Respondent as "Waddell." Reference to the record on appeal will be designated by the symbol "R" followed by applicable page numbers. Throughout this Brief, all emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

Waddell was injured in a compensable industrial accident on November 12, 1981, and reached maximum medical improvement ("MMI") on January 27, 1983. (R 741). The Employer paid Waddell temporary total disability benefits for the period from December 15, 1981 to April 14, 1982, and from April 28, 1982 to September 14, 1982; temporary partial disability benefits for the period from October 13, 1982 to January 31, 1983; and wage loss benefits for the period from February 1, 1983 to June 30, 1983, and for June, 1985 and July, 1985. (R 742).

Waddell asserted entitlement to wage loss benefits and filed a claim for every month from August 1, 1983 to August 1, 1985. (R 745). He was re-employed as a maintenance mechanic with Florida Tile, Sikes Bros., where he worked from June, 1983 to the end of July, 1984, received three pay increases, and by July, 1984 earned a higher average weekly wage than what he was earning as of the date of the accident in 1981. (R 133). In August, 1984, Florida Tile, Sikes Bros., fired Waddell for being drunk at work. (R 703-704, 250-251). That month, he was convicted of a third Driving Under the Influence ("DUI") charge, was adjudicated a habitual offender under the Florida Traffic Code, and was incarcerated from October 22, 1984 through December 2, 1984 in the Polk County jail. (R 252). Deputy

Commissioner Hurt found that Waddell's wage loss for the months from August, 1984 through May 31, 1985 was attributable to his termination from employment and to his incarceration because of his drinking at work and while driving, "actions which directly affected his ability to earn his living which actions he could have avoided." (R 704-705).

Subsequently, Waddell sought wage loss benefits for the period from August 1, 1985 through November 30, 1986. (R 742). In a Compensation Order dated January 15, 1987, Deputy Commissioner Vocelle found that Section 440.15(3)(b)3.a., Florida Statutes (1981), the statute of repose in the wage loss compensation scheme of the Workers' Compensation Act, barred Waddell's claim for additional wage loss benefits. (R 745).

Waddell appealed the Deputy Commissioner's January 15, 1987 Order. He contended, first, that the Deputy Commissioner erred in denying wage loss benefits because he equated "payable" in the statute with non-payment of wage loss benefits and, second, that the Deputy Commissioner erred in finding there had been no consecutive three month period when the Claimant was entitled to wage loss benefits in a twenty-four month period following MMI. (R 52, Appellant's Initial Brief).

In a 2-1 decision, Judge Barfield dissenting, the First District Court of Appeal reversed the Deputy Commissioner's denial of wage loss benefits, on the authority of Monroe

Furniture Co. v. Bonner, 509 So.2d 1264 (Fla. 1st DCA 1987), and held that during the months in which Waddell was incarcerated, the running of the two-year period under the statute was tolled, because Waddell was unable to demonstrate in those months a loss of wage earning capacity resulting from his work-related injury. Waddell v. USS Agri-Chemicals, 13 F.L.W. 769, 770 (Fla. 1st DCA 1988).

The First District Court of Appeal certified to this Court the following question:

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)?

13 F.L.W. at 770.

On April 8, 1988, the Employer invoked the discretionary jurisdiction of the Supreme Court of Florida to review the March 25, 1988 decision of the First District Court of Appeal.

SUMMARY OF ARGUMENT

Waddell's term of incarceration did not toll the running of the two-year period set forth in Section 440.15(3)(b)3.a., Florida Statutes (1981), because no wage loss benefits are "payable" to a Claimant like Waddell who fails to prove his inability to obtain employment is due to physical limitation caused by his accident. The legislature made no provision for and did not intend for a tolling of the statute of nonclaim during a period of a claimant's incarceration following conviction for a voluntary criminal act. Therefore, the First District Court of Appeal committed error when it reversed the Deputy Commissioner's application of Section 440.15(3)(b)3.a. to bar Waddell's claim for additional wage loss benefits; consequently, the Employer requests the Court to answer the certified question in the negative, reverse the decision of the First District Court of Appeal, and reinstate the decision of the Deputy below.

ARGUMENT

A TERM OF INCARCERATION FOLLOWING
CONVICTION FOR AN INTENTIONAL CRIMINAL
ACT DOES NOT TOLL THE RUNNING OF SECTION
440.15(3)(b)3.a., FLORIDA STATUTES
(1981).

On the strength of Monroe Furniture Co. v. Bonner, 509 So.2d 1264 (Fla. 1st DCA 1987), the First District Court of Appeal reversed the Deputy Commissioner and decided in the instant case that Waddell's incarceration, following a third conviction for the offense of DUI, tolled the running of Section 440.15(3)(b)3.a., Florida Statutes (1981).

The Deputy Commissioner, who studied and applied the statute to the facts of this claim, concluded that Waddell's situation:

exactly fits what the legislature intended, and that is that the right to wage loss benefits shall terminate at the end of any two-year period commencing at any time subsequent to the month when the injured employee reached the date of maximum medical improvement, unless during such two-year period, wage loss benefits shall have been payable during at least three consecutive months . . . I find that we have a situation here in which there was a two-year period during which wage loss benefits were not payable for at least three consecutive months. (R 48).

The sole issue before this Court is whether the District Court of Appeal erroneously determined that Waddell's incarceration tolled the statute of repose because his incarceration

tion precluded him from demonstrating that his injury caused a wage loss.

The Employer contends first, that Judge Barfield, dissenting below, correctly applied the plain meaning of Section 440.15(3)(b)3.a. to this case, as the legislature of Florida intended the section to be applied. Second, the Employer submits the Bonner court, whose lead the court below followed, misconstrued this plain meaning and rewrote the statute to provide that benefits were payable unless the Employer disproved they were payable by proof of the amount of post-MMI income the worker received. Waddell v. USS Agri-Chemicals, 13 F.L.W. 769, 770 (Fla. 1st DCA 1988) (J. Barfield, dissenting). Therefore, the Employer requests that this court vacate the March 25, 1988 opinion of the First District Court of Appeal and reinstate the findings of the Deputy Commissioner.

The foundation for the opinion below, Bonner, crumbles under scrutiny. The Bonner court upheld as reasonable a deputy commissioner's finding that a claimant's incarceration, following a compensable injury, an unsuccessful job search, and a conviction for felonies, tolled the running of Section 440.15(3)(b)3.a., Florida Statutes (1981). According to Bonner, entitlement to wage loss benefits under Section 440.15(3)(b)1. is determined by comparing the amount of income a claimant is able to earn after reaching MMI with

his pre-injury earnings, and the statute only cuts off the right to wage loss benefits if:

during the three month term the workers' post-injury income equals or exceeds his pre-injury income . . . in order for the statutory limitation to apply, the evidence must disclose that wage-loss benefits were not payable solely because of the amount of income received by the worker, and not for any other reason.

Bonner, 509 So.2d at 1266-1267 (emphasis in original).

The Employer agrees with the dissent of Judge Barfield in the proceedings below, who concluded that:

[n]ot only is this construction contrary to the express language of the statute, but the Bonner court admitted it sought a construction inconsistent with legislative intent. The contortion of the statute was for the purpose of avoiding the constitutional [sic] issues presented in Bonner, which the court should have addressed.

Waddell, 13 F.L.W. at 770 (J. Barfield, dissenting).

As the Bonner court acknowledged:

As originally enacted by Chapter 79-40, § 10, Laws of Florida, Section 440.15(3)(b)3. provided that an employee's right to wage loss benefits would terminate upon the occurrence of four events, whichever came first: the expiration of the two-year period following the worker's attainment of MMI, subject to the exception under consideration, or 350 weeks after the injured employee reaches MMI, if his injury occurred before July 1, 1980, or 525 weeks thereafter if the injury occurred after July 1, 1980, or, finally, when the worker reaches age 65.

509 So.2d at 1267.

The legislature's decision in 1979 to move from a system of compensation for permanent partial disability, based on impairment ratings, to a system of compensation for permanent partial disability, based on actual wage loss in relation to pre-injury earnings, was a pioneering, but carefully considered, decision. Acton v. Ft. Lauderdale Hosp., 418 So.2d 1099, 1100 (Fla. 1st DCA 1982) (citing Sadowski, Herzog, Butler, and Gokel, The 1979 Florida Workers' Compensation Reform: Back to Basics, 7 Fla. St. U.L. Rev. 640, 648-652 (1979)). Records of the proceedings before the House Committee on Insurance, Conference Committee on Workers' Compensation, on the compromised version of Senate Bill 188, contain the following statement of legislative intent underpinning the change to a wage loss system:

The legislature, in providing impairment benefits and wage loss benefits for any employee suffering permanent impairment caused by a work related accident, did so for the following reasons, among others:

1. The former system of compensation for permanent partial disability was based upon factors that bore no relation to the economic needs of the injured worker. Such compensation was based either on an arbitrary schedule of benefits or, more often, upon subjective physical impairment or diminution in wage earning capacity ratings. The subjectivity not only aggravated the spiralling costs of the system, but also resulted in inequitable distribution of benefits among permanently injured workers. Actual work disability should be the primary

basis for permanent partial benefits.

2. The role of the impairment benefits should be secondary to wage loss benefits. Impairment benefits are to be paid only for the most serious physical impairments as provided in this section.

Careful consideration has been given to the welfare of those workers who suffer a permanent impairment not listed in that section. The legislature has determined that in providing for medical benefits pursuant to a section, temporary disability benefits pursuant to a second section, and wage loss benefits pursuant to a third section, the worker has been adequately compensated.

Hearings on Worker's Compensation, 1979: CS/SB 188 Before the House Committee on Insurance, Conference Committee, April 23, 1979 (Cassette Series 414, Box 152, Tape 2, Side 1) (available from the collections of the Florida State Archives, Tallahassee, Florida).

The wage loss system adopted by the legislature in 1979 was the legislature's attempt to provide equity in compensation, reduce subjectivity in determining compensation, reduce the need for attorney involvement and litigation, provide an incentive for injured workers to return to work, and offer an incentive for employers to provide rehabilitation. Acton v. Ft. Lauderdale Hosp., 418 So.2d 1099, 1100 (Fla. 1st DCA 1982), aff'd, 440 So.2d 1282 (Fla. 1983).

This court observed:

The workers' compensation law continues to afford substantial advantages to injured workers, including full medical care and wage-loss payments for total or partial disability without their having to endure the delay and uncertainty of tort litigation . . . some inequality or imprecision will not render a statute invalid. (Citations omitted). [T]he fact that injured workers may recover different amounts for the same injury due to individual differences in wage loss is inherent in the very nature of the wage loss system.

Acton v. Ft. Lauderdale Hosp., 440 So.2d 1282, 1284 (Fla. 1983).

The Bonner court, and, in turn, the court below, committed error when they looked beyond this legislative intent and the plain meaning of Section 440.15(3)(b)3.a., Florida Statutes (1981). See Daniel v. Holmes Lumber Co., 490 So.2d 1252, 1256 (Fla. 1986); Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879, 882 (Fla. 1983); Thompson v. Florida Indus. Comm'n, 224 So.2d 286 (Fla. 1969).

Following the plain meaning of the wage loss provisions of the Workers' Compensation Act, a claimant of wage loss benefits must show his inability to obtain employment within his physical restrictions is a result of his injury. The burden is on the claimant "to show his inability to obtain employment or to earn as much as he earned at the time of his industrial accident is due to physical limitation related to his accident . . ." Section 440.15(3)(b)2.,

Florida Statutes (1981); Waddell, 13 F.L.W. at 770 (J. Barfield, dissenting).

Section 440.15(3)(b)1., Florida Statutes (1981), provides that wage loss benefits "shall be based on actual wage loss, and the claimant has the burden of demonstrating inability to obtain employment or to earn as much as he earned at the time of his industrial accident due to the physical limitation caused by the industrial accident." R. E. Dailey Co. v. Dorman, 509 So.2d 377, 378 (Fla. 1st DCA 1987). The Dorman court reversed the award of wage loss benefits during the time a claimant was incarcerated, because the claimant "clearly could not conduct a work search during that time, and there is no showing that claimant's loss of income was caused by the industrial accident." Id. To repeat, wage loss benefits were not payable to a claimant for the months he spent in jail.

In an analogous case, an illegal alien, Candelo, suffered a compensable injury to his back, was rehired to do light duty work, but had never been issued a green card, which resulted in his being terminated. Even though Candelo looked for work and found employers who would hire him if he obtained a valid green card, the First District Court of Appeal reversed an award of wage loss benefits.

Performing a good faith job search is a method by which a claimant may demonstrate a causal link between his injury and his wage loss. City of Clermont v. Rumph, 450 So.2d 573 (Fla. 1st DCA 1984).

However, where the claimant may not legally be employed, a work search, no matter how exhaustive, will not adequately demonstrate such a causal link, . . . Entitlement to wage loss benefits is based on proof of a connection between the injury and the alleged wage loss. One method of demonstrating that connection is by an adequate good faith work search. Use of that method is unavailing in circumstances such as this where the claimant may not legally be employed because of his illegal alien status. That is not to say that such a claimant is foreclosed from demonstrating entitlement to wage loss through other allowable means such as where the injuries are severe enough to excuse a work search.

Cenvill Dev. Corp. v. Candelo, 478 So.2d 1168, 1170 (Fla. 1st DCA 1985).

In neither Dorman nor Candelo did the court indicate that months spent in jail or as an illegal alien confer special equity on a convict or an illegal alien seeking wage loss benefits. There is no authority in either case for exempting illegal aliens or convicted claimants from the requirements of the Workers' Compensation Act. Consequently, the Bonner court and the court below erred in contriving, for incarcerated claimants, an exception from the running of the statutory period and thereby upset an otherwise unambiguous statutory scheme.

Florida law is consistent with the workers' compensation law of other states, which supports the view that no benefits are "payable" for the post-MMI period in which a convicted claimant is incarcerated, unless the claimant carries his burden of proof that the injury caused lost wages or

earning capacity. E.g., Scott Hous. Sys., Inc. v. Howard, 256 Ga. 675, 353 S.E.2d 2 (1987) (benefits terminated as of the date of adjudication of guilt); Bilello v. Eckert Co., 43 A.D.2d 192, 350 N.Y.S.2d 815 (1974) (benefits barred after murder conviction because claimant's loss of earnings was the result of his crime, not his disability); United Riggers Erectors v. Industrial Commission, 131 Ariz. 258, 640 P.2d 189 (1981) (prisoner who was unable to conduct job search was not excused from complying with the requirements of the workmen's compensation statutes, and could attempt to meet his burden of proof of loss of wage earning capacity by relying on expert witnesses to demonstrate the types of work he would be able to do within his post-injury physical restrictions). See generally, Annotation, Workers' Compensation: Incarceration as Terminating Benefits, 54 A.L.R. 4th 241 (1987).

The Bonner court rewrote the express language of the statute to avoid considering the constitutional issues of whether a straightforward interpretation and application of the statute, as the legislature wrote it, denies a claimant, incarcerated during the two-year period of the statute, access to courts or equal protection. Bonner, 509 So.2d at 1266. Although these constitutional issues were not presented in the proceedings below, the Employer observes that the court has upheld the statutory wage loss scheme, Sections 440.15(3)(a) and 440.15(3)(b), against access to

court challenges and equal protection challenges. Acton v. Ft. Lauderdale Hosp., 440 So.2d 1282, 1284 (Fla. 1983), aff'g, 408 So.2d 1099 (Fla. 1st DCA 1982); Mahoney v. Sears Roebuck & Co., 440 So.2d 1285 (Fla. 1983); John v. GDG Services, Inc., 440 So.2d 1286 (Fla. 1983); Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984), aff'g, 431 So.2d 204 (Fla. 1st DCA 1983).

In lieu of a tort system for recovery of compensation for a permanent partial disability, the statutory system for awarding wage loss benefits has allowed Waddell to recover, in an efficient and certain way, eight and one-half months' temporary total disability benefits (December 15, 1981 through April 14, 1982 and April 28, 1982 through September 14, 1982); three and one-half months' temporary partial disability benefits (October 13, 1982 through January 31, 1983); and seven months' wage loss benefits (February 1, 1983 through June 30, 1983, June 1985, and July 1985). The statutory scheme has not denied him equal protection or access to courts. See Acton, 418 So.2d at 1100-1101.

The Florida legislature considered the effect of incarceration of an injured employee on workers' compensation benefits when it adopted Section 440.15(8), Florida Statutes [formerly Section 440.15(9)]. Under that section, if an employee who is permanently totally disabled becomes an inmate at a public institution, no compensation is payable unless

he has dependents. See Dorman, 509 So.2d at 378 (The section does not apply when TPD or wage loss benefits are at issue, but only applies to PTD claims). The legislature in 1979 reviewed the entire statutory scheme for workers' compensation, and elected not to make an exception from the running of Section 440.15(3)(b)3.a. for time criminals spend in jail. If the legislature had intended to exempt periods of incarceration from the running of the two year period, it would have so provided, and had an opportunity to do so. The legislature chose not to do so. The Bonner court should not have overruled that choice.

The legislature could have placed no limitations on the entitlement to wage loss benefits and could have provided that wage loss benefits were payable for the duration of the condition, as the legislature provided for permanent total disability, in Section 440.15(1), Florida Statutes; or could have provided that payment of wage loss benefits in excess of pre-injury earnings alone triggers the application of Section 440.15(3)(b)3.a. Instead, the legislature placed a maximum statutory limit of 525 weeks on wage loss benefits, and enacted the tolling period found in Section 440.15(3)(b)3.a.

The Deputy Commissioner observed that Waddell's situation "exactly fits what the legislature intended . . . I find that we have a situation here in which there was a two year period during which wage loss benefits were not payable

for at least three consecutive months." (R 48). The January 15, 1987 Compensation Order sets forth the Deputy's findings first, that during the 24 month period immediately preceding August 1, 1985, wage loss benefits were payable to Waddell for the months of August 1983, June 1985, and July 1985, even though he asserted his entitlement to wage loss benefits for each month between August 1983 and August 1985, including the months when he was incarcerated; second, as a corollary to the first finding, that during the two-year period, wage loss benefits were not payable during at least three consecutive months subsequent to MMI; and, third, following from the first two findings, that Section 440.15(3)(b)3.a., Florida Statutes (1981), precluded Waddell's recovery of wage loss benefits after August 1, 1985. (R 745). This court should restore the findings of the Deputy which the First District Court of Appeal reversed.

Even if this court were to adopt in the Bonner court's novel interpretation of the statute, followed by the majority below, and hold that post-MMI earnings alone trigger application of the statute of repose, the facts of the instant case are distinguishable from the facts of Bonner. Bonner had no earnings in a relevant post-MMI, two-year period. Waddell had significant post-MMI earnings. He reached MMI on January 27, 1983, received wage loss benefits for February 1983 through June 1983, for August 1983, for

June 1985, and for July 1985, even though he asserted his entitlement to wage loss benefits for every month between August 1983 and August 1985. Waddell filed wage loss claims, as he had done every month since MMI, for the months of his incarceration. Prior to his conviction for habitual drunk driving, Waddell worked as a first class maintenance mechanic from June 1983 to the end of July 1984, received three raises, and, by July 1984, was earning more money at Sikes than he had been making with the Employer, and more money than he had been making on the date of his accident. (R 133). After his incarceration in December 1984, Waddell's wage loss request showed further earnings. (R 145, 151, 153).

Deputy Commissioner Hurt's initial Compensation Order sets forth his findings that for the months during the relevant two-year period prior to June 1985, Waddell simply failed to sustain his burden of proving that lost wages were due to his physical limitations caused by his injury, and not due to acts within his control. "In the current situation, Mr. Waddell took actions which directly affected his ability to earn his living, which actions he could have avoided." (R 466). The Deputy was "unwilling to state the employer is or should be responsible for actions lying solely within the control of the employee." Id. In short, even under the strained Bonner interpretation that post-MMI earnings which exceed pre-injury earnings alone trigger the

application of Section 440.15(3)(b)3.a., the record shows Waddell acquired such earnings in the two-year period after MMI and immediately preceding August 1, 1985. Any wage loss during the months of and following his incarceration, was because of his incarceration, not because of his injury. Judge Hurt's decision in this regard, that Waddell was not entitled to wage loss for the time spent in jail, is now the law of the case, which Waddell seeks to overturn in this subsequent appeal.

When the Supreme Court of Florida was confronted with a case in which the carrier had paid 350 weeks of temporary total disability benefits, and the claimant was still temporarily totally disabled, the court followed the law as written.

The statute is clear and unambiguous in its language. The carrier was justified in ceasing to pay additional temporary total disability benefits.

The Florida Workmen's Compensation Act is inadequate in failing to provide for a situation such as this. However, the remedy lies with the legislature and not with the Florida Industrial Commission or the Court.

Thompson v. Florida Indus. Comm'n, 224 So.2d 286 (Fla. 1969).

Similarly, the language of Section 440.15(3)(b)3.a. should now guide the court, and the legislature should remedy any perceived inadequacies in failing to provide for a situation like Waddell's. The Employer submits, however,

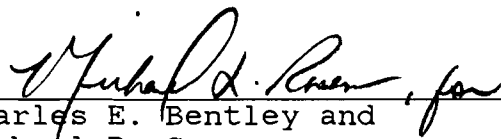
that when wage loss is attributable to a cause other than an injury, and particularly to a claimant's own voluntary criminal acts which keep him from participating in the work force, no inequities arise from applying the statute to bar wage loss benefits. To hold otherwise gives an inmate an unwarranted advantage not available to other law abiding claimants with more appealing reasons for not discharging workers' compensation obligations (e.g., participation in unauthorized schooling or rehabilitative program; staying home to raise children; travelling).

Accordingly, the Employer respectfully urges the court to answer the question certified in the negative, to vacate the decision below, to adopt the reasoning of the dissent of Judge Barfield as its own, and to apply the law as written.

CONCLUSION

Section 440.15(3)(b)3.a., Florida Statutes (1981), provides that the right to wage loss benefits shall terminate at the end of any two-year period commencing at any time subsequent to MMI, unless wage loss benefits "shall have been payable" during at least three consecutive months during this period. In the two years from August 1, 1983, and ending July 30, 1985, there were no three consecutive months during which wage loss benefits were payable to Waddell. Competent substantial evidence supported the Deputy Commissioner's application of the unambiguous language of the statute to bar Waddell's entitlement to wage loss benefits after August 1, 1985. The First District Court of Appeal's reversal, based on the spurious rationale for the decision in Bonner, constitutes reversible error.

Based on the argument and authorities set forth above, the Employer respectfully requests this Court to vacate the decision of the First District Court of Appeal and to reinstate the Deputy's decision in all respects.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by U. S. Mail, postage prepaid, this 9th day of May, 1988, to Richard R. Roach, Jr., Esquire, Post Office Drawer AR, Lakeland, Florida 33802-2034, Attorney for Respondent; 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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9973-352SCBrief:148