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 REPLY BRIEF

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 Reply Brief 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, 523 So.2d 683 (Fla. 1st DCA 1988). In this Reply Brief, Petitioner will continue to 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. Reference to Petitioner's Brief on the Merits will be designated by the symbol "IB" and to Respondent's Brief by the symbol "RB."

The Statement of the Case and of the Facts set forth in Petitioner's Brief on the Merits is incorporated herein by reference. Throughout this Reply Brief, all emphasis has been supplied unless otherwise indicated.

ARGUMENT IN REPLY

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).

The First District Court of Appeal, which Waddell believes has "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," (RB 9-10), determined that the following issue, and sole issue now before the Supreme Court, was ripe enough and of great enough public importance to have certified it for the Court's discretionary review:

> 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)?

Waddell v. USS Agri-Chemicals, 523 So.2d 683, 683-684 (Fla. 1st DCA 1988). Waddell's belief that the First District Court of Appeal has greater insight into Waddell's life than do Deputy Commissioner Hurt, Deputy Commissioner Vocelle, and, presumably, Judge Barfield (dissenting below), all of whom applied Section 440.15(3)(b)3.a., Florida Statutes (1981), as the legislature wrote it, underpins Waddell's responses to the Employer's argument on the certified question.

Deputy Commissioner Hurt's determination that Waddell "took actions which directly affected his ability to earn his living, which actions he could have avoided," and decision that Waddell was not entitled to wage loss for the time spent in jail, is now the law of the case. (R 466).

Deputy Commissioner Vocelle concluded that Waddell's incarceration did not toll the running of Section 440.15(3)(b)3.a., Florida Statutes (1981). He found that Waddell's situation "exactly fits" the legislature's intention to terminate a claimant's entitlement to wage loss benefits at the end of any two-year period after the date of maximum medical improvement during which wage loss benefits were not payable for at least three consecutive months. (R 48).

Judge Barfield dissented on the merits of the instant case from the majority's decision to follow Monroe Furniture Co. v. Bonner, 509 So.2d 1264 (Fla. 1st DCA 1987), because he thought the basis for the decision in Bonner was "clearly wrong," since no wage-loss benefits are "payable" under the Workers' Compensation Act to a person who fails to show his inability to obtain employment is due to physical limitations related to his accident. Waddell, 523 So.2d at 684. Therefore, Judge Barfield would affirm Deputy Commissioner Vocelle's application of Section 440.15(3)(b)3.a., Florida Statutes (1981), to abate Waddell's entitlement to wage loss

benefits after the running of a two-year period beginning July 1, 1983 and ending June 30, 1985. Id.

Implicit in the majority's conclusion that Waddell's incarceration tolled the running of the statute of repose is an understanding that, in the absence of a tolling, the straightforward language of Section 440.15(3)(b)3.a., Florida Statutes (1981), would terminate Waddell's entitlement to future wage loss benefits. Nevertheless, Waddell attempts to beg the certified question on the effect of incarceration on the running of the statute by inviting the court to engage in a "simple counting of months following MMI, (RB 4), and by contending that "any two-year period," commencing at any time after MMI, cannot start until the first month after the last month for which wage loss benefits are payable; that since wage loss benefits were payable in August, 1983, the two-year period cannot start until September 1, 1983. (RB 6).

The legislature did not include Waddell's proposed provisos in the statute of repose. There is nothing tricky or baffling about the statute. Reviewing the calendar at R 81, the the period from August 1, 1983 to July 30, 1985 qualifies as "any two-year period" following MMI. Wage loss benefits were not "payable" for three consecutive months during the period; therefore, Waddell's right to wage loss benefits was terminated after June 30, 1985. Deputy Commissioner Hurt's decision, which Waddell did not appeal,

and which is the law of the case, was that wage loss benefits were not payable during many months of this two-year period on account of either high post-MMI earnings or actions within Waddell's control which he could have avoided and which directly affected his ability to earn wages. (R 466)

Waddell's apparent misunderstanding that the statute of repose requires a "clean" 24-month period, uninterrupted by a month in which wage loss benefits are payable, fuels his contention that the Employer "has re-written the statute so it no longs [sic] reads 24-months but now reads 22-months." (RB 7). Under Waddell's view of the statute, a claimant could reach MMI, work for 23-months in which no wage loss benefits were payable, receive wage loss benefits in the 24th month, renew another 24-month period, and repeat the pattern, thereby extending his entitlement to wage loss benefits for the entire 525-week statutory period of entitlement, despite sporadic receipt of wage loss benefits.

The legislature did not intend to make an employer's liability as uncertain and indefinite in duration as Waddell's interpretation of the statute contemplates. The wage loss system adopted by the legislature in 1979 was the legislature's attempt to provide equity and 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) ("the 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"). The legislature was not dealing with "theoretical or idealized situations," as Waddell asserts, (RB 10), but was dealing with real world claimants, employers, lawyers, litigation, and spiraling costs of workers' compensation. (IB 9-10).

When Waddell finally gets to the certified question, he argues that the Employer "is not satisfied with the penalty exacted by the County Court [for Waddell's crime of habitual drunk driving], but wants the workers' compensation system to kick the injured employee while he is down." (RB 10). Waddell is not a victim; the Employer is not out to punish or "kick" him. As a direct result of his own voluntary acts, though, Waddell removed himself from the job market, and consequently failed to demonstrate wage loss benefits were "payable" during the months he spent in jail. In these months, Waddell, and not the Employer, took away his ability to prove benefits were "payable" because of physical limitation related to his accident. Section 440.15(3)(b)2, Florida Statutes (1981), ("the burden shall be on the employee to establish that any wage loss claimed as a result of the compensable injury...[and] to show that 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 and not because of economic conditions or the unavailability of employment"); Waddell, 523 So.2d at 684 (Barfield, J., dissenting) ("The benefits are not 'payable' until proved. Before proved, the benefits 'may be payable.'").

Wage loss benefits were not "payable" to the claimant in R. E. Daily Co. v. Dorman, 509 So.2d 377, 378 (Fla. 1st DCA 1987), for the months he spent in jail, and they were not "payable" to Waddell for the months he spent in jail. (R 704). The claimant in Dorman "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." 509 So.2d at 378.

When a claimant cannot be legally employed, he cannot show entitlement to wage loss benefits based on a connection between his injury and the alleged wage loss. Still, no wage loss benefits are "payable" in such circumstances, unless the claimant demonstrates 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) (no wage loss benefits were payable to illegal alien who conducted a work search, found work, but was unable to work without a valid green card).

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. His incarceration did not toll the statute. 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.

Accordingly, the Employer urges the Court to answer the question certified in the negative, to vacate the District Court's decision below, to adopt the reasoning of Judge Barfield's dissent, and to apply Section 440.15(3)(b)3.a., Florida Statutes (1981), as the legislature wrote it, without reprieve for incarcerated claimants like Waddell.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief has been furnished by U. S. Mail, postage prepaid, this 23rd day of June, 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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