OA 6-6-91

IN THE SUPREME COURT OF FLORIDA

UNIVERSITY OF FLORIDA and
DIVISION OF RISK MANAGEMENT,

Petitioners,

vs. CASE NO.: 76,414

EMMETT H. MASSIE,

Respondent.

_____/

ON PETITION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF THE FIRST DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONERS, UNIVERSITY OF FLORIDA and DIVISION OF RISK MANAGEMENT

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STATEMENT OF THE CASE AND FACTS

Emmett Massie, the respondent, came to work for the University of Florida in July 1979 as head of the engineering department of the university television station, WUFT-TV (R:126). At that time, he had already been diagnosed with multiple sclerosis (R:238), a progressively disabling disease of the central nervous system (R:320, 337). After commencing his employment, the respondent was often required to work eleven to twelve hours per day for as many as six or seven days a week (R:134). However, he had actually worked unusually long hours on a routine basis before ever coming to work for the University (R:11,39-44). In October 1980, a small airplane crashed into the WUFT tower, destroying it along with the satellite dish and other equipment (R:209). In response to this emergency, the respondent's hours increased to sixteen to seventeen hours per day (R:135) for approximately two months (R:137). Thereafter, however, his hours decreased to eight hours per day (R:138).

His department was experiencing a turnover ratio of approximately 84% as of February 1980 (R:215). By June 1982, the respondent was involved in conflicts with his superiors at the University (R:387-92). As his multiple sclerosis became progressively disabling in November 1981, he began cutting back his hours of employment with the University (R:138) so that when his employment terminated in July or August 1983 (R:82), he was working only a few hours per day, two to three days per week (R:139).

On September 6, 1983, the respondent filed a claim for

workers' compensation benefits with the Division of Workers' Compensation in Tallahassee, alleging "repeat exposure to long hours of work causing exhaustion and fatigue accompanied by high stress in an unfavorable work environment aggravating pre-existing Multiple Sclerosis" (R:185). A hearing was held on the claim on January 23, 1984 (R:66-179). Testifying at the hearing were the respondent (R:125-79), his wife (R:121-25), his supervisor (R:75-93), and a vocational expert, Mr. Alan Pappas (R:94-121). Also testifying by way of deposition was the respondent's treating neurologist, Dr. David Mouat (R:314-64).

Mr. Pappas testified that stress is inherent in technical areas (R:115), that stress is subjective (R:115), and that job stress is not unusual (R:108). Dr. Mouat testified by way of a letter dated November 11, 1983 (R:224) that the respondent "suffers from chronic progressive multiple sclerosis and that within a reasonable amount of probability the accelerated course which Mr. Massie has experienced over the last several years was related to job-related stresses." Dr. Mouat made plain in his deposition testimony that when he used the term "job-related stresses" he was speaking in terms of <u>emotional</u> or <u>psychological</u> stress, not in terms of the number of hours the respondent was working (R:337-38, 340-41, 358-59).

On February 17, 1984, the judge of compensation claims found that the respondent had not sustained a "accident" within the meaning of §440.02(1), Florida Statutes, and denied the claim for benefits (R:402-08) [Appendix I]. The judge specifically found

that the respondent had not been subjected to "repeated trauma" (R:407), that the respondent's stress was in the nature of a "psychological trauma" (R:407), and that

> the stress which the claimant testified to over a long period of time was not to an extent greater than that to which the general public is exposed, was not an exposure peculiar to and constituting a hazard of his employment operating upon the physical condition of the claimant. The claimant must to have been subject [sic] to more that [sic] the ordinary hazards confronting people generally. Job pressure and long hours of work in and of itself have never been held to be factors which result in entitlements under the Workers' Compensation Act.

(R:407).

On February 23, 1984, the respondent filed a Motion to Vacate and Set Aside, or Amend Order (R:443-49). During a hearing on the motion (R:423-41), the respondent accused the judge of compensation claims of having no evidentiary support for his finding regarding the level of the respondent's stress. The judge of compensation claims responded facetiously, "I know there's no support for it, but that's what I found. I don't, uh, listen. If I, you don't think that this is a stressful situation, sitting here?" (R:439). The motion was denied by order dated March 9, 1984 (R:451), and the respondent filed a notice of appeal on March 6, 1984 (R:410-11).

In an opinion dated January 24, 1985, the First District Court of Appeal affirmed the order of the judge of compensation claims, agreeing that the respondent's stress was "an emotional condition" and that competent substantial evidence supported the judge's finding regarding the level of stress which the respondent had

experienced. Massie v. University of Florida, 463 So.2d 383 (Fla.1st DCA 1985) [Appendix II]. Respondent's motion for rehearing was denied by the district court on February 20, 1985. This court denied review in Case No. 66,744; 472 So.2d 1181 (Fla.1985).

On August 22, 1985, the respondent filed a petition for modification of the judge's previous order pursuant to §440.28, Florida Statutes (R:47), alleging that there had been a change in his condition since the original order of February 17, 1984 or, alternatively, that the judge had made a mistake in the determination of a fact in the original order. A hearing was held on the petition on March 24, 1986 (R:2-45). Testifying at the hearing were the respondent (R:38-45) and Mr. Alan Pappas (R:24-38), the same vocational expert who had testified at the original hearing. For his part, the respondent admitted that there had been no change in his condition since the original hearing in January 1984 (R:39). Although Mr. Pappas testified that his original testimony had been misunderstood by both the judge of compensation claims and the First District Court of Appeal (R:25), he also admitted that it was not his intent to change any of his previous testimony (R:34-35).

The petition for modification was denied by order dated April 30, 1986 (R:462-65). In addition, the judge of compensation claims considered the petition to have been filed without reasonable grounds, and accordingly taxed the costs of the proceedings against the respondent pursuant to §440.32, Florida Statutes (R:464)

[Appendix III]. The respondent filed a notice of appeal to the First District Court of Appeal on May 16, 1986 (R:467-68).

Two years later, in an opinion dated June 2, 1988, the district court of appeal reversed the order of the judge of compensation claims, finding that the respondent had sustained a compensable "accident" by virtue of his "exposure over a long period of time to a combination of emotional stress and physical exertion attributable to unusual circumstances and exceptionally long hours of work . . . ." Massie v. University of Florida, 13 F.L.W. 1342, 1344 (Fla.1st DCA June 2, 1988) [Appendix IV].

In addition, because there had been no change in the respondent's condition since the original order of February 17, 1984 and because the evidence of a mistake in a determination of fact was legally insufficient, the district court held that the judge of compensation claims was correct in denying modification under §440.28, Florida Statutes. 13 F.L.W. at 1343, 1344, 1346. Nevertheless, the district court held that reversal was necessary in order to avoid "manifest injustice." The court found that both the judge of compensation claims and the original appellate panel had misunderstood Mr. Pappas' testimony at the hearing in January 1984. 13 F.L.W. at 1346-47. Two weeks later, the district court withdrew this opinion on its own motion. 13 F.L.W. 1464 [Appendix V].

After an additional two years had passed, the First District Court of Appeal issued its final opinion on June 29, 1990. Massie v. University of Florida, 570 So.2d 963 (Fla.1st DCA 1990)

[Appendix VI]. In this opinion, the district court again found that the claimant had sustained a compensable "accident" because of his "prolonged exposure" to "a combination of emotional and physical stress and strain attributable to unusual circumstances and exceptionally long hours of work . . . ." 570 So.2d at 969. The district court also held once again that the judge of compensation claims was correct in denying modification because of a change in the claimant's condition. 570 So.2d at 967. However, unlike the June 2, 1988 opinion, the district court now held that the judge of compensation claims should have granted the petition for modification, and indeed that he had the duty to do so on the present record, based on the mistake-of-fact provision of §440.28. 570 So.2d at 973. This holding was based on the district court's finding that there was absolutely no evidence to support the judge's original finding regarding the respondent's "stress" level and that the judge of compensation claims had admitted his "error" at the modification hearing. 570 So.2d at 967-68.

Your petitioners filed a motion for rehearing in the district court on July 15, 1990 and a notice to invoke the discretionary jurisdiction of this court on July 30, 1990. Although it conceded that the alleged confession of error by the judge of compensation claims did not actually occur at the modification hearing, the district court of appeal denied the motion for rehearing on September 27, 1990. This court agreed to accept jurisdiction by order dated February 26, 1991.

SUMMARY OF ARGUMENT

The respondent did not sustain an "accident" within the meaning of §440.02(1), Florida Statutes. His multiple sclerosis, a progressively disabling disease, pre-existed his employment with the University. Although there was medical testimony that the progress of his multiple sclerosis was accelerated by "job-related stresses," the stress being spoken of was emotional or psychological, not physical. Accordingly, there was competent substantial evidence to support the finding of the judge of compensation claims that the respondent's stress was "in the nature of a psychological trauma" and that he was "not subjected to repeated trauma."

But even if the judge's finding in that regard were unsupported, the district court erred in applying the test it promulgated in Festa v. Teleflex, Inc., 382 So.2d 122 (Fla.1st DCA 1980), to the facts of this case. Because this case involves a pre-existing progressively disabling disease which was not aggravated by exposure to any deleterious substance or force in the workplace, the district court should have looked to this court's holdings in Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla.1962); Richard E. Mosca & Company, Inc. v. Mosca, 362 So.2d 1340 (Fla.1978); Tintera v. Armour & Company, 362 So.2d 1344 (Fla.1978); Richards Department Store v. Donin, 365 So.2d 385 (Fla.1978); and City of Miami v. Rosenberg, 396 So.2d 163 (Fla.1981). Those cases make plain that there is no "accident" when pre-existing disease is aggravated or accelerated by emotional

stress, including long working hours.

Moreover, your petitioners submit that even if the district court was correct in applying its Festa rule, it should not have reversed the order of the judge of compensation claims denying the petition for modification. This court held in Power v. Joseph G. Moretti, Inc., 120 So.2d 443 (Fla.1960), that the judge of compensation claims may not grant a mistake-of-fact petition for modification based on "a reanalysis of the prior record . . . and a change of his conclusions as a result of a retrospective exploration of the original record." 120 So.2d at 446. Although couching its holding in terms of preventing "manifest injustice," the district court of appeal has done precisely what this court held that the judge of compensation claims may not do. The judge of compensation claims did not abuse his discretion in denying the petition for modification and therefore should not have been reversed.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED IN FINDING THAT RESPONDENT SUSTAINED AN "ACCIDENT" WITHIN THE MEANING OF §440.02(1), FLORIDA STATUTES.

Eligibility for workers' compensation benefits under Chapter 440, Florida Statutes, is determined by whether an employee has sustained: (1) an "accident" (2) which "arises out of" and (3) occurs "in the course of" his employment, the idea being to compensate for injuries that result from the employment and to bar compensation for injuries that do not. Southern Bell Telephone and Telegraph Co. v. McCook, 355 So.2d 1166 (Fla.1977). Chapter 440 "was not designed to take the place of general health and accident insurance." General Properties Co. v. Greening, 154 Fla.814, 820, 18 So.2d 908, 911 (1944). Also see: Leon County School Board v. Grimes, 548 So.2d 205 (Fla.1989). As this court stated in Protectu Awning Shutter Co. v. Cline, 154 Fla. 30, 16 So.2d 342 (1944):

> The purpose of the act is to shoulder on industry the expense incident to the hazards of industry; to lift from the public the burden to support those incapacitated by industry and to ultimately pass on to the consumers of the products of industry such expense. Our act affords no relief for disease or physical ailment not produced by industry. (Emphasis added).

Id. at 31, 16 So.2d at 343.

With that purpose in mind, the fundamental question presented for the court's resolution in this case is whether the respondent sustained an "accident" within the meaning of §440.02(1), Florida

Statutes.[1] Petitioners respectfully submit that he did not. In order to fully appreciate the district court's holding in the instant case, a brief review of the concept of "accident" as developed by judicial interpretation will be helpful.

A. THE CONCEPT OF "ACCIDENT" UNDER FLORIDA LAW

"Accident" is defined in §440.02(1) in pertinent part as: "an unexpected or unusual event or result, happening suddenly." With the exception of an amendment in 1953, this portion of the definition has remained unchanged since the original enactment of the Florida Workers' Compensation Act in 1935.[2] The courts have endeavored to give meaning to these words over the years in a variety of factual situations. One of the landmark decisions in this area of the law before the 1953 amendment is Gray v. Employers Mutual Liability Insurance Company, 64 So.2d 650 (Fla.1953).

In that case, the injured worker was employed as a waitress who, as part of her duties, was also required to cook waffles. The waffle batter was kept in a five-gallon can which was stored on the bottom shelf of the refrigerator until needed. Gray picked up the can of waffle batter and suffered an injury to her right arm. The deputy commissioner denied compensation on the ground that there was no "unexpected or unusual event" preceding the injury such as a slip, fall, of misstep, and therefore no "accident." This court

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[1] Until 1983, this subsection was numbered §440.02(18) or (19), Florida Statutes.

[2] Chapter 17481, Laws of Florida (1935).

reversed, holding that "[i]t is enough . . . if there is an unexpected result, even though there was no unexpected cause, such as a slip, fall, or misstep, in order to constitute an 'accident' within the meaning of the Workmen's Compensation Law . . . . " 64 So.2d at 651. (Emphasis in original).[3]

While "accidents" such as the one involved in Gray are now accepted as compensable without a second thought, cases where the injury is the result of a series of events spread over time instead of a single traumatic insult have proved somewhat more troublesome from a conceptual standpoint. Nevertheless, in a series of cases that may be broadly categorized as "exposure" cases, "repeated trauma" cases, and "occupational disease" cases, the courts have found the occurrence of an "accident."

1. The "exposure" cases

The "exposure" cases have generally found the occurrence of an "accident" where the employee suffers an injury due to his exposure to some external, deleterious force in the workplace. For example, in Alexander Orr, Jr., Inc. v. Florida Industrial Commission, 129 Fla. 369, 176 So. 172 (1937), a compensable "accident" was found where a plumber died of sunstroke after being subjected to oppressive heat and using a blow torch on a hot August day. Likewise, in Czepial v. Krohne Roofing Co., 93 So.2d 84 (Fla.1957),

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[3] The legislature subsequently ratified this court's interpretation in Gray by amending the definition of "accident" to read: "an unexpected or unusual event or result, happening suddenly." (Emphasis added). Chapter 28238, §1, Laws of Florida (1953).

an "accident" was found where the employee's constant inhalation of dust and fumes at the workplace over a period of time aggravated or accelerated a pre-existing tubercular condition. More recently, the First District Court of Appeal has found the occurrence of an "accident" where the employee's pre-existing emphysema is aggravated by exposure to secondary tobacco smoke in the workplace, assuming there is proper medical proof of causation. ATE Fixture Fab v. Wagner, 559 So.2d 635 (Fla.1st DCA 1990).

2. The "repeated trauma" cases

Closely related to and overlapping with these "exposure" cases are the so-called "repeated trivial trauma" cases. In these cases, an "accident" has been found where the employee is injured as a result of the cumulative effect of small repetitive trauma spread out over a period of time. Although it could just as easily be categorized as an "exposure" case, perhaps the landmark Florida case in this area is this court's decision in Worden v. Pratt and Whitney Aircraft, 256 So.2d 209 (Fla.1971). There, this court found the occurrence of an "accident" or series of "accidents" where the employee developed cataracts from looking into a high intensity furnace over a period of years. Relying on the language in this case, the former Industrial Relations Commission found the occurrence of an "accident" where a carpet installer developed cysts and spurs on his right knee after repeatedly using a "knee-kicker" at work over a period of several months. Keller Building Products of St. Petersburg v. Shirley, IRC Order 2-3263 (November 3, 1977), cert. denied, 362 So.2d 1054 (Fla.1978).

In Festa v. Teleflex, Inc., 382 So.2d 122 (Fla.1st DCA), pet. for rev. denied, 388 So.2d 1119 (Fla.1980), the employee developed carpal tunnel syndrome as a result of the repetitive twisting and turning of his wrists while exerting 30 to 40 pounds of pressure and doing the work of two persons. 382 So.2d at 123. In holding that the employee had sustained a compensable "accident," the district court of appeal developed its own test for compensability under the "repeated trauma" theory. Under that theory, the district court held that an injured worker must show:

> 1) [P]rolonged exposure, 2) the cumulative effect of which is injury or aggravation of a pre-existing condition and 3) that he has been subjected to a hazard greater than that to which the general public is exposed. Alternatively, he must demonstrate a series of occurrences, the cumulative effect of which is injury.[4]

382 So.2d at 124.

3. "Occupational disease" pursuant to §440.151, Florida Statutes

Also closely related to the "repeated trauma" and "exposure" cases are those dealing with "occupational disease." First enacted in 1945,[5] §440.151, Florida Statutes, mandates that certain diseases shall be recognized as "accidents" notwithstanding the definition of "accident" contained in §440.02(1), Florida Statutes. In Broward Industrial Plating, Inc. v. Weiby, 394 So.2d 1117

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[4] Although this court denied review in Festa, your petitioners note that the district court of appeal's test has never been expressly approved by this court.

[5] Chapter 22852, §1, Laws of Florida (1945).

(Fla.1st DCA 1981), the district court of appeal set forth the following test for proving the existence of an "occupational disease:"

> (1) the disease must be actually caused by employment conditions that are characteristic of and peculiar to a particular occupation;
>
> (2) the disease must be actually contracted during employment in the particular occupation;
>
> (3) the occupation must present a particular hazard of the disease occurring so as to distinguish that occupation from usual occupations, or the incidence of the disease must be substantially higher in the occupation than in usual occupations; and
>
> (4) if the disease is an ordinary disease of life, the incidence of such a disease must be substantially higher in the particular occupation than in the general public.

394 So.2d at 1119.

Also see: Wesley v. Warth Paint and Hardware Co., 52 So.2d 346 (Fla.1951) (painter suffering from chronic lead poisoning suffered from "occupational disease"): Lake v. Irwin Yacht & Marine Corp., 398 So.2d 902 (Fla.1st DCA 1981) (although employee's chronic bronchitis not compensable as an "occupational disease," condition was compensable under the "exposure" theory).

4. The "heart attack" cases

A fourth category of cases, those where an employee has been injured as a result of some "internal failure" not due to any external force or agency in the workplace and not due to

occupational disease, have been more problematic and present special problems of proof. Typically, these cases have involved heart attacks and the aggravation of pre-existing cardiovascular disease. The seminal Florida case in this area is Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla.1962). Because of the difficulties inherent in distinguishing between heart attacks caused by employment and those due merely to the natural progression of pre-existing disease, this court announced the following test for compensability of heart attacks:

> When disabling heart attacks are involved and where such heart conditions are precipitated by work-connected exertion affecting a pre-existing non-disabling heart disease, said injuries are compensable only if the employee was at the time subject to unusual strain or over-exertion not routine to the type of work he was accustomed to performing.
>
> Thus, if there is competent substantial medical testimony, consistent with logic and reason, that the strain and exertion of a specifically identified effort, over and above the routine of the job, combined with a pre-existing non-disabling heart disease to produce death or disability sooner than it would otherwise have occurred from the normal progression of the disease, the employee has a right to some compensation. (Emphasis added).

141 So.2d 588-89.

Writing for the district court of appeal in McCall v. Dick Burns, Inc. 408 So. 2d 787 (Fla.1st DCA 1982), Judge Ervin, one of the panel members in the instant case below, opined that Victor Wine imposes tests of both legal and medical causation. He explained the rationale underlying the Victor Wine holding as follows:

> The reasoning behind the requirement of both a legal and medical causation analysis in heart cases, as well as in pre-existing disease cases, stems in good part from the view that the natural progress of a disease might precipitate a collapse during working hours. In such cases absent proof of some identifiable effort on the job which within reasonable medical probability can be said to have a causal connection to the collapse, there arises serious doubt that the collapse was either accidental or causally related to the employment. (Emphasis added).

408 So.2d at 790.

In a line of cases following Victor Wine, this court confronted the issue of whether internal failures of the cardiovascular system produced by emotional strain are compensable. In Richard E. Mosca & Company, Inc. v. Mosca, 362 So.2d 1340 (Fla.1978), the claimant suffered a rupture of a congenital cerebral aneurysm after being under a great deal of stress and strain and working long hours. 362 So.2d at 1341. The court denied compensation and held:

> We have had a number of 'heart' cases in which we determined what was or was not an unusual and non-routine strain or exertion within the definition of Victor Wine. These decisions have involved either physical strain or exertion alone or physical strain or exertion in concert with emotional strain, but in no case have we held emotional strain alone to be sufficient. Emotional strain alone is too elusive a factor to be utilized, independent of any physical activity, in determining whether there is a causal connection between a heart attack or other internal failure of the cardiovascular system and the claimant's employment. (Emphasis added).

362 So.2d at 1342.

Mosca also makes clear that the Victor Wine holding is not

limited to "heart attacks," but also applies to any internal failure of the cardiovascular system:

> The claimant . . . maintains that a ruptured aneurysm should not be treated the same as a heart attack. He argues that any failure of the cardiovascular system, other than the heart, should be treated as any other internal failure, such as a strained muscle, ruptured disc, 'snapped' knee-cap and the like.
>
> We conclude that the same rationale for requiring a stricter rule in heart cases is also applicable to other internal failures of the cardiovascular system. (Emphasis added).

362 So.2d at 1342.

On the same day that the court decided Mosca, it also issued its opinion in Tintera v. Armour & Co., 362 So.2d 1344 (Fla.1978), a "heart attack" case. As in Mosca, the claimant had been under severe stress for the preceding several weeks. The evidence showed that he was concerned about being laid off from work and that he had been working exceptionally long hours. 362 So.2d at 1345. Again, this court denied the compensability of the claim. Also see: City of Miami v. Rosenberg, 396 So.2d 163 (Fla.1981) (compensation for myocardial infarction denied where claimant was experiencing stress on the job because of pressure from his superiors to retire).

The Victor Wine holding was further refined in Richards Department Store v. Donin, 365 So.2d 385 (Fla.1978). In that case, the claimant sustained a subendocardial-myocardial infarction as a result of a series of ill-defined, albeit unusual, non-routine occurrences, including compressing a week's worth of work into a day and a half. 365 So.2d at 386. In denying compensation under

Chapter 440, this court held:

> We find, consistent with our pronouncement in Victor Wine and its progeny, that, for a heart attack occurring during the course of employment to be compensable, it must have been caused by the unusual strain or overexertion of a specifically identifiable effort not routine to the work the employee was accustomed to performing. (Emphasis added).

365 So.2d at 386.

The holdings in Mosca, Tintera, Rosenberg, and Donin have been followed by the First District Court of Appeal. In Hammersmith, Inc. v. Zanfardino, 425 So.2d 80 (Fla.1st DCA 1982), the decedent employee had been required to take three polygraph tests during an investigation of pilferage. Within minutes of the third test, he collapsed and died of a ruptured aorta, which medical testimony showed was related to the polygraph examination. Applying Victor Wine, the district court found that taking the polygraph examination, while non-routine, was not a physical over-exertion, and therefore denied the claim. 425 So.2d at 81.

Likewise, the district court has extended the Victor Wine rule to internal failures of the pulmonary system. In Wolbert, Saxon & Middleton v. Warren, 444 So.2d 511 (Fla.1st DCA 1984), the claimant suffered from severe attacks of asthma brought on by emotional trauma after she discovered some alleged discrepancies and irregularities in her employer's trust account. Relying on Victor Wine and its progeny, the majority denied the claim and held:

> For purposes of determining the compensability of an injury under our Workers' Compensation law, we are entirely unable to distinguish an internal failure of the pulmonary system

> caused solely by emotional stress from similarly caused internal failures of the cardiovascular system.

444 So.2d at 513.

Interestingly, Judge Ervin dissented from the majority holding in Warren. He would not have applied the Victor Wine holding and apparently would have reduced the test merely to one of medical causation. 444 So. 2d at 514-17. Also see: Polk Nursery Co., Inc. v. Riley, 433 So.2d 1233 (Fla.1st DCA 1983) (claimants who became agitated because they incorrectly believed that they had been poisoned on the job denied compensation, even though the agitation resulted in actual physical symptoms such as nausea, cramps, headaches, and blurred vision).

Having reviewed the law of "accident" as developed through judicial interpretation, we must now examine the district court's opinion in the case at bar.

B. THE DISTRICT COURT'S HOLDING

Seizing upon its holding in Festa v. Teleflex, Inc., 382 So.2d 122 (Fla.1st DCA 1980), and its prior opinion in Massie v. University of Florida, 463 So.2d 383 (Fla.1st DCA), pet. for rev. denied, 472 So.2d 118 (Fla.1985), the district court of appeal found that the respondent herein had sustained an "accident" arising out of and in the course of his employment with the University of Florida. The court held:

> The aggravation of claimant's multiple sclerosis by his prolonged exposure in his employment to a combination of emotional and physical stress and strain attributable to

> unusual circumstances and exceptionally long hours of work may be compensable so long as the exposure to stress and strain is greater than that to which the general public is exposed. (Emphasis added).

570 So.2d at 969.

Because the court made improper factual findings and improperly applied its Festa rule to a case of pre-existing disease not involving any exposure to a deleterious substance in the workplace, this holding is fatally flawed.

1. The district court of appeal substituted its opinion for that of the judge of compensation claims in finding that the claimant had experienced unusual physical stress

It has been settled law in this state for nearly 40 years that an appellate court reviewing a workers' compensation case may not reverse findings of fact made by the judge of compensation claims[6] unless there is no competent substantial evidence to support them. United States Casualty Co. v. Maryland Casualty Co., 55 So.2d 741 (Fla.1951). As the district court of appeal held in Swanigan v. Dobbs House, 442 So.2d 1026 (Fla.1st DCA 1983):

> We do not retry the claim at the appellate level and substitute our judgment for that of the deputy on factual issues supported by competent, substantial evidence, and appeals asking us to do so are frivolous.

442 So.2d at 1027.

Yet, in finding that the respondent had experienced unusual physical stress during his employment with the University, the district court is guilty of this very offense.

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[6] Formerly known as "deputy commissioners" or "judges of industrial claims."

In his order of February 17, 1984, the judge of compensation claims found that there was no physical stress involved in this case:

> Unlike Festa v. Teleflex, Inc., 382 So.2d 111 (Fla.1st DCA 1980) [sic],[7] the claimant was not subjected to repeated trauma. Stress while it may exacerbate multiple sclerosis, or for that matter many other organic diseases, is in the nature of a psychological trauma and is not compensable. (Emphasis added).

(R:407).

That finding is clearly supported by competent substantial evidence. Dr. David Mouat, a neurologist who examined and treated the respondent, testified as follows:

> Q. Now with respect to Mr. Massie's job and his job related situation we're of course dealing with the workers' compensation law of the State of Florida and I assume from the questions that Mr. Kann has asked and the answers that you've given that you do not in any way attribute his disease to what is commonly known as an occupational disease under the workers' compensation law?
>
> A. Not in any way that I'm aware in terms of industrial and toxic exposure, physical injury occurring on the job or any relationship of that sort. (Emphasis added).

(R:337-38).

* * *

> The frequent use of the term stress in medicine is normally associated not with easily objective measured things such as number of hours spent on the job, number of papers written, things of this sort, but conflicts between an individuals [sic] efforts and their productivity. Perhaps best saying it as in the sense that someone is on a

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[7] The correct citation is 382 So.2d 122 (Fla. 1st DCA 1980).

> treadmill and that they're getting further behind all of the time.
>
> The genesis of those conflicts is highly individual and I don't think it could be identified with one particular job necessarily more so than another, although certain jobs such as an air traffic controller are classically associated with a higher risk of what are called stress related diseases, including coronary artery disease, ulcer and the like. (Emphasis added).

(R:340-41).

* * *

> If you don't mind let me make one comment and that is medical definitions of stress require some perception that the individual has significant conflicts within the working environment that may be of any of several varieties.
>
> It might be of some value to consider expert testimony -- medical testimony in this regard, in terms of psychological evaluation because I seem to be hearing repetitively questions of stress and its relationship, which was the basic gist of my letter. That again is based on stress as being conflicts within the job rather than numerically the number of hours or the basic tasks of the job itself. (Emphasis added).

(R:358-59).

Thus, when Dr. Mouat stated that the claimant's chronic progressive multiple sclerosis had been accelerated by "job-related stresses" (R:224), he was clearly speaking in terms of emotional or psychological stress, not physical. [Also see Dr. Mouat's testimony at R:347-48]. That point was made to the judge of compensation claims during the hearing on respondent's Motion to Vacate (R:434) and, in fact, was conceded by the respondent (R:435) at that time. Moreover, the original panel of the district court

agreed and characterized the respondent's stress as "an emotional condition" in its first opinion. Massie v. University of Florida, 463 So.2d 383, 384 (Fla.1st DCA 1985). Accordingly, the judge's finding regarding the lack of physical trauma was supported by competent substantial evidence, and the district court of appeal therefore erred in substituting its opinion for that of the judge of compensation claims. Leon County School Board v. Grimes, 548 So.2d 205, 208 (Fla.1989).

Since there was no physical trauma, the district court should have followed its prior decisions in Polk Nursery Co., Inc. v. Riley, 433 So.2d 1233 (Fla.1st DCA 1983), as cited by the judge of compensation claims in his order (R:407), and Wolbert, Saxon & Middleton v. Warren, 444 So.2d 511 (Fla.1st DCA 1984).[8] However, even if the judge's factual finding on that point is ignored, because this case involved the acceleration of a pre-existing disease, the decision of the district court of appeal flies in the face of this court's decisions in Victor Wine, Mosca, Tintera, and Donin.

2. The district court's opinion is inconsistent with Victor Wine and its progeny

In its initial opinion in Case No. BN-98 dated June 2, 1988, the district court discussed the heart attack cases and found them persuasive since heart attacks are compensable when caused by a

[8] It is not altogether clear whether Judge Ervin would have agreed to extend the Victor Wine holding to the facts of this case even in the absence of any physical trauma. See Wolbert, Saxon & Middleton v. Warren, 444 So.2d 511 (Fla.1st DCA 1984) (Ervin, J., dissenting).

non-routine, specifically identifiable physical effort and emotional stress acting in concert. 13 F.L.W. at 1343-44. Yet, this discussion was deleted from the district court's final opinion dated June 29, 1990. Instead, we are now told by way of a cryptic footnote that the proof requirements in this case are "not to be confused with the proof requirements in heart attack cases . . . ." Massie v. University of Florida, 570 So.2d 963, 969 n.4 (Fla.1st DCA 1990). Presumably then, if the respondent had suffered a heart attack, stroke, or any other "internal failure of the cardiovascular system" instead of an acceleration of his pre-existing multiple sclerosis, the district court of appeal would not have found this claim compensable, given the same set of facts.

One may reasonably ask why multiple sclerosis should be treated differently. According to Dr. Mouat,

> M.S. is a term used to describe a situation in which there is damage to the insulation around nerve fiber tracts at different places in the -- basically central nervous system, brain, spinal cord, and a couple of nerves which are closely related to the brain such as the optic nerve.
>
> The particular defects are caused by damage to the insulation which slows the transmission of nerve impulses, and thus makes the function which those nerve fibers transmit less effective.

(R:320).

Should an internal failure of the central nervous system be treated differently than an internal failure of the cardiovascular system? Petitioners submit that it should not. Multiple sclerosis is a progressively disabling disease (R:337). If the rationale for

the Victor Wine rule is indeed "for the obvious reason that the internal failure may be attributable to the natural progress of the disease which could precipitate a collapse during working hours, as well as non-working hours," Wolbert, Saxon & Middleton v. Warren, 444 So.2d 511, 514 (Fla.1st DCA 1984) (Ervin, J., dissenting), that rationale is certainly no less applicable here.

"Long working hours" have never been held to constitute an "accident" under the Florida Workers' Compensation Act. If that were the law, the courts would be absolutely deluged with claims. An "accident" must consist of something more than just "being at work." The claimants in Mosca, Tintera, and Donin all worked exceptionally long hours, yet this fact, even when coupled with the claimants' emotional strain, was not sufficient to justify a finding of compensability. Moreover, the respondent testified at the modification hearing in this case that he had actually worked unusually long hours on a routine basis before ever coming to work for the University (R:39-44). Therefore, there is even less evidence of a causal connection between his employment with the University and his multiple sclerosis.

By adopting the holding of the district court of appeal, this court essentially would be eliminating the "accident" requirement from the statute and therefore "would be amending the purpose of chapter 440 to allow compensation to injured employees without regard to whether industry brought about the injury." Leon County School Board v. Grimes, 548 So.2d 205, 208 (Fla.1989). As this court held in Arkin Construction Company v. Simpkins, 99 So.2d 557,

562 (Fla.1957), "[t]he Workmen's Compensation Act . . . does not make industry the insurer of the lives of its employees and we cannot do so by judicial decree." Accordingly, this court should, consistent with its holdings in Victor Wine, Mosca, Tintera, Rosenberg, and Donin, hold that the respondent did not sustain a compensable "accident" and should quash the decision of the district court of appeal.

II. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE ORDER OF THE JUDGE OF COMPENSATION CLAIMS DATED APRIL 30, 1986 WHICH DENIED RESPONDENT'S PETITION FOR MODIFICATION

Generally speaking, absent appellate review, an order of the judge of compensation claims becomes final 30 days after copies of the order are mailed to the parties. Section 440.25(4)(a), Florida Statutes. Thereafter, except as provided in §440.28, Florida Statutes, the judge of compensation claims is divested of jurisdiction to consider the claim further. Power v. Joseph G. Moretti, Inc., 120 So.2d 443 (Fla.1960). Except to the extent modification is permitted by §440.28, compensation orders are governed by the same principles of res judicata as are judgments of a court. Boston v. Budget Luxury Inns, 474 So.2d 355 (Fla.1st DCA 1985).

Section 440.28 provides the exclusive and limited exception to the doctrines of res judicata and law of the case in workers' compensation proceedings. That section reads in pertinent part:

> Upon a judge of compensation claims' own initiative, or upon the application of any party in interest, on the ground of a change in condition or because of a mistake in a determination of fact, the judge of compensation claims may . . . review a compensation case in accordance with the procedure prescribed in respect of claims in s.440.25 and, in accordance with such section, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation or award compensation. (Emphasis added).

Thus, the statute provides only two grounds for relief from a final order: (1) change in condition; and (2) mistake in a

determination of fact. The respondent conceded (R:39), the judge of compensation claims found (R:464), and the district court of appeal held (570 So.2d at 967), that there had been no change in the respondent's condition since the entry of the original order on February 17, 1984. Accordingly, the only issue before this court with respect to modification is whether the judge of compensation claims erred in finding that there was no mistake in the determination of fact in the original order of February 17, 1984. Even assuming that the district court is correct in applying its Festa rule to a case of pre-existing disease, petitioners respectfully submit that the district court erred in reversing the judge's order of April 30, 1986.

A. THE DECISION OF THE DISTRICT COURT OF APPEAL CONFLICTS WITH POWER V. JOSEPH G. MORETTI, INC. 120 So.2d 443 (Fla.1960).

Over 30 years ago, in Power v. Joseph G. Moretti, Inc. 120 So.2d 443 (Fla.1960), this court enunciated the standard governing modifications based on a mistake of fact:

> It is well established that in order to justify the modification of a compensation order on the basis of a mistake, the subsequent showing must consist of something more than additional evidence of facts already known, an accumulation of testimony on facts previously established, a mere change of mind by a witness, or a reanalysis of the prior record by the deputy and a change of his conclusions as a result of a retrospective exploration of the original record. (Emphasis added).

120 So.2d at 446.

Moreover, in Hall v. Seaboard Maritime Corporation, 104 So.2d 384 (Fla.1st DCA 1958), cited with approval in Power, the district

court of appeal held:

> Further, while new evidence may be fairly introduced in a proceeding to reopen on the ground of a mistake in a determination of fact, and this new evidence need not be 'newly discovered,' it is equally plain that the statute means something more than that the commissioner may change his mind whenever he pleases, and either on the same evidence or new evidence, make a new award. (Emphasis added).

104 So.2d at 387.

* * *

> The statute does not say, nor does it mean, that a proceeding may be reopened whenever any party finds a witness who can testify more favorably for him than his other witnesses had done; or finds that a former witness can offer stronger and more favorable testimony than he had previously given. (Emphasis added).

104 So.2d at 388.

It is interesting to note that in the opinion dated June 2, 1988, the district court found the evidence presented at the modification hearing to be legally insufficient under Power and its progeny:

> [T]he following decisions [Power and its progeny] construing the mistake of fact provision in section 440.28 confirm that the deputy commissioner's decision to deny modification under that section was legally correct.

13 F.L.W. at 1344.

* * *

> These decisions have made clear that modification under section 440.28 for mistake in the determination of fact will not be approved simply because it is shown that the deputy commissioner or the court made an honest mistake in interpreting the facts. The

> underlying rationale for this principle is based upon the quest for finality of decision . . . .

13 F.L.W. at 1344.

* * *

> While we are now convinced that this case has been erroneously decided upon a mistaken construction of Pappas's testimony, the record before us reveals that his testimony at the modification hearing did little more than supplement that previously given at the original hearing, albeit in a clearer and more convincing manner. Under the cited authorities, therefore, his testimony must be characterized as merely cumulative and legally insufficient to support modification based on a mistake in the original determination of fact by the deputy commissioner. Modification under section 440.28 cannot be employed to avoid the quest for finality of decision which the doctrines of law of the case and res judicata are intended to accomplish, especially when the sufficiency of the evidence has been appealed and decided by an appellate court. (Emphasis added).

13 F.L.W. at 1346.

* * *

> [S]ection 440.28 does not provide an appropriate avenue of relief in this circumstance . . . .

13 F.L.W. at 1346.

Nevertheless, the district court went on to reverse the judge of compensation claims in an attempt to avert what it termed "manifest injustice" resulting from its alleged misconstruction of the evidence in the original appeal. 13 F.L.W. at 1346-47. Two weeks later, this opinion was withdrawn by the court on its own motion. 13 F.L.W. 1464.

When the opinion was reissued on June 29, 1990, the above-

quoted passages had been deleted. Also deleted from the opinion was the court's extensive discussion of Power and its progeny contained at 13 F.L.W. 1344-45. Why? This we are not told, but perhaps the court concluded that once it had acknowledged the correctness of the judge of compensation claims' position on both the change of condition and mistake of fact issues, there was no real basis for reversing the order.

In any event, for whatever reason, the district court abandoned its initial position and instead seized upon the notion that the judge of compensation claims had confessed error at the modification hearing and indeed that there had been no evidence at all at the initial hearing to support the judge's finding that "the stress which the claimant testified to over a long period of time was not to an extent greater than that to which the general public is exposed . . . ." (R:407). That fact, the district court felt, afforded it a basis for distinguishing Power. 570 So.2d at 973. (One wonders why, if Power is truly distinguishable on that basis, the district court, particularly the concurring opinion, spends so much time lamenting the decision and lauding the "more enlightened" federal approach to modification. 570 So.2d at 970-73, 977-78).

The picture painted by the district court - that of a penitent judge of compensation claims wringing his hands in anguish over his previous order, powerless to render justice because of the prior appellate affirmance - is, quite simply, not sustained by even a cursory review of the record. After the initial order dated February 17, 1984 (R:402-08) was entered, the respondent filed a

Motion to Vacate and Set Aside, or Amend Order (R:443-449). During the hearing on that motion (R:423-441), after extensive argument of counsel, and after counsel for respondent had announced his intention to file an appeal (R:439), the following exchange took place:

> [Counsel for respondent]: I would like the order to go up, if it has to go up on appeal, with the accurate findings of fact specifically on that stress. I haven't heard that, uh, addressed at all, uh, by Mr. Clayton and my point is there was no conflicting evidence on that. That man had a pressure packed stressful job. Everybody that came here told the court he did, yet the findings in the court order were that it wasn't.
>
> [The judge]: Just present the facts. I just don't think that the situation fits the, uh, philosophy of Workers' Compensation.
>
> [Counsel for respondent]: Well, understanding the court's position on that situation, I am - ---
>
> [The judge]: Now, I got reversed in Ross, but, uh, I didn't agree with the reversal.
>
> [Counsel for respondent]: Judge, the order has this language -- I find that the stress which the claimant testified to, uh, over a long period of time was not to an extent greater than that which the general public is exposed. There's no support for that finding.
>
> [The judge]: I know there's no support for it, but that's what I found. I don't, uh, listen. If I, you don't think that this is a stressful situation, sitting here?
>
> [Counsel for respondent]: Judge, I'm saying there are other people that have stressful jobs, but I am saying that when you compare him to the general public, his job was very stressful and maybe, uh, air traffic controllers have very stressful jobs, I think that certainly prison guards and there have been prison guard cases.

> [The judge]: I know, Fine with me.
>
> [Counsel for respondent]: And you and me do. Fireman have a special law written for their benefit.
>
> [The judge]: That's right.
>
> [Counsel for respondent]: But, you take a lot of people, they don't. They just punch in their eight hours a day and they do their steady work and they don't have people looking for them to make all the, uh, the goals, and they don't work ten to twelve hours a day, they don't work six to seven days a week and they don't have eighty-six percent turnover in their staff.
>
> [The judge]: Well, we can go the New Zealand phylosophy [sic] and everybody that's in the work force, they [sic] covered.

(R:439-440).

Obviously, the judge was speaking tongue in cheek when he said there was "no evidence" to support the order, and the remark was taken out of context by the district court. If, as the district court suggests, this really was a confession of error, then why did the judge not simply grant the Motion to Vacate? There was no appellate affirmance of the order at that point to prevent him from doing so. [The motion was denied (R:451-52)]. Moreover, if this really was a confession of error, why did the judge tax costs against the respondent in his order of April 30, 1986 pursuant to §440.32, Florida Statutes, for filing a frivolous claim? (R:464). The answers are self-evident.

Additionally, the finding of fact made in the February 17, 1984 order was clearly supported by competent substantial evidence. As note by the original panel, Mr. Pappas testified that stress was

inherent in technical areas (R:115), that stress is subjective (R:115), and that job stress is not unusual (R:108). Accordingly, the district court erred in substituting its judgment for that of the judge of compensation claims and the original panel. U.S. Casualty Co. v. Maryland Casualty, 55 So.2d 741 (Fla.1951); Massie v. University of Florida, 463 So.2d 383 (Fla.1st DCA), pet. for rev. denied, 472 So.2d 1181 (Fla.1985).

Although carefully couching its holding in terms of preventing "manifest injustice," the district court has done precisely what this court has repeatedly held that a judge of compensation claims may not do, i.e., engage in "a reanalysis of the prior record . . . and . . . change . . . [its] conclusions as a result of a retrospective exploration of the original record." 120 So.2d at 446. As the district court held in Hall v. Seaboard Maritime Corporation, 104 So.2d 384 (Fla.1st DCA 1958), "the statute means something more than that the commissioner may change his mind whenever he pleases . . . . " 104 So.2d at 387. That holding is no less applicable to the district court of appeal itself.

One can easily foresee the mischief that will result from the district court's decision in this case. Literally thousands of disgruntled litigants all over Florida, both employees and employers, no doubt smarting over the "manifest injustice" of the previous decision of the judge of compensation claims, will be free to file mistake-of-fact petitions for modification. What is the judge of compensation claims to do? Does he have the "duty," as the district court holds, to re-examine the previous record and

"recognize his mistake?" 570 So.2d at 973. Even if he decides that he was correct, the district court is free to correct his previous "error" on appeal to prevent the perceived "manifest injustice." Your petitioners submit that even if not a single petition is ultimately granted, the judicial labor expended in making the determination will be prodigious. This court should not open that Pandora's box and should quash the decision of the district court of appeal.

B. THE JUDGE OF COMPENSATION CLAIMS DID NOT ABUSE HIS DISCRETION IN FINDING THAT THERE WAS NO MISTAKE IN THE DETERMINATION OF A FACT.

The legislature's use of the word "may" instead of "shall" in §440.28 should not be overlooked. The work "may" necessarily means that the judge of compensation claims has discretion in determining whether a claimant has experienced a change in condition or whether there has been a mistake in determination of fact.

Since modification is discretionary with the judge of compensation claims, his findings as to whether there was a mistake in the determination of fact should not be overturned unless there has been an abuse of that discretion. In Canakaris v. Canakaris, 382 So.2d 1197 (Fla.1980), this court explained the "abuse of discretion" standard:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said

that the trial court abused its discretion.

382 So.2d at 1203. (quoting Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942)).

Contrary to the finding of the district court of appeal, the judge of compensation claims did not deny the petition for modification "based on his belief that his previous ruling, having been affirmed by this court, was binding on him and could not be relitigated under section 440.28." 570 So.2d at 968. That conclusion by the district court was based on its further erroneous conclusion in the preceding sentence of the opinion that the judge of compensation claims had confessed error at the modification hearing. As discussed above, the judge of compensation claims never confessed error, much less at the modification hearing, a fact which the district court later conceded on rehearing. 570 So.2d at 978-79. Moreover, he did not, as suggested by the district court, "refuse to consider" the petition for modification. 570 So.2d at 973, 977. The petition was considered and denied.

The judge of compensation claims did not deny the petition because he felt bound to do so; rather, he did so because, in the exercise of his broad discretion, he determined that he simply had not made a mistake. Since no abuse of discretion has been demonstrated, the opinion of the district court of appeal should be quashed and the order of the judge of compensation claims should be affirmed.

CONCLUSION

Florida is in the midst of a workers' compensation crisis. With the enactment of the Comprehensive Economic Development Act of 1990, the Florida Legislature specifically found this to be the case:

> WHEREAS, the Legislature finds that there is a financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state, and
>
> WHEREAS, the Legislature finds that businesses are faced with dramatic increases in the cost of workers' compensation insurance coverage, and
>
> * * *
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many businesses will cease operating and numerous jobs will be lost in the State of Florida . . . .

Chapter 90-201, Preamble, Laws of Florida (1990).[9]

Now is not the time for judicial expansion of Chapter 440 beyond the scope intended by the legislature. The failure of this court to reverse the decision of the district court of appeal on both issues presented herein will have cataclysmic results for employers and insurance carriers throughout Florida. The judges of compensation claims will be inundated not only with "stress" claims

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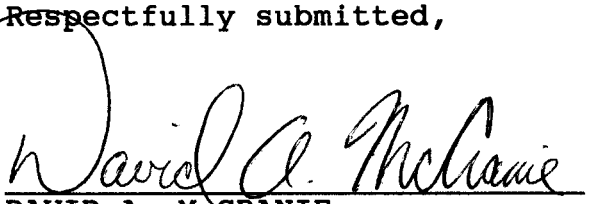
[9] Petitioners recognize that the constitutionality of Chapter 90-201 is currently under consideration by this court in Martinez v. Scanlan, Case No. 77,179. Regardless of the court's decision, it will not change these legislative findings.

which have not been compensable heretofore, but with mistake-of-fact petitions for modification seeking the proverbial second bite at the apple.

Petitioners respectfully submit that this case presents a splendid example of why the district court of appeal should not be "empowered to share with the Florida Supreme Court the right to overrule even the supreme court's established, precedential authority to the contrary" in workers' compensation proceedings. 570 So.2d at 977 (Ervin, J., concurring). The results would be absolutely chaotic and would result in a totally unnecessary expenditure of judicial labor. If the district court disagrees with an earlier decision of this court, its duty is to recognize the conflict forthrightly and certify the question to this court as one of great public importance. Hoffman v. Jones, 280 So.2d 431 (Fla.1973).

Accordingly, petitioners respectfully request this court to quash the decision of the district court of appeal and to reinstate that of the judge of compensation claims.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Terrence J. Kann, Esquire, at 2929 Plummer Cove Road, Jacksonville, Florida, 32223, by U.S. Mail, this 25th day of March, 1991.

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