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

BRIEF ON JURISDICTION OF PETITIONERS, UNIVERSITY OF FLORIDA and DIVISION OF RISK MANAGEMENT

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STATEMENT OF THE CASE AND FACTS

This case is before this court on a notice filed by the University of Florida and the Division of Risk Management ("Petitioners") to invoke this court's discretionary conflict jurisdiction to review the decision of the District Court of Appeal of the First District of Florida in Massie v. University of Florida, Case No. BN-98 (Fla.1st DCA June 29, 1990). The issues resolved by the district court involved: (1) whether "stress" in the form of long working hours and other psychological stressors aggravating a worker's pre-existing multiple sclerosis can constitute a compensable accident under chapter 440, Florida Statutes; and (2) whether a petition for modification pursuant to section 440.28, Florida Statutes, is properly granted when a witness testifies that his previous testimony at the hearing on the original claim for benefits was misunderstood by both the deputy commissioner and the appellate court which affirmed the deputy commissioner. The facts, for purposes of this brief on jurisdiction, are those stated in the district court's opinion. Id., slip op. at 2-3.

Following the deputy commissioner's denial of the initial claim for benefits on February 17, 1984, the respondent appealed to the District Court of Appeal, First District of Florida. In an opinion dated January 24, 1985, the district court affirmed the deputy commissioner, holding that the respondent had not sustained an accident arising out of and in the course of his employment. Massie v. University of Florida, 463 So.2d 383 (Fla.1st DCA), pet.

for rev. denied, 472 So.2d 1181 (Fla.1985).

On August 22, 1985, the respondent filed a petition for modification of the deputy commissioner's February 1984 order pursuant to section 440.28, Florida Statutes, contending that he had suffered a change of condition since the original order and that the deputy commissioner had made a mistake in the determination of fact in the original order. The deputy commissioner denied the petition for modification in an order dated April 30, 1986, and the respondent appealed once again.

Two years later, on June 2, 1988, the district court of appeal reversed the order of the deputy commissioner and found that a claim for job-related "stress" was compensable under chapter 440, Florida Statutes.

The court further found that there had been no change in the claimant's condition since the original hearing and that the testimony presented at the modification hearing was insufficient as a matter of law to show a mistake in the determination of fact. Massie v. University of Florida, 13 F.L.W. at 1343, 1346 (Fla.1st DCA June 2, 1988). Yet, the court reversed in order to prevent what it termed "manifest injustice," based on its belief that the original Massie panel had misconstrued the evidence presented at the original hearing. 13 F.L.W. at 1346. Curiously, on June 17, 1988, this opinion was withdrawn by the court on its own motion. Massie v. University of Florida, 13 F.L.W. 1464 (Fla.1st DCA June 17, 1988).

The case then languished in the district court for two more

years. On June 29, 1990, the court issued its revised opinion in this cause, this time finding that there had been a mistake in the determination of fact, based on an alleged confession of error by the deputy commissioner during the modification hearing. Slip. op. at 8, 10. On rehearing, the court conceded that the remarks made by the deputy commissioner were actually made at a hearing held on March 4, 1984 on respondent's motion to vacate the original order in this case, not at the modification hearing. Nevertheless, this district court denied rehearing on September 27, 1990.

SUMMARY OF ARGUMENT

The decision of the district court of appeal in Case No. BN-98 expressly and directly conflicts with the court's decision in Power v. Joseph G. Moretti, Inc., 120 So.2d 443 (Fla.1960), wherein this court held that a petition for modification based on a mistake in the determination of fact could not e predicated upon testimony which was merely cumulative of that previously presented or upon a change of mind by the deputy commissioner as to the sufficiency of the evidence originally presented to him.

The decision further conflicts with the rule of law announced in the United States Casualty Co. v. Maryland Casualty Co., 55 So.2d 741 (Fla.1951), that findings of fact made by the deputy commissioner should not be reversed unless there is no competent substantial evidence to support them.

Substantively, the decision breaks new ground by holding for the first time that job-related "stress" can constitute a compensable accident under the Florida Workers' Compensation Act.

The district court's decision conflicts with this court's decision in Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla.1961), and its progeny.

ARGUMENT

Article V, section 3(b)(3) of the Florida Constitution provides, in pertinent part, that this court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with the decision of another district court of appeal or of the supreme court on the same question of law." This court has long adhered to the principle that it will exercise its conflict jurisdiction to resolve "issues of public importance" and to preserve "uniformity of principle and practice" throughout the state. Ansin v. Thurston, 101 So.2d 808, 810 (Fla.1958). Thus, the exercise of conflict jurisdiction is appropriate whenever a district court "announce[s] a rule of law which conflicts with a rule previously announced" by the court or another district court or "appli[es] a rule of law to produce a different result in a case which involves substantially the same facts as a prior case." Mancini v. State, 312 So.2d 732, 733 (Fla.1975). See also City of Jacksonville v. Florida First National Bank, 339 So.2d 632, 633 (Fla.1976) (England, J. concurring).

In light of these principles, this court should exercise its discretionary jurisdiction and review the district court's decision. As discussed below, the decision expressly and directly conflicts with several previous decisions of this court. In addition, it concerns questions of substantial public importance

which will materially affect the administration of justice in this state.

I. THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN POWER V. JOSEPH G. MORETTI, INC., 120 SO.2D 443 (FLA.1960).

One of the issues essential to the district court's decision was whether, under section 440.28, Florida Statutes, the respondent presented sufficient evidence to show that the deputy commissioner had made a mistake in the determination of fact in his original order. It has been settled law in this state for at least 30 years that such evidence must be more than cumulative and not based merely on a change of mind by a witness or the deputy commissioner. The rule of law was stated most succinctly in Power v. Joseph G. Moretti, Inc., 120 So.2d 443 (Fla.1960):

> [I]n 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.

It is interesting to note the district court's original holding in regard to the sufficiency of the evidence presented:

> 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. (Emphasis added).

13 F.L.W. at 1344.

The above-quoted passage was deleted from the district court's opinion of June 29, 1990. Nevertheless, the court found a mistake in the determination of fact based on an alleged confession of error by the deputy commissioner at the modification hearing. Slip op. at 10-11.[1] A review of the record on appeal will reveal that the remarks made by the deputy commissioner were never intended as a confession of error, but even assuming arguendo that they were, the decision of the district court would still conflict with Power wherein this court held that modification is not proper based merely on 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." 120 So.2d at 446.

Accordingly, this court should exercise its discretionary conflict jurisdiction to review the decision of the district court.

II. THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH UNITED STATES CASUALTY CO. V. MARYLAND CASUALTY CO., 55 SO.2D 741 (FLA.1951).

It is important to note that it was not the deputy

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[1] The district court conceded on rehearing that the alleged confession by the deputy commissioner did not occur at the hearing on modification, but at a hearing held before the original order of February 17, 1984 ever became final. Nevertheless, this fact was deemed immaterial by the court.

commissioner in this case who engaged in a "reanalysis of the prior record" or who changed his conclusions "as a result of a retrospective exploration of the original record." Rather, it was the district court of appeal which engaged in these activities. Such judicial fact-finding is not the proper function of an appellate court.

It has been settled law in this state for nearly 40 years that an appellate court reviewing a workers' compensation case should not reverse findings of fact made by the deputy commissioner unless there is no competent substantial evidence to support them. United States Casualty Co. v. Maryland Casualty Co., 55 So.2d 741 (Fla.1951). Clearly, there was competent substantial evidence to support the deputy commissioner's findings of fact in his February 1984 order, and the original Massie court so held. Massie v. University of Florida, 463 So.2d 383 (Fla.1st DCA), pet. for rev. denied, 472 So.2d 1181 (Fla.1985). Having now seen fit to revisit the factual findings of the deputy commissioner six years after the fact, a different panel of the district court has rendered a decision unique in the annals of Florida jurisprudence. The decision does unprecedented violence to the competent substantial evidence rule, and this court should therefore exercise its discretionary conflict jurisdiction to correct the error.

III. THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN VICTOR WINE & LIQUOR, INC. V. BEASLEY, 141 SO.2D 581 (FLA.1961) AND TINTERA V. ARMOUR & CO., 362 SO.2D 1344 (FLA.1978).

Contrary to the holding of the district court, slip op. at 11,

12-13, no Florida court, including the original Massie court, has ever held that aggravation of a pre-existing condition due to job-related "stress" is cognizable as an "accident" which "arises out of" a worker's employment, thus entitling him to benefits under chapter 440, Florida Statutes.

Moreover, although the district court repeatedly refers to the physical stress which the claimant underwent and cites its opinion in Festa v. Teleflex, Inc., 382 So.2d 122 (Fla.1st DCA 1980) as authority for finding compensability in this case, the deputy commissioner in his original February 1984 order distinguished Festa, found that the claimant had not been subjected to any repeated trauma, and further found that the claimant's "stress" was in the nature of a psychological trauma. Slip op. at 6, fn. 1, par. 10.

Because there was no physical trauma, this case is more properly analyzed under the rule of law announced in Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla.1961), and its progeny. In Victor Wine, this court held that a heart attack can be compensable under chapter 440, Florida Statutes, only if it is the result of an "unusual strain or over-exertion not routine to the type of work [the claimant] was accustomed to performing." 141 So.2d at 589.

In Tintera v. Armour & Co., 362 So.2d 1344 (Fla.1978), the claimant had suffered a heart attack as a result of severe job stress. The evidence showed that the claimant was concerned about being laid off from work and that he had been working exceptionally

long hours. 362 So.2d at 1345. This court held that such evidence was insufficient as a matter of law to prove compensability.

It there any legitimate reason why a condition such as multiple sclerosis should be analyzed or treated any differently than heart disease for purposes of determining entitlement to workers' compensation benefits? Your petitioners respectfully submit there is not. Both involve "internal failures" and should be analyzed under the same rule of law. Accordingly, this court should exercise its conflict jurisdiction to review the rule of law announced by the district court in this case on the issue of the compensability of respondent's condition.

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' comepnsation insurance industry, causing severe economic problems for Florida's business community and adversly 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
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> * * *
>
> 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).

Now is not the time for continued judicial expansion of chapter 440 beyond the scope intended by the Legislature. The failure of this court to exercise its jurisdiction in this case will have cataclysmic results for employers and insurance carriers throughout Florida. The judges of compensation claims will be deluged not only with "stress" claims which have not heretofore been compensable, but with petitions for modification filed by disgruntled litigants hoping that they too will be the recipient of some judicial largesse. Perhaps just as disturbing is the concurring opinion authored by Judge Ervin wherein he opines that the First District Court of Appeal should have the right to overturn binding authority from this court in light of the district court's exclusive appellate jurisdiction over workers' compensation cases. Slip op. at 35-38.

Accordingly, for the reasons stated above, petitioners respectfully request this court to exercise its conflict jurisdiction to review this case.

Respectfully submitted,

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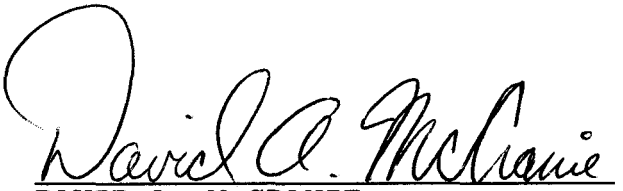
CERTIFICATE OF SERVICE

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 11th day of October, 1990.



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