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IN THE SUPREME COURT
OF FLORIDA
TALLAHASSEE, FLORIDA

CITY OF HOLMES BEACH)
and I.S.A.C.,)
)
Petitioners,)
)
vs.)
)
MICHAEL GRACE,)
)
Respondent.)
_____)

Case Number: 76,883

First District Number: 90-306

APPEAL FROM THE COMPENSATION ORDER
DATED DECEMBER 22, 1989
BY THE HONORABLE JOE E. WILLIS
JUDGE OF COMPENSATION CLAIMS

ANSWER BRIEF OF RESPONDENT
MICHAEL GRACE

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PREFACE

For purposes of this brief, the respondent, Michael Grace, will be referred to as claimant. The petitioners, City of Holmes Beach and I.S.A.C., will be referred to as the employer/carrier. References to the record on appeal will be in the form of (R.1).

STATEMENT OF THE CASE AND OF THE FACTS

This case arises out of an accident which occurred on July 17, 1985, when the claimant, while on duty as a police officer with the City of Holmes Beach Police Department, accidentally shot to death a suspect he was in the process of subduing for the purpose of making an arrest. The claimant suffered severe anguish, depression and physical injury following the incident to the point that, eventually, he became mentally and physically unable to return to work. (R.19,20) He was diagnosed by therapists and a medical doctor as suffering from post-traumatic stress disorder. (R.123, 124, 165) They also stressed that claimant was unable to continue working as a police officer. (R.21, 77, 125, 165-166)

Eventually, claimant made a claim for, and was awarded, temporary total disability benefits. The employer/carrier appealed the award, maintaining claimant's injury "is not the result of an injury within the meaning of the term as used in the Florida Compensation Act." (R.262)

On July 17, 1985, claimant responded to a report of a stolen car. He stopped the suspect vehicle and the occupant got out of the car and ran. (R.34) The claimant got out of his patrol car and ran after the suspect. (R.35) Claimant eventually caught up with the suspect and ordered him to lie face down on the pavement. The suspect was uncooperative and "after working with him for some time" he lay face down on the ground. (R.36)

Claimant then called for back up but, because the suspect was moving around and it appeared he would get up and flee, claimant decided to put him under arrest. (R.38)

Claimant put his knee on the suspect's back and pulled the suspect's arms behind him to place handcuffs on him. "I attempted to place the cuffs on Thomas with him struggling." (R.256)

During the struggle, the suspect hit claimant with his elbows several times. (R.41) The claimant said, "During this wrestling period, he had struck me several times with his elbow." (R.40)

The claimant testified:

He jerked, his right arm went up underneath him. I grabbed his arm, pulled it back behind him. I again went to cuff him with my weapon against his back to reassure him that I had -- you know, that I was still in full control. He jerked his left arm, I went after it, and the gun fired. (R.230)

Before the accident, claimant served with the Holmes Beach Police Department for almost fourteen (14) years. (R.226) Following the accident, claimant took leave for approximately two (2) months. (R.42) He returned to duty and for the next one (1) year and five (5) months received treatment from Dr. Floyd. (R.45, 46) In January of 1987, claimant was relieved of duty by the Police Chief:

... he noticed a change. And eventually he came to me, and he said that he was going to go ahead and ask that I be taken -- relieved of duty until they could do re-evaluations. And during the re-evaluation they found that I was not capable of working with people or with the department. (R.50)

Claimant underwent evaluations and treatment by psychologists and a medical doctor. All agreed that claimant's injury was caused by the struggle and shooting incident on July 17, 1985. (R.76, 126, 138, 166, 172)

All agreed that claimant was unable to engage in any type of employment until he

underwent treatment and therapy. (R.77, 125, 166) There were also indications that claimant's condition was permanent. (R.77)

On May 24, 1989, a hearing was held on the claim for temporary total or temporary partial disability benefits, as well as authorization for psychiatric care and payment of claimant's past medical and psychiatric bills. On December 22, 1989, the Judge of Compensation Claims, Joe E. Willis, entered an Order in which he noted the claimant was suffering emotionally and physically. He found the medical testimony to show that the claimant was distraught and had difficulty sleeping, was suicidal and "suffering from a post-traumatic inventory of various problems, including headaches every day, light-headedness, nausea, difficulty falling asleep, etc." (R.282, 285) The Judge of Compensation Claims ordered the employer/carrier:

To pay the claimant temporary total disability from the time the claimant terminated his employment with the City of Holmes Beach in April of 1987, and continuing up through the time of the hearing of May 24, 1989. (R.287)

The employer/carrier appealed the decision of the Judge of Compensation Claims to the First District Court of Appeal. (R.294, 295) The First District Court of Appeal affirmed the Compensation Order and cited Sheppard v. City of Gainesville Police Department, 490 So. 2d 972 (Fla. 1st DCA 1986); Prahl Brothers, Inc. v. Phillips, 429 So. 2d 386 (Fla. 1st DCA 1983); City of Tampa v. Tingler, 397 So. 2d 315 (Fla. 1st DCA 1981), as controlling.

However, the First District Court of Appeal noted that this Court's decision in Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1101 (Fla. 1989), warranted

further consideration of the evolution of the compensability of work related emotional disorders. In Note Four of Justice Barkett's opinion, he states:

Because we decide this case on grounds of the strong public policy against work place sexual harassment, we do not address the propriety of the rationale expressed in these cases.

There, Justice Barkett was making reference to Sheppard and Phillips, cases relied on by the First District Court of Appeal and in their decision in City of Holmes Beach and I.S.A.C. v. Grace, 15 F.L.W. D2629, (Fla. 1st DCA October 26, 1990).

In that decision, the First District Court of Appeal certified the following question to this Court:

Whether §440.02(1), Florida Statutes (1985), defining "accident" excludes a mental or nervous injury where the injury suffered by the claimant results in only minor physical consequences?

The claimant reiterates his position and argues that Florida should join the majority of jurisdictions in extending workers' compensation benefits to claimant's who suffer mental and behavioral injuries as a result of on the job traumatic episodes regardless of whether the trauma results in a disabling injury. Therefore, the claimant stands by the award of temporary total disability benefits from the Judge of Compensation Claims and the affirmation of that award by the Florida First District Court of Appeal.

ISSUES ON APPEAL

- I. WHETHER §440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT" EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE ALLEGED PHYSICAL INJURY SUFFERED BY THE CLAIMANT RESULTS IN ONLY MINOR PHYSICAL CONSEQUENCES.

SUMMARY OF ARGUMENT

On July 17, 1985, the claimant, while exercising his duties as a Holmes Beach Police Officer, accidentally shot and killed a suspect he was trying to handcuff and place under arrest. The suspect was struggling and fighting with the claimant as he was resisting arrest. The claimant was struck several times by the suspect. Following the incident, the claimant took leave from his duties and eventually had to leave the police force for emotional and physical reasons. Thereafter, claimant was diagnosed as suffering from post-traumatic stress disorder. He made a claim for temporary total disability benefits and was awarded the benefits.

Claimant's award was proper in that it falls within the progression of cases awarding workers' compensation benefits for job related mental injuries. Workers' compensation benefits have been denied for disabling mental injuries absent a pronounced physical injury. This State's Legislature has announced that a claimant suffering from a work related mental disorder shall be denied benefits if the disorder is as a result of fright or excitement only. This Statute has been interpreted liberally to conform with the objective of placing workers' compensation benefits quickly in the hands of the injured employee. Today a claimant's mental disability is compensable if it is the result of a combination of fright, excitement and trauma. In fact, if there is a mere touching and it is a significant causative factor in the claimant's ensuing psychiatric impairment, resulting mental or nervous injury is compensable.

In this case, the claimant was touched several times during the struggle. In fact, the claimant was struck several times by the suspect's elbows. Also, the claimant's gun

discharged twice, constituting further impact and trauma on the claimant. The claimant's health care providers also testified that claimant's condition developed from this incident.

Thus, the requisite trauma is established. That trauma was combined with the horror of unintentionally putting another human being to death. That trauma caused claimant's disabling psychiatric condition and, therefore, claimant's post-traumatic stress disorder should be compensable and the award of temporary total disability benefits should be affirmed.

ARGUMENT

- I. WHETHER §440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT" EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE ALLEGED PHYSICAL INJURY SUFFERED BY THE CLAIMANT RESULTS IN ONLY MINOR PHYSICAL CONSEQUENCES.

The employer/carrier maintain that the claimant should be denied temporary total disability benefits because his post-traumatic stress disorder is not specifically the result of a physically disabling injury. Florida Statute §440.02(1) (1985) states that "A mental or nervous injury due to fright or excitement only" is not a compensable injury under the Workers' Compensation Law. However, the Courts of this state, in discussing that Statute, have declared that an injured employee is entitled to workers' compensation benefits for a mental or nervous injury even though the underlying physical injury or trauma is not itself disabling. In fact, "an increasing number of cases have appeared ...involving a mental or emotional stimulus resulting in a primarily 'nervous' injury, and there is already visible a distinct majority position supporting compensability in these cases." See Larson's Workman's Compensation Law, Sec. 42.23. Furthermore, Florida's Statute, denying benefits for emotional injuries due to fright or excitement only is "unique" in American law. Id.

It has long been recognized that mental or nervous injuries are compensable under the workers' compensation laws. This Court has recognized that a sudden traumatic episode resulting in a mental or nervous injury is compensable even though the original trauma did not result in visible or disabling physical injury. In Lyng v. Rao, 72 So. 2d 53 (Fla. 1954), the claimant was a stenographer working in a hospital when the building

was struck by lightening. Apparently, the floor was wet due to a leaky roof. The claimant suffered chest pains and was hospitalized. The claimant made a claim under workers' compensation and the employer/carrier defended on the ground there was no showing of a trauma or traumatic injury. However, the Court held that the evidence before the Commissioner established that the claimant had suffered an injury and benefits were awarded.

In that case, this Court took issue with the Deputy Commissioner's definition of trauma which would have limited it to an outwardly visible bodily injury. This Court said:

We find no definition which limits the word to a visible injury. Many serious accidental injuries-especially those affecting internal organs-are not visible to the eye, and yet we know that such constitute a great part of compensable injuries. An injury to the brain is seldom observable-except by symptoms. Insanity, resulting from an injury received in the course of employment is compensable. Lyng, 72 So. 2d at 56.

In Superior Millwork v. Gabel, 89 So. 2d 794 (Fla. 1956), this Court said:

It is generally held that 'When there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis or hysterical paralysis...the full disability including the effects of the neurosis is compensable.' Gabel, 89 So. 2d at 795.

In Oolite Concrete Company v. Carver, 145 So. 2d 733 (Fla. 1962), this Court said that an award based on a mental disability is proper even though the physical trauma or injury is relatively minor. In that case, the claimant suffered a minor physical injury when he was thrown into the air after an accidental discharge of dynamite. It was found that as a result of the accident, the claimant suffered a disabling anxiety complex. The claim was made for benefits primarily based on the anxiety complex rather than the

physical injury. This Court said that compensation benefits were due based on a mental injury brought on by physical trauma even though the physical trauma was relatively minor. Furthermore, a traumatic neurosis is by definition an injury. Watson v. Melman, Inc., 106 So. 2d 433 (Fla. 3rd DCA 1958).

The First District Court of Appeal has considered these notions in a variety of situations. In Prahl Bros., Inc. v. Phillips, 429 So. 2d 386 (Fla. 1st DCA 1983), the claimant was robbed at gunpoint while employed as a switchboard operator at a hotel. The robber placed a gun to the claimant's head, removed a ring from her finger and forced her to lie down on the floor. The claimant suffered no bruises, cuts or other visible contusions. However, she developed a disabling psychiatric impairment which was held compensable. The Court said that the underlying physical injury or trauma need not be itself disabling for the ensuing mental or nervous injury to be compensable. Id. at 387.

The Court went on to say that "non-disabling physical trauma was a significant causative factor in the claimant's ensuing psychiatric impairment." Id.

In Sheppard v. City of Gainesville Police Department, 490 So. 2d 972 (Fla. 1st DCA 1986) the issue was addressed again. There, claimant sought benefits for a psychiatric injury sustained while in the course of his employment as a Gainesville police officer. In 1972, claimant killed a suspect in order to save a fellow officer. For the next twelve years, he feared that he might face the same situation. In August of 1984, he was called to the scene of an accident involving a bicyclist. As claimant bent over the victim, the victim lurched toward the claimant. The claimant put up his hands to defend himself

and the victim grabbed claimant's right arm and shoulder. The claimant wondered if he would have to kill the victim.

The claimant went on relaxed duty with the Gainesville Police Department until he suffered a breakdown. Later he sought treatment and was diagnosed with a post-traumatic stress disorder. A claim was filed for workers' compensation benefits, however, the Deputy Commissioner found that claimant's injury was due to fright or excitement only and denied all benefits. The Court reversed that decision recognizing that "the underlying physical injury or trauma need not be itself disabling for the ensuing mental or nervous injury to be compensable." Sheppard, 490 So. 2d at 975.

It was noted that "the claimant was at least touched on several occasions during the fray." Id. at 974.

The issue was also addressed in City of Tampa v. Tingler, 397 So. 2d 315 (Fla. 1st DCA 1981). In that case, a Tampa police officer responded to a domestic dispute. A struggle ensued and the officers arm was severely twisted. The claimant soon recovered from the physical trauma but suffered a disabling psychological reaction.

On Motion for re-hearing, the Court found claimant's disorder compensable. The Court noted: The physical involvement of the struggle did in fact contribute a lot to the cause of the psychiatric problems.

In the present case, the claimant was touched several times during the struggle. Here, the claimant, also a police officer, responded to a call to be on the lookout for a stolen car. He stopped a car and attempted to arrest the suspect. (R.17, 255) The suspect fled and the claimant gave chase. (R.256) The suspect and during the arrest, a

struggle ensued. (R.17, 230, 256) The suspect was fighting with the claimant and the claimant was struck several times with the suspect's elbows. (R.17, 18, 41)

The claimant pulled his gun out to get the suspect to settle down. (R.39) As the claimant tried to handcuff the suspect, the suspect squirmed, wrestled and struggled, striking claimant several times. (R.17, 40, 41) The claimant's gun discharged killing the suspect. (R.17, 18, 256)

Thereafter, claimant was off work for three months. (R.256) He returned to work but had to leave permanently after assisting in another shooting. (R.19)

Claimant testified:

I just wasn't able to cope with people. People made me mad. People were--I started having--I started breaking out. My feet started breaking out and bleeding. I wasn't able to sleep, headaches. (R.19)

Claimant was diagnosed as suffering from post-traumatic stress disorder. (R.166) Claimant testified that he was breaking out and that his feet were bleeding. (R.19) His therapist and physician testified that claimant's condition was a direct result of the struggle wherein he accidentally killed the suspect. (R.76, 138, 166, 167)

The record in this case is clear. The medical and non-medical testimony both indicate that claimant's disabling mental condition was a result of the trauma of struggle with and the shooting of the suspect. (R.176, 138, 166) The claimant was struck several times in the struggle. Claimant's gun discharged twice, establishing further impact and trauma on the claimant. The doctors testified that claimant's condition developed from this incident. Thus, the trauma as defined by this Court in Lyng, was present. It caused claimant's disabling psychiatric disability. Claimant's post-traumatic disorder is

compensable as per the decisions rendered by this Court and the First District Court of Appeal and therefore, the award of the Judge of Compensation Claims should be affirmed.

The employer/carrier rely on Amoco Container Company v. Aviles, 453 So. 2d 894 (Fla. 1st DCA 1984). In that case, the claimant's benefits were denied because she failed to demonstrate that her psychiatric condition was causally related to any compensable injury.

There, the claimant was working in a warehouse when a machine exploded and caught fire approximately fifty feet away from her. As the claimant ran from the area, she struck her head, bruised her arm and injured her wrist. These injuries were not treated medically.

The claimant returned to work after about a week and continued to work for a period of nine months. The claimant took a leave of absence due to some chest pains and had not returned to work since taking the leave.

A claim was made for workers' compensation benefits based on a psychiatric condition, however, benefits were denied because there was no clear evidence showing that the claimant's psychiatric condition was the direct and natural result of the compensable primary injury.

In that case, the claimant relied on Phillips but the Court emphasized that, in Phillips, the evidence clearly established that the claimant's psychiatric impairment was brought on by the employment related incident; the incident being the employment related robbery, the gun being placed to claimant's head and a ring being physically

removed from the finger.

In the present case, there is clear evidence showing that claimant's injury is a result of the on the job traumatic incident. Again, the claimant accidentally took the life of another human being while engaged in a struggle pursuant to the victim's arrest. The claimant was diagnosed as suffering from a post-traumatic stress disorder and two therapists and a physician testified that claimant's condition was a direct result of the struggle wherein the suspect was accidentally killed. (R.76, 138, 166, 167) Therefore, by the authority relied upon by the employer/carrier, the claimant's post-traumatic stress disorder is compensable and the award for temporary total disability benefits should be affirmed.

The employer/carrier also rely upon Polk Nursery Company, Inc. v. Riley, 433 So. 2d 1233 (Fla. 1st DCA 1983). In that case, the Court said that "in order for the claimants to have sustained a compensable injury some physical trauma or organic injury even if relatively minor must be found to have occurred." Riley, 433 So. 2d at 1236. The employer/carrier insist that there is no medical testimony establishing a causal link between the trauma of the shooting incident and claimant's post-traumatic stress disorder. However, that is simply an inaccuracy. Karen Turnbow, a clinical psychologist, testified that claimant's post-traumatic stress disorder was "due to the shooting." (R.76) Dr. Frank Kulik, a psychiatrist and neurologist, testified:

I asked him when the trauma occurred, and he said July 17th, 85, and he said he shot a boy, didn't like it. (R.120)

In distinguishing between the shooting of the victim and the later incident that

resulted in claimant's discharge from employment, Dr. Kulik noted that it was the initial incident, the accidental shooting, that caused claimant's stress disorder. (R.138)

Furthermore, Kenneth A. Visser, a licensed psychologist, was asked:

Q Do you feel that this post-traumatic stress disorder is as a result of this incident as he related it to you--

A Yes.

Q --When his gun went off?

A Yes.

Q Did you find any evidence that was related to anything but that?

A No.

Again, the claimant was touched several times during the incident referred to by the medical specialist. (R.17, 18, 40, 41, 230, 256) The suspect was fighting with the claimant and the claimant was struck several times with the suspect's elbows. (R.17, 18, 41) The incident was referred to by the medical experts repeatedly as a trauma. The trauma referred to is well within the meaning establishing by this Court in Lyng. Therefore, the claimant's post-traumatic stress disorder brought on by the traumatic incident involving the shooting of the suspect, should be compensable.

The employer/carrier suggest that §440.02(1) as currently interpreted would allow the payment of workers' compensation benefits for a mental injury triggered by any physical touching. The employer/carrier suggest that this would lead to payment of benefits for mental illnesses that are suffered by workers whose job would include any type of physical contact. They utilize an example of a nurse or lab technician whose job

it is to draw blood from patients. They suggest that such an employee, under the current status of the law, might be entitled to workers' compensation benefits after developing a fear of catching the AIDS virus from patients. They also note that a teacher who paddles a student might be entitled to benefits after he or she develops a psychiatric condition related to that paddling. There are certainly concerns for allowing benefits to persons who develop mental incapacities from simply coming into contact with other physical objects. However, the employer/carrier fail to recognize that a lab technician may deserve workers' compensation benefits if he or she happens to struggle with an AIDS patient in the course of obtaining a blood sample and that blood sample splashes on to the technician. Or, in the case of the teacher, there should be some concern for the teacher who paddles the student pursuant to the teacher's job duties and the student subsequently suffers an unexpected incapacitating condition or even death.

The question certified asks this Court to determine whether §440.02(1) allows compensation for mental injuries where the claimant suffers only a minor physical consequence. What would the answer be in either of the previous examples? If there is a struggle in either of the two situations does the employee get compensation if a broken arm is suffered? Does the employee get compensation if a sprained arm is suffered? A bruised arm? A touched arm? Must there be medical evidence or do we take the claimant's word that he or she has suffered a physical trauma?

The question was answered by this Court in Lyng and Carver. Clearly, a claimant has sustained a compensable mental injury as long as some physical trauma, even though relatively minor, has occurred.

These, of course, are not typical cases and neither is the claimant's in this case. The claimant was involved in a struggle and he was struck several times by the suspect. Furthermore, he unintentionally shot and killed the suspect. Taking the life of another under any circumstances, is certainly an unusual and traumatic experience. It is clear the claimant suffered some physical trauma and not necessarily a minor trauma. Claimant's resulting traumatic stress disorder should be compensable.


CONCLUSION

For the foregoing reasons, the claimant contends there is no reversible error in the Order of December 22, 1989, by the Judge of Compensation Claims nor the affirmation of that award in City of Holmes Beach and I.S.A.C. v. Grace, 15 F.L.W. D2629 (Fla. 1st DCA October 26, 1990), awarding temporary total disability benefits from April of 1987, through the time of the hearing of May 24, 1989 along with psychiatric treatment and care, penalties and interest. Accordingly, claimant requests this Court to answer the certified question in the negative allowing compensation for a mental or nervous injury even though the physical injuries suffered by the claimant results in only minor physical consequences.

Respectfully submitted,

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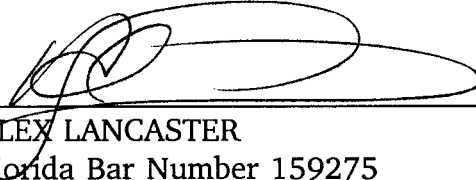

Alex Lancaster
Florida Bar Number 159275

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been delivered by U.S. Mail to Nancy A. Lauten, Esquire, P. O. Box 1438, Tampa, FL 33601, this 28th day of December, 1990.

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