IN THE SUPREME COURT OF FLORIDA

ESCAMBIA COUNTY SHERIFF'S DEPARTMENT, ET AL.,

Appellants,

v.

THOMAS GRICE,

Appellee.
_____/

CASE NO.: 86,327

District Court of Appeal,
1st District - No. 94-1950

CITY OF LAKELAND'S AMICUS CURIAE BRIEF

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STATEMENT OF THE CASE AND FACTS

The City of Lakeland files this amicus curiae brief in support of the Appellant Escambia County Sheriff's Department and Escambia County Risk Management in its appeal from an order entered in favor of the workers' compensation claimant Thomas Grice. This appeal is taken from Grice v. Escambia County Sheriff's Department, 20 FLW D1863 (Fla. 1st DCA, August 15, 1995), in which the First District Court of Appeal certified a question to this Court as being of great public importance.

Specifically, the First District Court of Appeal asked this Court to rule on the following question:

> WHEN AN EMPLOYEE RECEIVES WORKERS' COMPENSATION, STATE DISABILITY RETIREMENT, AND SOCIAL SECURITY DISABILITY BENEFITS, IS THE EMPLOYER ENTITLED TO OFFSET AMOUNTS PAID TO THE EMPLOYEE FOR STATE DISABILITY RETIREMENT AND SOCIAL SECURITY DISABILITY AGAINST WORKERS' COMPENSATION BENEFITS TO THE EXTENT THAT THE COMBINED TOTAL OF ALL BENEFITS EXCEEDS THE EMPLOYEE'S AVERAGE WEEKLY WAGE?

The City of Lakeland is similarly situated with Escambia County, since it is a public employer that finances, in part, an employee retirement fund, and is self-insured for workers' compensation claims.

SUMMARY OF ARGUMENT

An employer that participates in funding an employee retirement pension plan should be allowed to offset permanent total workers' compensation benefits against both pension benefits and Social Security Disability benefits to the extent that the combined total of the three benefits exceeds the employee's average weekly wage. The combined total of benefits an injured employee receives from these three sources should not exceed the employee's average weekly or monthly wages, since the employer would otherwise be forced to bear expenses beyond replacement of income, and the employee would receive a financial windfall.

ARGUMENT ON APPEAL

AN EMPLOYER SHOULD BE ALLOWED TO OFFSET PERMANENT TOTAL WORKERS' COMPENSATION BENEFITS AGAINST BOTH EMPLOYER-FUNDED PENSION OR DISABILITY BENEFITS AND SOCIAL SECURITY DISABILITY BENEFITS TO THE EXTENT THAT THE COMBINED TOTAL OF ALL THREE SOURCES DOES NOT EXCEED THE EMPLOYEE'S AVERAGE WEEKLY OR MONTHLY WAGE.

ARGUMENT

AN EMPLOYER SHOULD BE ALLOWED TO OFFSET PERMANENT TOTAL WORKERS' COMPENSATION BENEFITS AGAINST BOTH EMPLOYER-FUNDED PENSION OR DISABILITY BENEFITS AND SOCIAL SECURITY DISABILITY BENEFITS TO THE EXTENT THAT THE COMBINED TOTAL OF ALL THREE SOURCES DOES NOT EXCEED THE EMPLOYEE'S AVERAGE WEEKLY OR MONTHLY WAGE.

Florida law allows an employer to offset permanent total workers' compensation benefits to the extent of employer-funded pension benefits also being paid to the injured employee. Florida employers are also entitled to offset permanent total disability benefits to the extent of the injured employee's receipt of Social Security Disability benefits. These provisions are designed to enable an injured employee to maintain his standard of living and suffer no diminution of income.

Both of these offset provisions are also designed, however, to ensure that the employee receives no windfall benefit by virtue of having sustained a work-related accident. An employer who suffers the loss of an injured employee should not also be forced to bear the additional expense of paying for the injured employee's enhanced standard of living. The offset provisions for both employer-funded pensions and Social Security Disability meet two goals of the workers compensation system: the employee is made whole by receipt of income benefits commensurate with his wage earning capacity, and the employer is not required to pay benefits beyond those that restore the injured employee to his pre-injury financial status. An employee should not receive more income when disabled that when healthy.

Under the current state of Florida law, an injured employee who receives permanent total workers' compensation benefits and either Social Security Disability or employer-funded pension benefits can receive a combination of benefits equal to his average weekly or monthly wages. The employer should therefore be entitled to take the offset of permanent total disability benefits to the extent that the combined total of these three benefits exceeds the employee's average wages. To allow otherwise would enable an injured employee to violate the principle of indemnity by profiting from his injury.

This Court has previously held that an employer may offset an injured employee's permanent total workers' compensation benefits against employer-funded pension benefits to the extent that the combined total of benefits exceeds the employee's average monthly wage. Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989). This is based on the rationale that an employer should not be forced to pay an injured employee's benefits beyond replacement of income. In Barragan, this Court struck a City of Miami ordinance that allowed reduction of an injured employee's pension benefits to the extent of workers' compensation benefits being paid. This Court noted that the municipal ordinance was preempted by §440.01, et. seq., Florida Statutes, and held that "[t]he employer may not offset workers' compensation payments against an employee's pension benefits except to the extent that the total of the two exceeds the employee's average monthly wage." (Emphasis added) Id. at 255.

Subsequent opinions of the First District Court of Appeal have explained and clarified this holding. City of Miami v. Smith, 602 So. 2d 542 (Fla. 1st DCA 1991), held that the claimant was not entitled to both permanent total workers' compensation benefits and employer-funded pension benefits to the extent that the combined total exceeded his average monthly wage. The employer was allowed to take the offset of workers' compensation benefits where the combined total of workers' compensation benefits and pension benefits exceeded the average monthly wage.

These holdings are based on the rationale that when an employee is made whole by payment of benefits from any combination of sources, he should not be entitled to reap a financial windfall by collecting more after an injury than his pre-injury average wages. The combined total of benefits from all sources should therefore not exceed the injured employee's average weekly or monthly wage.

This Court previously set forth the reasoning behind this rule in Brown v. S. S. Kresge Co. Inc., 305 So. 2d 191 (Fla. 1974). The employer in this action was allowed to offset workers' compensation benefits being paid to the employee to the extent of sick leave insurance benefits that were being provided by the employer. The combined total of these two benefits that were funded by the employer could not exceed the employee's average weekly wage. In explaining the propriety of the offset, this Court noted that:

> "[I]t is reasonable to conclude that workmen's compensation benefits when combined with sick leave insurance benefits provided by the employer should not exceed claimant's average weekly wage because under a

> logical interpretation of the I.R.C. Rule 9 when an injured employee receives the equivalent of his full wages from whatever employer source that should be the limit of compensation to which he is entitled." Id. at 194.

The total sum of benefits paid to the injured employee that are funded in whole or in part by the employer should not exceed the employee's average weekly or monthly wage. To pay an injured employee more than his average wages from employer-funded sources would subvert the purpose of the Workers' Compensation Act to replace lost wages. The Florida Legislature has allowed employers to take the pension offset so that employees are made whole, but not financially enhanced, after an industrial accident.

Payment of employer-funded benefits that exceed the employee's average wages would likewise be contrary to the general law of damages by placing the injured worker in a better position than he occupied before his industrial injury. The nature of civil recovery is to make a person whole from his injuries, not to bestow a windfall on the injured. "Florida has followed the rule that damages awarded to a plaintiff should be equal to and precisely commensurate with the loss sustained." Hollins v. Perry, 582 So. 2d 786 (Fla. 5th DCA 1991).

Employees injured in the course of their employment with employers who provide pension benefits should not realize an increased standard of living through employer payments exceeding their average wages. To allow this windfall to injured employees would increase the likelihood of fraudulent claims.

The impropriety of windfall indemnity benefits was addressed by the First District Court of Appeal in K-Mart v. Young, 526 So. 2d 965 (Fla. 1st DCA 1988). In this action, the First District Court of Appeal found that the Judge of Compensation Claims erred in not allowing the employer to offset workers' compensation benefits to the extent of disability benefits paid from a source wholly funded by the employer. The employer was allowed a credit of disability benefits paid, and the injured employee was not entitled to collect benefits that exceeded her average wages. "[A]lthough the employer is not entitled to a credit per se, a claimant may not receive a windfall by receipt of a combination of benefits that exceeds his or her average weekly wage." Id. at 968.

The employer's right to offset Social Security Disability (SSD) benefits is also clearly established. Sec. 440.15(1), Florida Statutes, (Supp. 1994) provides that the total of SSD benefits paid to an injured employee and his dependents shall not exceed 80% of the employee's average weekly wage. This principle has been well-supported in Florida appellate opinions, and the SSD offset is a common provision of claims administration under the Workers' Compensation Act. See for example, Hyatt v. Larson Dairy, Inc., 589 So. 2d 367 (Fla. 1st DCA 1991), where the First DCA set forth the formula for calculating the SSD offset. Hyatt makes clear that the indemnity benefits an employer pays to an injured worker can be reduced when the employee is likewise receiving SSD benefits.

The judicial aversion to windfall benefits and the patent unfairness in awarding windfall benefits to injured employees is illustrated in other holdings of the First District Court of Appeal. In Dax & Trim Development Co. v. Mullens, 590 So. 2d 539 (Fla. 1st DCA 1991), the Court held that in calculating the offset of SSD benefits against workers' compensation benefits, the total of SSD benefits paid to the injured employee and his dependents must be considered. To allow the offset of SSD benefits only to the extent of SSD benefits paid exclusively to the injured employee would enable the injured employee to realize a greater family income as a result of his industrial accident and attendant impairment.

CONCLUSION

Florida employers should be allowed to take offsets of permanent workers' compensation benefits to the extent that workers' compensation benefits, Social Security Disability benefits, and employer-funded pension benefits exceed the employee's average wages. An employee should not be enabled to receive monetary benefits after an industrial injury that exceed his average wages, since the employee would be receiving a financial windfall from his injury, and the principles of indemnity would be violated by placing the employee in a better financial position after his injury than before. Furthermore, Florida employers should not be forced to bear the additional expenses of enhancing an injured employee's standard of living, as well as replacing that employee's lost wages.

For the foregoing reasons, Florida employers should be allowed to simultaneously offset both employer-funded pension benefits and Social Security Disability benefits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by regular U.S. Mail on December 6, 1995 to Mr. James McKenzie, Attorney for Respondent, 905 E. Hatton St., Pensacola, FL 32503, Mr. David McCranie, 3733 University Blvd. W, Suite 112, Jacksonville, FL 32217, Mr. Thomas McDonald, 201 E. Pine St., 15th Floor, Orlando, FL 32801, Mr. Derrick Cox, 201 S. Orange Ave., Suite 640, Orlando, FL 32801, Ms. Ellen Lorenzen and Mr. John Dixon, P. O. Box 172118, Tampa, FL 33672-0118, Mr. Edward Dion, 307 Hartman Building, 2012 Capital Circle SE, Tallahassee, FL 32399-6583, Ms. Mary E. Cruickshank, P. O. Box 229, Tallahassee, FL 32302-0229, Mr. Michael J. Valen, P. O. Box 13570, Pensacola, FL 32591-3570, Mr. Lonnie N. Groot, 1101 E. First Street, #3, Sanford, FL 32771-1468, Ms. Ann L. Robbins, 5907 106th Terrace N., Pinellas Park, FL 34666, and Mr. Thomas A. Tucker Ronzetti, Assistant County Attorney, 111 NW 1st St., Suite 2810, Miami, FL 33128-1993.

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