IN THE SUPREME COURT OF FLORIDA

ESCAMBIA COUNTY SHERIFF'S DEPARTMENT and ESCAMBIA COUNTY RISK MANAGEMENT,

Petitioners,

vs.

THOMAS GRICE,

Defendant.
_____/

CASE NO. 86,327

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BRIEF OF AMICUS CURIAE METROPOLITAN DADE COUNTY

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Metropolitan Dade County, accepts the statement of the case and facts submitted by the Petitioners.

In addition, the Amicus would note that because a multitude of its employees could be affected by the Court's decision, the Amicus requested and was granted leave to file this Brief in support of the Petitioner's position.

SUMMARY OF ARGUMENT

At issue in this case is whether a disabled employee may receive workers' compensation disability benefits without regard to disability benefits from both social security and a state disability retirement plan. By the operation of two workers' compensation provisions, Sections 440.15(9)(a) and 440.20(15) of the Florida Statutes, the employee may not.

Under §440.15(9)(a), a claimant's workers' compensation benefits are reduced by social security benefits so that their sum does not exceed 80% of his predisability income. The operation of this provision, as described by this Court, is "unequivocal" and "mandatory".

Section 440.15(9)(a) and the federal provisions it incorporates also require reducing workers' compensation by the benefits received from state disability retirement. Section 440.15(9)(a) is a "reverse offset" provision. It is designed to allow Florida's employers rather than the federal government to offset benefit payments.

By enacting the reverse offset provision, Florida adopted the federal policy of coordinating all state-sponsored disability benefits, including both workers' compensation and state disability retirement. This coordination of benefits prevents a windfall of benefits which would exceed the employee's predisability compensation. Excessive benefits waste scarce state funds and diminish the worker's incentive to return to work. To avoid this, workers' compensation

benefits must be set off not only by social security, but also by state disability retirement.

The set off for state disability retirement benefits is further permitted by §440.20(15), Florida Statutes. That provision has long been used to reduce workers' compensation by employer-sponsored disability benefits to match the employer's predisability wage level. But where the employer receives social security, the terms of the provision allow a set off to 80% of the predisability wage, the level of compensation mandated by §440.15(9)(a).

In sum, the coordination of workers' compensation, state disability retirement, and social security benefits is required by Florida and federal statutes and the policies they represent. The Court should therefore quash the district court's decision and answer the certified question in the affirmative.

ARGUMENT

AN EMPLOYER IS ENTITLED TO OFFSET BOTH SOCIAL SECURITY AND STATE RETIREMENT BENEFITS AGAINST WORKERS' COMPENSATION BENEFITS.

For a claimant who receives both social security and state disability retirement benefits, workers' compensation benefits are determined by two provisions. Because the claimant receives social security, his maximum workers' compensation benefits are determined by Florida's "reverse offset" provision, §440.15(9)(a), Florida Statutes. That provision reduces workers' compensation benefits so that combined workers' compensation and social security may not exceed 80% of the claimant's predisability income. By that provision, Florida also adopted federal provisions and policies which require coordinating all state-sponsored plans, including state disability retirement, to prevent a windfall to the worker. A set off for state disability retirement is also permitted by a further provision, §440.20(15), which requires reducing the workers' compensation benefit by the benefits from an employer-sponsored plan.

A. Section 440.15(9), Florida Statutes, Requires Coordinating Workers' Compensation, State Disability Retirement, and Social Security Benefits.

Section 440.15(9)(a), Florida Statutes, determines the maximum amount of workers' compensation benefits a claimant may receive when also receiving social security. In pertinent part the statute states:

> (a) Weekly compensation benefits payable under this chapter for disability

> resulting from injuries to an employee who becomes eligible for benefits under 42 U.S.C. s. 423 shall be reduced to an amount whereby the sum of such compensation benefits payable under this chapter and such total benefits otherwise payable for such period to an employee and his dependents, had such employee not been entitled to benefits under this chapter, under 42 U.S.C. ss. 423 and 402, does not exceed 80 percent of the employee's average weekly wage. However, this provision shall not operate to reduce an injured worker's benefits under this chapter to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. s. 424(a). . . .

The Court explained the operation of this provision in Department of Public Health, Div. of Risk Manauement v. Wilcox, 543 So.2d 1253 (1989):

> Section 440.15(9)(a), Florida Statutes (1985), requires that weekly workers' compensation benefits be reduced by the amount that they and social security benefits, in the aggregate, exceed eighty percent of the injured workers' average weekly wage. The language is unequivocal. The offset is mandatory if the combined benefits exceed eighty percent of the worker's salary.

Id. at 1254-55 (footnote omitted).

As Wilcox and the plain language of §440.15(9)(a) make clear, a claimant who receives social security has workers' compensation benefits reduced to reach an aggregate cap of 80% of the employee's average weekly wage.[1/] Here, the employee's

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L/The operation of §440.15(9) in conjunction with the federal provision it incorporates, 42 U.S.C. § 424a, in fact allows the claimant to receive 80% of his average weekly wage or 80%
(Footnote Continued)

average weekly wage is $583.88, and 80% of this is $467.11. With social security benefits of $163.85, the claimant should receive workers' compensation benefits of no more than $303.25, before any set off from other forms of compensation.

Those workers' compensation funds should be further set off, however, by benefits from other state-sponsored disability plans. Such an overall coordination of state and federal disability benefits arises from the structure of the social security laws and the policies that structure supports.

The social security laws provide that, generally, federal disability benefits are reduced by the amount of state benefits awarded. See 42 U.S.C. § 424a. Social security benefits are reduced to the extent the beneficiary is entitled to

> (A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or
>
> (B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a political subdivision . . .

42 U.S.C. § 424a(a)(2).

(Footnote Continued)
of his average current earnings (the federally mandated benefit), whichever is greater. Trilla v. Braman Cadillac, 527 So. 2d 873 (Fla. 1st DCA 1988). To simplify discussion, the Brief will refer to the greater of the two figures as the "80% benefit cap."

The federal set off for workers' compensation "was enacted to prevent injured workers from receiving 'windfall' benefits from the combination of social security disability benefits and workers' compensation benefits." Wilcox, 543 So. 2d at 1255 (footnote omitted). "It was strongly urged that [the concurrent state and federal benefits] reduced the incentive of the worker to return to the job, and impeded rehabilitative efforts of the state programs." Richardson v. Belcher, 404 U.S. 78, 83 (1971). Congress thus required social security to be set off by workers' compensation for a combined benefit of 80% of predisability income -- an amount it found appropriate to provide an incentive for a claimant to return to work. Id.; Merz v. Secretary of Health & Human Servs., 969 F.2d 201, 206 (6th Cir. 1992).

Presently the federal laws reduce social security benefits not only by the amount of workers' compensation benefits, but also by the amount of benefits from any other state disability retirement plan. In 1981, the federal statute was amended to include a set off for "any other law or plan of . , , a State, a political subdivision . . . ." See Omnibus Budget Reconciliation Act (OBRA) of 1981, Pub. L. No. 97-35, § 2208, 95 Stat. 357, 839 (1981). The purpose of the modification was so that "the offset provision would be expanded to include other disability benefits provided by Federal, State and local governments . . , ." H. Conf. Rep. No. 208, 97th Cong., 1st Sess. 977 (1981), reprinted in 1981 U.S.C.C.A.N. 1010, 1339, The § 424a(a)(2)(B) offset provision

thus applies to disability retirement benefits received under both federal and state systems. Smith v. Sullivan, 982 F.2d 308, 312 (8th Cir. 1992) (applying offset due to benefits received under the Federal Civil Service Retirement System); Meehan v. Sullivan, 746 F. Supp. 656 (E.D. Tex. 1990) (applying offset due to benefits received under Teacher Retirement System of Texas).

There is a well-recognized exception to these social security offsets. Under federal law, social security benefits are not reduced if the state law or plan itself reduces its benefits based on the social security entitlement.[2/] See 42 U.S.C. § 424a(d). Florida therefore adopted §440.15(9) to allow its employers and carriers to capture benefits that otherwise would be offset by the federal government. Wilcox, 543 so. 2d at 1255; Burks v. Day's Harvestina, Inc., 597 so. 2d 858, 859-60 (Fla. 1st DCA 1992); Whitman v. Hillsborouah County Sch. Bd., 386 So. 2d 877 (Fla. 1st DCA 1980); Swain v. Schweiker, 676 F.2d 543 (11th Cir. 1982). As the court explained in Burks,

> [I]n the case of Florida claimants, the Florida E/C would take the offset rather than the federal government. Florida is thus considered, in social security terminology, a "reverse offset" state, since the statutory scheme provides that

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2/ Through the same 1981 OBRA amendments, "Congress provided, in a cost saving measure, that all states which did not then have in effect a reverse offset provision were forever foreclosed from taking advantage of federal monies provided pursuant to Section 424a(d)." Merz, 969 F.2d at 206.

> the workers' compensation carrier takes the offset.

597 So. 2d at 860.

From this backdrop the relationship between benefits from workers' compensation, state disability retirement, and social security becomes clear. Benefits from both state disability retirement and workers' compensation offset those from social security unless the state passes a "reverse offset" provision. Florida did just that, through §440.15(9). Using its reverse offset, Florida reduces benefits to disabled employees from workers' compensation but at the same time effects an increase in social security benefits in order to reach the 80% benefit cap.

Florida's reverse offset provision should also reduce workers' compensation by state disability retirement benefits. As benefits received on account of a governmental "law or plan" under 42 U.S.C. § 424a(a)(2)(B), state disability retirement benefits will ordinarily reduce social security. The federal courts universally agree that the set off reduction is dollar-for-dollar to the extent combined benefits exceed that statutory cap. Merz, 969 F.2d at 207; Sciarotta v. Bowen, 237 F.2d 135 (3d Cir. 1988); Swain, 676 F.2d at 546-47. By reducing workers' compensation in proportion to state disability retirement, however, the reverse offset provision prevents the reduction in social security. This maintains the total benefits to the disabled worker while

shifting the burden from the state to the federal government, a result permitted by 42 U.S.C. § 424a(d).

This construction of the reverse offset provision also satisfies the federal and Florida policies regarding coordination of benefits. Florida has adopted the federal Act's policy -- to prevent a claimant's disincentive to return to work -- through its reverse offset provision. See Wilcox, 543 so. 2d at 1255; Burks, 597 so. 2d at 860 (relying on the federal policy to hold that social security benefits set off workers' compensation for a distinct physical or mental condition). Notably, the Florida Legislature adopted an 80% benefit cap through §440.15(9)(a), reflecting the same incentive policy of the federal system. Thus, to coordinate governmental benefits as prescribed by federal law and adopted by Florida law, and to promote the policies reflected by those laws, the Court should allow workers' compensation benefits to be offset by state disability retirement benefits.

B. Section 440.20(15), Florida Statutes, Requires Setting Off Workers' Compensation Benefits by State Retirement Disability Benefits.

Section 440.20(15) of the Florida Statutes is a general offset provision, entitling an employer to reimbursement for any payments of compensation or medical expenses made outside of workers' compensation benefits.[3/] The statute has been

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3/ In full, §440.20(15), Florida Statutes, states:

(Footnote Continued)

characterized as allowing a set off so that the combination of workers' compensation and employer-contributed benefits does not exceed the claimant's average weekly wage. Domutz v. Southern Bell Tel. & Tel. Co., 339 So. 2d 636, 637 (Fla. 1976) (discussing I.R.C. Rule 9, the precursor to §440.20(15)); Brown v. S. S. Kresge Co., 305 So. 2d 191 (Fla. 1974). See generally Brief of Amicus Curiae, State of Fla., Dep't of Ins., Div. of Risk Management, at 13-15 & passim (tracing the history of §440.20(15)).

Where a claimant receives social security disability benefits, however, the §440.20(15) set off should apply to limit the combined benefits to the 80% benefit cap mandated by §440.15(9)(a). This conclusion results from the language of §440.15(9)(a) itself, the operation of the related federal provision which reduce social security benefits from those of a state-provided plan, and from the policy to provide an

(Footnote Continued)

> When an employee is injured and the employer pays his full wages or any part thereof during the period of disability, or pays medical expenses for such employee, and the case is contested by the carrier or the carrier and employer and thereafter the carrier, either voluntarily or pursuant to an award, makes a payment of compensation or medical benefits, the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded, plus medical benefits, if any, out of the first proceeds paid by the carrier in compliance with such voluntary payment or award, provided the employer furnishes satisfactory proof to the judge of compensation claims of such payment of compensation and medical benefits. Any payment by the employer over and above compensation paid or awarded and medical benefits, pursuant to subsection (14), shall be considered a gratuity.

incentive for claimants to return to work. See Point A, supra.

Nothing in the Workers' Compensation Law contradicts this result. The language of §440.20(15) does not speak to the amount of workers' compensation benefits the claimant should receive. That section simply allows "reimbursement to the extent of the compensation paid or awarded," regardless of the amount of benefits actually due. The only limitation to this reimbursement is in the last sentence of §440.20(15), which in conjunction with subsection §440.20(14) converts any payment in excess of "compensation due" into a gratuity. But nothing in these provisions, or in any provision of 5440.20, determines the amount of "compensation due." Thus, the set off provision of §440.20(15) permits reducing workers' compensation benefits to the 80% benefit cap because that amount is the "compensation due."

The rationale of the Court's prior decisions also permits this result. In its prior references to the average weekly wage as a minimum combined benefit, the Court has relied on §440.21(1), Florida Statutes. That statute states in pertinent part:

> No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid , , . .

(Emphasis added.)

The language of §440.21(1) does not conflict with the 80% benefit cap prescribed by §440.15(9)(a). It refers to agreements used to provide compensation "as required by this chapter" -- that is, the Workers' Compensation Law. Through §440.15(9)(a), the Workers' Compensation Law limits compensation to the 80% benefit cap. Thus, a set off for state disability retirement benefits does not conflict with the §440.21(1) proscription as long as the claimant still receives the 80% benefit cap. In sum, the statutory rationale for limiting the general offset provision does not prevent the Court from enforcing the 80% benefit cap required by §440.15(9)(a).

CONCLUSION

Florida's reverse offset statute requires the coordination of benefits from state disability retirement, workers' compensation, and social security. By its plain terms, the statute reduces workers' compensation to 80% of predisability income when combined with social security benefits. The statute also requires reducing workers' compensation by state disability retirement benefits, a result permitted by the general offset provision, §440.15(20). This statutory interplay coordinates state and federal plans both to provide claimants an incentive to work and to prevent a "windfall" of excessive government-sponsored benefits -- a wise course in times such as these, when social programs are starved for funds. In recognition of those policies and the statutory design that promotes them, the Court should quash the district court's decision and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 6th day of December, 1995, mailed to: James McKenzie, 905 E. Hatton St., Pensacola, FL 32503; David McCranie, 3733 University Blvd. West, Suite 112, Jacksonville, FL 32217; Thomas McDonald, 201 E. Pine St., 15th Floor, Orlando, FL 32801; Derrick Cox, 201 S. Orange Ave., Suite 640, Orlando, FL 32801; Ellen Lorenzen, P.O. Box 172118, Tampa, FL 33672-0118; Dennis Ross, P.O. Box 1867, Lakeland, FL 33802-1867; Mary E. Cruickshank, P.O. Box 229, Tallahassee, FL 32302-0229; and Edward Dion, 307 Hartman Building, 2012 Capital Circle, S.E. Tallahassee, FL 32399-6583.

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