SUPREME COURT OF FLORIDA

ESCAMBIA COUNTY SHERIFFS DEPARTMENT and ESCAMBIA COUNTY RISK MANAGEMENT,

Petitioners,

vs.

THOMAS GRICE,

Respondent.

CASE NO.: 86,327
DCA CASE NO.: 94-1950

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT

AMENDED ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other

INTRODUCTION

This is an appeal of the opinion of the First District Court of Appeal dated August 15, 1995, reversing the order of the Judge of Compensation Claims which denied employee's claim for repayment of improper offsets on permanent total disability benefits, attorney's fees, costs, interest and a ten percent (10%) statutory penalty from April 4, 1993, to the time of the appeal and continuing.

The parties will be referred to as they stood below or by name. References to the record will be to the printed number at the bottom of the pages as follows: (R.).

STATEMENT OF THE CASE AND FACTS

This case involves a disabled deputy sheriff who was receiving permanent total disability benefits, social security disability benefits and state disability retirement benefits. The Employee's pre-injury average weekly wage was $583.88 (R.32). Before any offsets, the Employee received $167.36 weekly in state retirement benefits, $392.00 weekly in workers compensation and $163.92 weekly in social security disability benefits (R.47, 60).

Taking the position that the Employee was not entitled to receive more than one hundred percent (100%) of his average weekly wage in benefits paid because of his disability no matter what the source, the Employer began offsetting workers compensation benefits that, when added to the weekly social security and state retirement benefits, exceeded $583.88 per week (R.32). The Employee filed a claim which came on for hearing before the Judge of Compensation Claims. The Judge of Compensation Claims found that there existed no provision in the workers compensation law authorizing any offset of state retirement benefits from workers compensation. Likewise, the Judge of Compensation Claims acknowledged that the State Retirement Act contained no provision allowing offset of workers compensation benefits from state retirement benefits. Further, the Judge

of Compensation Claims found that the workers compensation law did not provide for an aggregation of social security and retirement benefits (R.67-69). Despite the lack of statutory or case law authority, the Judge of Compensation Claims found that the Employer should be allowed to "stack" the state retirement benefits and social security benefits to take an offset against workers compensation benefits so that the combination of the benefits did not exceed the Employee's pre-injury average weekly wage (R.69).

The District Court of Appeal, First District reversed the Judge of Compensation Claim's decision in the instant case holding that the "combining of the three benefits for the purpose of allowing an offset is improper." Grice v. Escambia County Sheriff's Department and Escambia County Risk Management, 20 FLW, D1863, 1864. In so holding, it relied upon Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), for the proposition that workers compensation cannot be offset by a pension except to the extent that the combined total exceeded the average weekly wage, 20 FLW, D1863, 1864.

The Court agreed with the Claimant and found as follows:

> "Under a strict interpretation of the statutory framework, it appears to us that since the legislature provided for a social security offset against workers' compensation benefits, but did not include an offset based upon the receipt of state disability retirement pension benefits, it must be presumed that the legislature did not intend to allow such an offset. In this case, the pension plan contains no offset provision, and the state retirement system has not sought an offset."

Id. In addition, the Court determined that the issue in this case presented a question of great public importance which was certified to this Court in the form of 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?"

Id.

It is from this decision that this appeal has been brought and to which Claimant responds.

ISSUE ON APPEAL

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 WORKER'S COMPENSATION BENEFITS TO THE EXTENT THAT THE COMBINED TOTAL OF ALL BENEFITS EXCEEDS THE EMPLOYEE'S AVERAGE WEEKLY WAGE?

SUMMARY OF THE ARGUMENT

The District Court of Appeal below found that a strict interpretation of the statutory scheme of workers compensation did not provide any offset for disability pension benefits against workers compensation benefits and, therefore, it must be presumed that the Legislature did not intend to allow any such offset. On that basis and on the basis that F.S. §440.15(a) did not allow any aggregation of pension benefits with social security benefits to compute an offset, the District Court of Appeal correctly found that the Judge of Compensation Claim's order allowing such aggregation for offset purposes was erroneous.

At the time relevant to this claim, there was no provision in the workers compensation law allowing an offset of disability retirement benefits from workers compensation. Additionally, there was also no provision in that law allowing any stacking of disability retirement benefits with social security disability benefits to offset against workers compensation from disability retirement benefits. Therefore, no statutory authority exists to support reversal of the decision of the District Court of Appeal, First District, in this case. Moreover, neither the Petitioner nor Amici have cited any case law that allows any such aggregation. Instead, the Petitioner and the Amici in this

case urge this Court to become a super legislature by judicially adding a provision that would allow for the stacking of these benefits although the Legislature did not do so. They urge this Court to do so by providing public policy reasons that are inapplicable, by misinterpreting this Court's decision in Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), and by referencing inapplicable federal case law. In short, none of these attempts are able to overcome the fact that there are no applicable statutory provisions or case law. In order for this Court to find in favor of the Petitioner, a new page in the workers compensation legislation must be written by this Court. Since the Legislature in F.S. Section 440.15 (1985) provided certain offsets but did not include the offset sought by the Employer in this case, the statutory construction principle of expressio unius est exclusio alterius is applicable and this Court is not empowered to judicially create the omitted offset. Dobbs v. Sea Island Hotel, 56 So.2d 341 (Fla. 1952). Further, since workers compensation is peculiarly a creature of statute, this Court should not judicially fill in the blanks the way it thinks the law should be. J.J. Murphy & Sons, Inc. v. Gibbs, 137 So.2d 553, 562 (Fla. 1962).

The Petitioner argues that this Court's decision in Barragan v. City of Miami, supra, allows the offset of any disability benefits received by an employee to the extent that those combined benefits exceed the employee's pre-injury average weekly wage. However, the actual holding in Barragan was that when the disability pension plan has an offset provision, an offset would still only be allowed when the combined pension benefits and workers compensation exceed one hundred percent (100%) of the average weekly wage. The Court rendered this holding based on the fact that allowing an offset for benefits not exceeding one hundred percent (100%) would violate Florida Statute §440.21 (1985). The pension plan in Barragan did have an offset provision and the total of the pension and workers compensation did exceed one hundred percent (100%) of the average weekly wage. Whereas, in this case, the state retirement plan contained no offset provision (R. 67) and the total of workers compensation benefits, $392.00 weekly (R.32), and the state retirement benefits, $167.36 weekly, (R.60) did not exceed the Employee's pre-injury average weekly wage of $583.88 (R.32). Barragan, like the workers compensation law itself, is completely silent on the issue of stacking of social security disability benefits with pension benefits to compute an offset.

A more analogous case is City of Pensacola v. Winchester, 560 So.2d 1273 (Fla. 1st DCA 1990). In that case, the pension plan of the City had a provision allowing the employee to collect in line of duty disability benefits and workers compensation. The plan did not contain an offset provision. However, the combination of the two did exceed one hundred percent (100%) of the pre-injury wage. The First District found that the Barragan rationale was not applicable because the Employee was entitled to the full value of the contracted for benefits. The same situation exists in this case. The Employee, in his employment contract with the Escambia County Sheriff's Department became a member of the State Retirement System. The State retirement plan does not provide for any offsets for the receipt of workers compensation or social security disability benefits. Therefore, the Employee is entitled to receive workers compensation and disability benefits with the only offset being the statutorily allowed offset for the receipt of social security disability benefits.

ARGUMENT I

IT IS IMPERMISSIBLE UNDER FLORIDA LAW TO ALLOW THE EMPLOYER TO AGGREGATE BOTH SOCIAL SECURITY AND STATE RETIREMENT BENEFITS AND OFFSET ALL PERMANENT TOTAL DISABILITY BENEFITS THAT WHEN ADDED THERETO EXCEEDS ONE HUNDRED PERCENT (100%) OF THE EMPLOYEE'S AVERAGE WEEKLY WAGE.

Neither the workers compensation law nor the State Retirement Act[1] specifically authorize either an offset against permanent total disability benefits or retirement benefits for receipt of the other. In addition, although the workers compensation law does provide an offset for social security disability benefits, there is no statutory provision allowing the aggregation or stacking of those benefits with any retirement or pension benefits to compute an offset. The Judge of Compensation Claims acknowledged these facts in his decision (R 67-69). Despite those findings, the Judge of Compensation Claims made a "public policy" based ruling that even absent statutory or case law basis for such "stacking", the Employer should be allowed to do so (R. 69). The District Court of Appeal, First District reversed based on strict interpretation of the Florida statutory workers compensation scheme and Social Security

[1]The retirement Commission has also not by rule provided for any offset.

law, 42 U.S.C. §424(a). Grice v. Escambia County Sheriffs Department, 20 FLW D1863, 1864.

Although the workers compensation law applicable to this accident contained no provision allowing for offset of retirement benefits from workers compensation benefits, the Supreme Court in Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989), found that if a retirement plan had an offset provision, some offset of workers compensation benefits against retirement benefits would be allowed under certain circumstances. In Barragan, the court found that a local ordinance of the City of Miami which reduced a city employees pension benefits by the amount of workers compensation benefits was invalid except to the extent that the total of the two benefits exceeded the workers average weekly wage. That decision stands for the proposition that the employer can reduce retirement benefits (not workers compensation benefits) when two things are present: 1. The retirement plan has an offset provision; and, 2. The sum of both pension benefits and workers compensation benefits exceeds one hundred percent (100%) of the employees average weekly wage.

In the instant case, none of those factors are present. The state retirement law contains no offset provision and the Retirement Commission has not sought any offset. It is

the Retirement Commission has not sought any offset. It is the workers compensation arm of the Employer that took an offset from workers compensation benefits. Additionally, the sum of Claimant's workers compensation rate and his state retirement benefits did not exceed one hundred percent (100%) of his average weekly wage. Therefore, Barragan does not support the offsets sought in this case.

However, the Petitioner argues that the rationale from Barragan allowing offset above one hundred percent (100%) of the average weekly wages when Employer funded retirement benefits and workers compensation benefits combined exceed the average weekly wage, then it follows that the two combined with social security disability benefits also should not be allowed to exceed the average weekly wage. There is absolutely no statutory or case law support for that conclusion. In fact, the existing case law, although not dead on point, supports an opposite conclusion.

What the Judge of Compensation Claims below and the Petitioner here overlook is that Barragan involved a situation where the pension plan had an offset provision. This Court did not authorize or create an offset in that case as did the Judge of Compensation Claims below. It is one thing to hold that an offset is permissible under a retirement plan containing an offset provision when the

combination of benefits exceeds one hundred percent (100%) of the average weekly wage. It is an entirely different thing to judicially create the offset. Barragan simply did the former and can in no way be stretched to have held the latter.

The courts have always held that the employee is entitled to the benefits accorded him by the employment contract or agreement without regard to the receipt of workers compensation benefits. Jewel Tea Company v. Fla. Industrial Comm., 235 So. 2d 289 (Fla. 1970); City of Pensacola v. Winchester, 560 So. 2d 1273 (Fla. 1st DCA 1990). For instance, in City of Pensacola v. Winchester, supra the First District considered the case of a City of Pensacola fire fighter who was injured on the job and was receiving both workers compensation and in line of duty disability benefits under the City Pension Plan. The sum of both exceeded the employees average weekly wage and the City sought an offset based upon Barragan, supra. The pension plan, however, provided that an employee would be entitled to the pension in addition to any workers compensation payable. The First District found that the contractual provision made the Barragan holding inapplicable. The same rationale should apply here. The Employee and the Escambia County Sheriffs Department

employment contract made the Employee a member of the State Retirement System and entitled the Employee to receive applicable pension benefits under the State retirement plan. That plan contained no offset for the receipt of workers compensation benefits or social security disability benefits. The Employee has, therefore, the right to receive those full retirement benefits despite the receipt of workers compensation and social security.

Further, the rules of statutory construction do not support the positions of Petitioner and Amici. The Legislature included certain offset provisions in F.S. §440.15 (1985). Those offset provisions allow for the offset of social security benefits but provide no offset for retirement disability benefits and clearly do not provide for the aggregation of social security and retirement benefits to compute any offset. While amicus Orange County argues that it is inapplicable, the doctrine of expressio unius est exclusio alterius applies here. This court has stated as follows in applying this principle of statutory construction to the workers compensation law, Dobbs v. Sea Island Hotel, 56 So.2d 341 (Fla. 1952):

> . . . This maxim, which translated from the Latin means: express mention of one thing is the exclusion of another, is definitely controlling in this case. The Legislature made one exception to

> the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally. We must assume that it thoroughly considered and purposely preempted the field of exceptions to, and possible reasons for tolling, the statute. We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof.

The same observations are present here. The Legislature is presumed to have allowed the setoffs that it decided were appropriate. This Court should not by statutory construction write into the law an additional setoff. See also, Thomas Smith Farms, Inc. v. Alday, 182 So.2d 405 (Fla. 1966); Univ. Of Florida, Institute of Agricultural Services v. Karch, 393 So.2d 621 (Fla. 1st DCA 1981).

Furthermore, contrary to Amicus Orange Countys argument, F.S. §440.15 (1985) creates a new offset. Not only does it create a new offset, but it creates a very different offset provision than the comparable offset for workers compensation benefits in the Federal statute. Federal law allows Social Security to take an offset based upon the receipt of workers compensation, while the Florida Statute allows the employer to take an offset based upon the

receipt of Social Security benefits. Additionally, the offset in F.S. §440.15 (1985) is based on the Average Weekly Wage while the offset in the Social Security Act is based upon the Average Current Earnings, which both the Petitioners and the Amici agree are two entirely different things. Therefore, no basis exists for disregarding the doctrine of expressio unius est exclusio alterius.

The Petitioner and Amicus Broward County argue that the many cases that discuss the policy of preventing an employee from receiving a windfall support the offset sought. Each one of those cases involved statutory provisions (or IRC rules) that allowed the offset sought. That argument ignores the lack of statutory authority for the offset sought in this case and also ignores that the burden of proving the right to an offset is imposed on the party seeking it. Dept. of Highway Safety v. McBride, 420 So.2d 897 (Fla. 1st DCA 1982). That argument further overlooks the statutory schemes which do allow, under certain circumstances, for an employee to receive in excess of one hundred percent (100%) of his pre-injury wage. For instance, an employee who is receiving permanent total disability benefits under workers compensation is entitled to a five percent (5%) per year cost of living increase in his or her compensation rate that is only capped by the

maximum compensation rate. F.S. § 440.15(1)(f) (1985). Even if the injured worker is receiving social security disability benefits which would activate the eighty percent (80%) offset provisions of F.S. § 440.15(7) (1985), the offset under Federal Law does not include annual cost of living increases paid by the Social Security Administration. Additionally, an employees average current earnings (ACE) (a figure computed under the Social Security Act which is based upon the employees highest earnings year in a certain time period),which is substantially higher than the Average weekly wage (AWW), is used to compute the offset and 80% of that figure could be greater than the AWW. Under all three of these circumstances, the amount actually received by the employee could exceed one hundred percent (100%) of the pre-injury average weekly wage.

The argument proffered by Petitioners and Amici herein that the claimant will receive a windfall if this unauthorized offset is not taken, also ignores the fact that the injury precludes the employee from improving his financial situation by working part-time second employment, working longer hours, by advancement in his company with the accompanying advancement in salary, by changing employment for a more lucrative position or by any other imaginable measure that an individual who is able to work has available

to him. This is not a windfall situation at all. This is a situation where an employee gets the benefits which he was entitled to receive under the law. The petitioner and amici neglect to consider that the offset sought was neither authorized, contemplated nor provided for by the applicable workers compensation law, and that to allow it would provide a windfall to the employers who have no right or expectation to receive such an offset under the law. The presence of so many amici in this case illustrates that reality.

Simply stated, the Petitioner and Amicus have cited no statutory or case law authority to justify the offset sought. If the offset is to be approved, this Court will have to judicially create it. Workers compensation is peculiarly a creature of statute, was not part of the Common Law and, therefore, is not an area historically subject to court made rules. As this Court held in J.J. Murphy & Sons, Inc. v. Gibbs, 137 So.2d 553, 562 (Fla. 1962),"... workers compensation is entirely a creature of statute and must be governed by what the statutes provide, not by what deciding authorities feel the law should be."

ARGUMENT II

42 U.S.C. § 424(A) DOES NOT AUTHORIZE AN EMPLOYER/CARRIER TO AGGREGATE SOCIAL SECURITY DISABILITY AND STATE RETIREMENT PENSION BENEFITS TO OFFSET AGAINST WORKERS COMPENSATION BENEFITS.

The Petitioner and Amicus argue that because 42 U.S.C. § 424(a) allows the Social Security Administration to take an offset against social security disability benefits for any amounts paid for disability under any state law, that the offset should be allowed to the Employer against workers compensation benefits in this case. The only case that has held that disability retirement benefits paid under a state plan could be offset from social security benefits is a federal trial level court from the eastern district of Texas. Meehan v. Sullivan, 746 F.Supp. 656 (E.D. Tx. 1990). Neither the Petitioner nor Amicus cite any Circuit Court of Appeals decisions or U.S. Supreme Court decisions supporting their interpretation that 42 U.S.C. § 424(a) authorizes an offset for Florida Retirement system disability payments from social security benefits.

However, even conceding for argument purposes that their interpretation is correct, it still does not overcome the following clearly correct observation made by the District Court below:

> "Under a strict interpretation of the statutory framework, it appears to us that since the legislature provided for a social security offset against workers' compensation benefits, but did not include an offset based upon receipt of state disability retirement pension benefits, it must be presumed that the legislature did not intend to allow such an offset."

20 FLW, D1863, 1864. It is immaterial that Congress may have accorded such an offset to the Social Security Administration against social security benefits. The Florida Legislature did not provide a concomitant offset (and certainly not an aggregation) to employers against workers compensation benefits. Specifically, F.S. §440.20(15) (1985) provides:

> 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 made by the

> employer over and above compensation paid or awarded and medical benefits, pursuant to subsection (14), shall be considered a gratuity.

Clearly this statute speaks to payments made in lieu of wages and medical benefits, neither of which is the same as pension benefits and social security benefits. Furthermore, it creates a reimbursement scheme between employers and insurance carriers. It in no way purports to cap the benefits which an employee can receive. In fact, it provides that payments made to an employee in excess of those required by the law shall be a gratuity. It in no way provides for the offset sought in this case. Once again, the doctrine of expressio unius est exclusio alterius is applicable. The failure of the legislature to provide the offset precludes this Court from doing so.

If this Court judicially creates the offset sought herein, employees could be subject to a double offset. According to the Petitioners and Amicus Metropolitan Dade County, the Social Security Administration can offset Social Security benefits for the receipt of state pension benefits. The Social Security Administration may decide to take that offset. At the same time, the Petitioners and Amici urge this Court to write that offset provision into the Workers Compensation law. As noted above, the Workers Compensation

law did not contemplate, nor did it provide for such an offset. If the Petitioner and Amici are correct, then Social Security could legitimately take an offset. Sciarotta v. Bowen, 837 F.2d 135 (3rd Cir. 1988) (Holding that although the states are free to reduce their own payments to comply with an 80% ceiling on total benefits, the federal government can further reduce benefits if the state reduction is insufficient.) In that circumstance, if the Court judicially creates the offset sought by petitioner and amici in this case, the employees will be subject to a possible double offset.

As pointed out in argument above, the provisions of the Workers Compensation Act must be strictly construed and this Court is not authorized to write into the law what it thinks the law should be. J.J. Murphy & Sons, Inc. v. Gibbs, supra. The omission of the Legislature to accord any offset for the receipt of state disability retirement benefits and to allow any aggregation of retirement benefits with social security benefits must be given its logical effect. Thomas Smith Farms, Inc., supra; Dobbs v. Sea Island Hotel, supra.

CONCLUSION

The decision of the District Court of Appeal, First District, below correctly decides the issue and should be affirmed based upon the arguments contained in this brief.

Respectfully submitted,

JAMES F. MCKENZIE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been furnished to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399; a copy has been furnished to David A. McRanie, Esquire, 9424 Baymeadows Road, Suite 220, Jacksonville, Florida 32256 by United States Mail; a copy has been furnished to Dennis A. Ross, Esquire, P.O. Box 1867, Lakeland, Florida 33802-1867 by United States Mail; a copy has been furnished to Ellen Lorenzen, Esquire, and John R. Dixon, Esquire, P.O. Box 172118, Tampa, Florida 33672-0118 by United States Mail; a copy has been furnished to Robert A. Ginsburg, Esquire, Stephen P. Clark Center, 111 N.W. First Street, Suite 2810, Miami, Florida 33128-1993 by United States Mail; a copy has been furnised to Robert A. McMillan, Esquire, Seminole County Services Building, 1101 East First Street, Sanford, Florida 32771 by United States Mail; a copy has been furnished to Derrick E. Cox, Esquire, 201 South Orange Avenue, Suite 640, Orlando, Florida 32801 by United States Mail; a copy has been furnished to Thomas H. McDonald, Esquire, 201 East Pine Street, 15th Floor, Orlando, Florida 32801 by United States Mail; and a copy has been furnished to Michael J. Valen, Esquire, 316 South Baylen Street, Suite

500, Pensacola, Florida 32501 by hand delivery on this the 21st day of December, 1995.

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