IN THE SUPREME COURT OF FLORIDA

ESCAMBIA COUNTY SHERIFF'S DEPARTMENT and ESCAMBIA COUNTY RISK MANAGEMENT Petitioners, vs. THOMAS GRICE, Respondent.	*	CASE NO. : 86, 327 District Court of Appeal, 1st District - No. 94-1950

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONERS

MARY E. CRUICKSHANK, ESQUIRE
McConnaughhay, Roland, Maida
& Cherr
Post Office Drawer 229
Tallahassee, Florida 32302-0229
Telephone: (904) 222-8121
Florida Bar No. 0898236

Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CASES

FLORIDA STATUTES

OTHER AUTHORITIES

INTRODUCTION

Petitioners, Escambia County Sheriff's Department and Escambia County Risk Management, the Employer and Servicing Agent, respectively, will be referred to individually as "Employer" and "Servicing Agent" and collectively as the "Employer/Servicing Agent" or "Petitioners."

Thomas Grice, the Claimant and Respondent, will be referred to as "Respondent" or "claimant."

Any reference to Amicus Curiae, State of Florida, Department of Insurance, Division of Risk Management will be referred to as Amicus, State of Florida.

References to the Record on Appeal will be designated by [R.___] with the appropriate page citation. References to the Initial Brief will be designated by [I.B.__] with the appropriate page citation. References to the Amended Answer Brief will be designated by [A.B.___] with the appropriate page citation.

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

ARGUMENT

I.

IT IS PERMISSIBLE UNDER FLORIDA LAW TO ALLOW THE EMPLOYER TO COMBINE BOTH SOCIAL SECURITY AND STATE RETIREMENT BENEFITS AND OFFSET PERMANENT TOTAL DISABILITY BENEFITS THAT WHEN ADDED THERETO EXCEED ONE HUNDRED PERCENT OF THE EMPLOYEE'S AVERAGE WEEKLY WAGE.[1]

Respondent argues in the Amended Answer Brief that neither the Florida Workers' Compensation Act nor the State Retirement Act specifically authorizes an offset against permanent total disability benefits or retirement benefits for receipt of the other. [A.B. 10]. He further contends that Florida law does not allow the stacking of different types of benefits to compute an offset. [A.B. 10]. In essence, Respondent asserts that since there is no statutory authority for the offset sought by Petitioners, this Court will have to create the offset. By advancing this argument, Respondent obviously ignores the plain language of the offset provision in Section 440.20(15), Florida Statutes (1985) and a line of relevant case law.

As set forth in the Initial Brief, the law of this state not only authorizes but, in fact, requires that an employer reduce an injured employee's compensation benefits under Chapter 440 to the extent that the combination of all benefits received by that

---

[1]In the Amended Answer Brief, Respondent rephrased the issues as set forth in the Initial Brief. For purposes of responding to the arguments raised in the Amended Answer Brief only, the undersigned has adopted the language in Respondent's Argument I and modified same slightly. Argument in response to both issues outlined in the Amended Answer Brief will be treated under the above heading.

injured worker exceeds 100% of his average weekly wage. Section 440.20(15) embodies this mandate and provides as follows:

> When an employee is injured and the employer pays his full wages or any part thereof during the period of disability . . . the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded. . . .

§ 440.20(15), Fla. Stat. (1985).

As noted in the Amicus Brief filed by the State of Florida, I.R.C. Rule 9 was the precursor to Section 440.20(15). [Amicus, State of Florida, Brief at 13]. Section 440.20(15) tracks almost identically the language of the former rule. [For full text of I.R.C. Rule 9 and Section 440.20(15), Florida Statutes, see the Appendix to this brief at pp. 13-16].

In Brown v. S.S. Kresge Co., Inc., 305 So. 2d 191 (Fla. 1974), this Court considered the applicability of I.R.C. Rule 9 where an injured worker, who was receiving employer-funded sick leave benefits, then sought workers' compensation benefits under Chapter 440. In concluding that the employer was entitled to an offset, this Court noted as follows:

> However, it is reasonable to conclude that workmen's compensation benefits when combined with sick leave insurance benefits provided by 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.

More recently, this Court in Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989), followed the rationale of its Brown decision. Specifically, the Court concluded that "the total

benefits from all sources cannot exceed the employee's weekly wage." Id. at 254 (emphasis added). See also Domutz v. Southern Bell Tel. & Tel. Co., 339 So. 2d 636 (Fla. 1976). This language confirms that an offset is mandatory when the combination of benefits is greater than the injured worker's average weekly wage. The First District Court of Appeal has consistently followed this Court's pronouncements on the offset issue. See, e.g., K-Mart v. Young, 526 So. 2d 965 (Fla. 1st DCA 1988); General Telephone Co. of Florida v. Willcox, 509 So. 2d 1270 (Fla. 1st DCA 1987); and Belle v. General Elec. Co., 409 So. 2d 182 (Fla. 1st DCA 1982).

In an attempt to distinguish the Barragan decision from the instant case, Respondent contends that the Barragan holding applies only when the retirement plan at issue contains an offset provision and the sum of the injured employee's workers' compensation benefits and retirement benefits exceed his average weekly wage. [A.B. 11]. Not only has the First District Court of Appeal squarely rejected Respondent's interpretation of the Barragan decision, but such a strained interpretation of this Court's holding in Barragan defies common logic. See Grice v. Escambia County Sheriff's Dept., 658 So. 2d 1208 (Fla. 1st DCA 1995).

The pension offset in Barragan was a dollar-for-dollar offset authorized by a local ordinance. This Court held the ordinance invalid based upon the Legislature's repeal of Section 440.09(4), Florida Statutes (1971), which allowed for the reduction of a public employee's workers' compensation benefits by the amount of

his or her pension benefits. Since there was no longer this dollar-for-dollar offset for public employees after the repeal of Section 440.09, this Court found the local ordinance in contravention of Section 440.21, Florida Statutes. Section 440.21 prohibits an employer from deducting workers' compensation benefits from an employee's pension benefits and vice versa. See Barragan, 545 So. 2d at 254.

Apparently, Respondent believes that this Court's decision in Barragan hinged, at least in part, upon the existence of an invalid offset provision. It is clear, however, from this Court's language in the Barragan opinion that the illegal offset provision had no bearing upon its decision to permit the City of Miami to offset workers' compensation benefits by the amount that the combination of pension and workers' compensation benefits exceeded an injured employee's average weekly wage. Instead, the Court based its decision to permit an offset on sound legal precedent. See Brown, 305 So. 2d 191 (Fla. 1974).

As the First District Court of Appeal noted in its opinion below, this Court relied upon its earlier ruling in Brown where, in the absence of any offset provision in the sick leave policy at issue, the Court allowed an offset when the combination of benefits exceeded the employee's average weekly wage. Grice, 658 at 1210. Likewise, whether or not the retirement plan here contained an offset provision is irrelevant. Under Barragan, the only pertinent inquiry is whether the total amount of combined benefits exceeds the employee's pre-disability earnings. If so, the employer must

offset the employee's workers' compensation benefits to the extent the employee's combined employer-provided benefits exceed his average weekly wage.

The offset discussed in Barragan and contained in Section 440.20(15) is not optional; it is mandatory. To consider it otherwise would be to open the door to a rapid erosion of the workers' compensation system. That is, allowing injured workers to receive more than their pre-injury earnings in combined disability benefits will allow those individuals to profit by their injuries. The workers' compensation law of this state was designed to assist injured workers through the disability period, not to reward them for being hurt on the job.

Respondent attempts to distinguish Barragan on another point. He argues that the case only applies to those situations in which the sum of both pension benefits and workers' compensation benefits exceed 100% of the employee's average weekly wage. [A.B. 11]. The ruling in Barragan is not as narrow as Respondent suggests. That is, this Court did not indicate that an offset could be taken only in the limited circumstance where pension and workers' compensation benefits alone combine to exceed the 100% cap. Rather, this Court concluded that "the total benefits from all sources cannot exceed the employee's average weekly wage." Barragan, 545 So. 2d 254 (emphasis added). Whether the excess in benefits results from a combination of only workers' compensation and pension benefits, or a combination of various employer-provided benefits, Barragan commands that workers' compensation benefits be reduced by the

amount in excess of the 100% cap.

Respondent next urges that the facts of this case are analogous to those in the case of City of Pensacola v. Winchester, 560 So. 2d 1273 (Fla. 1st DCA 1990), rev. den., 574 So. 2d 140 (Fla. 1990). [A.B. 13]. In Winchester, the claimant's pension plan included a contractual provision that an employee would be entitled to the pension benefits in addition to workers' compensation benefits. Id. at 1274. Respondent argues that since he and the Escambia County Sheriff's Department entered into an employment contract which made him a member of the retirement system, he is entitled to receive his full retirement benefits despite the receipt of workers' compensation and social security benefits. [A.B. 13-14]. Once again, the First District Court of Appeal rejected Respondent's argument and found the Winchester decision wholly distinguishable. Grice, 658 So. 2d at 1210. Specifically, the District Court found that in Winchester, the claimant was, by express contractual terms, entitled to the full pension benefits, in addition to workers' compensation benefits. Id. In the case at bar, no such contractual provision exists to warrant the claimant's receipt of full pension and workers' compensation benefits. Winchester simply has no application here.

Contrary to Respondent's contention, both Section 440.20(15), Florida Statutes and the case law clearly establish that permanent total disability benefits must be offset by retirement benefits to the extent that the sum of the two benefits exceeds the employee's average weekly wage. The law is equally clear, however, that this

same offset must be applied when the sum of an employee's pension benefits, social security disability benefits and workers' compensation benefits exceed the 100% cap. To conclude otherwise would require this Court to ignore its pronouncements in previous decisions and the plain language of Section 440.20(15).

Respondent notes that Petitioners and one of the Amicus Curiae rely on cases setting forth the policy that injured workers should not receive a windfall. He contends that those cases are inapplicable because they involved statutory provisions or I.R.C. rules allowing for an offset. [A.B. 16]. As set forth above, the statutory provision of Section 440.20(15) (and the former I.R.C. Rule 9) provides a means by which to prevent an injured worker from receiving a windfall when he is entitled to receive various forms of benefits on account of his disability. Just as the former I.R.C. Rule 9 guided this Court in finding that an offset did apply once an employee's total benefits reach the 100% cap,[2] Section 440.20(15) commands the same result in the case at bar. Accordingly, this case cannot be distinguished from cases such as Brown, Domutz, K-Mart, and Barragan on the basis that those cases involved statutory or rule authority for the offset sought, as Section 440.20(15) undoubtedly provides for an offset in the case at bar.

The only distinction between the above-cited cases and the instant case is that Brown, Domutz, K-Mart, and Barragan involved a two-way combination of benefits. Petitioners submit that the

[2]See Brown, 305 So. 2d 191 (Fla. 1974).

same principle set forth in those decisions applies to the instant case in which the only distinction is that the offset was based upon a three-way combination of benefits -- workers' compensation, state disability retirement and social security disability benefits. This factual difference is of no consequence as Section 440.20(15) neither expressly nor impliedly limits its application to situations where only two types of benefits are at issue. Instead, whenever an employer pays an employee's full wages, or any part thereof, the employer shall be entitled to offset workers' compensation benefits to the extent that the sum of all benefits exceed the average weekly wage. § 440.20(15); Barragan, 545 at 254.

In the case at bar, Petitioners paid Respondent his full wages, or a part thereof, in the form of retirement benefits, social security disability benefits and workers' compensation benefits. Therefore, the employer must reduce the amount of workers' compensation benefits paid to Respondent to the extent that the combination of benefits from all of these sources exceed Respondent's average weekly wage.

Respondent contends that Petitioners' windfall argument ignores the fact that the injury precludes him from improving his financial situation by 1) working part-time second employment; 2) working longer hours; 3) advancing in the company with an accompanying increase in salary; and 4) changing employment for a more lucrative position. [A.B. 17-18]. He seems to suggest that he should receive extra compensation for the loss of these potential

opportunities. This argument is wholly without merit. First, Respondent's contention is grounded upon nothing but mere speculation. There is no guarantee that in any employment situation, an individual, in the absence of injury, will have the opportunity to improve his financial situation by any of the means suggested by Respondent. Moreover, the purpose of the Workers' Compensation system is to compensate an injured worker based upon the earnings he was receiving at the time of the accident, not to compensate him based on some proposed financial condition in which he may have been but for the work-related accident. Section 440.14, Florida Statutes (1985) clearly illustrates this point:

> **Determination of pay.--**
> (1) Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation . . .

§ 440.14, Fla. Stat. (1985)(emphasis added).

There simply is no provision in the Workers' Compensation Act designed to compensate an injured worker for lost opportunities, especially opportunities as speculative as those alleged by Respondent.

Respondent has received the equivalent of his full wages from the employer. If Petitioners are not allowed to offset Respondent's workers' compensation benefits to the extent that the combination of benefits exceeds his pre-disability wages, the Respondent will not have been made whole but, rather, will have profited as a result of his injury. Such a result would undermine the intent of the Act -- to provide benefits to injured workers

while encouraging them to return to work and avoid on-the-job accidents.

Respondent reads the language in the reverse offset provision of Section 440.15(9)(a), Florida Statutes (1985) to preclude any offset for pension benefits. [For the full text of Section 440.15(9)(a), see Appendix to this brief at p. 17-18]. Specifically, Respondent concludes that since the Florida Legislature did not specifically provide for an offset for pension benefits under the social security offset statute, then no such offset exists. [A.B. 21].

Apparently, the claimant is suggesting that any time an injured worker receives social security benefits in conjunction with worker's compensation benefits, despite that individual's receipt of other forms of disability benefits, the employer is limited to an offset for social security benefits only, even if the result is to provide benefits in excess of his pre-injury wages. Respondent once again overlooks the language in Section 440.20(15) which forbids such a result.

Finally, the First District Court of Appeal concluded that social security benefits cannot be "stacked" with pension benefits to compute the offset discussed in Brown, Domutz, and Barragan because social security benefits are not entirely employer-funded. Grice, 658 So. 2d at 1211. As several Amici have discussed, the fact that social security (or any other benefit) is partially funded by the claimant is not dispositive of an employer's entitlement to the offset under Section 440.20(15). See City of

Miami v. Smith, 602 So. 2d 542 (Fla. 1st DCA 1991). Any time an employer pays a claimant his full wages, or any part thereof, during the period of disability, Section 440.20(15) authorizes an offset.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request this Court to answer the certified question in the affirmative and reverse the decision of the First District Court of Appeal.

Respectfully submitted,

MARY E. CRUICKSHANK
McConnaughhay, Roland, Maida,
& Cherr, P.A.
P. O. Drawer 229
Tallahassee, FL 32302-0229
(904) 222-8121
FLORIDA BAR ID NO. 0898236
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular United States Mail to Mr. James F. McKenzie, 905 E. Hatton St., Pensacola, FL 32503, Attorney for Respondent, Ellen Lorenzen and Mr. John Dixon, P.O. Box 172118, Tampa, FL 33672-0188; Mr. Thomas McDonald, 201 E. Pine St., 15th Floor, Orlando, FL 32801, Mr. Edward Dion, 307 Hartman Building, 2012 Capital Circle, S.E., Tallahassee, FL 32399-6583; David A. McCranie, 3733 University Boulevard, West, suite 112, Jacksonville, FL 32217, Derrick Cox, 201 S. Orange Ave., suite 640, Orlando, FL 32801, Thomas A. Tucker Ronzetti, Assistant County Attorney, 111 N.W. 1st St., suite 2810, Miami, FL 33128-1993, Dennis Ross, P.O. Box 1867, Lakeland, FL 33802-1867, Lonnie Groot, 1101 E. First St., #3, Sanford, FL 32771-1468 and Ann Robbins, 5907 106th Terrace, North, Pinellas Park, FL 34666, this 10th day of January, 1996.

Mary E. Cruickshank