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THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

WAL-MART STORES AND
CLAIMS MANAGEMENT, INC.

Petitioners

DOCKET NO. 90,757

First District Court of Appeal
DOCKET NO: 96-02764

CLAIM NO: 384-56-9384
D/A 12/13/90

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Appellee, GEORGE CAMPBELL, will be referred to as the Claimant.

Appellants, WAL-MART STORES, INC.. and CLAIMS MANAGEMENT, INC., will be referred to as the Employer, the Carrier, or collectively the Employer/Carrier.

References to the Record on Appeal will be designated by the letter "R" in parentheses followed by the appropriate page number in the Record.

Reference to Petitioners' Initial Brief will be designated by the letters "PB" in the brief.

STATEMENT OF THE FACTS

Respondent accepts the Petitioners' statement of the facts as being substantially accurate, with the following exception:

Petitioners' assert that it was their position before the Judge of Compensation Claims that it was illogical to include concurrent earnings in the Claimant's average weekly wage. (PB: 4). In fact, the issue presented to the JCC and to the first district court of appeal was how the concurrent earnings should be calculated. (R. 211-212). The Employer/Carrier's position was that the Claimant's average weekly wage should be calculated by adding up all of his earnings during the thirteen weeks prior to his accident and dividing by thirteen. (R. 212, 217-218, 264). The Employer/Carrier's position before the District Court of Appeals, First District of Florida, as set forth in their initial and reply briefs was that the Claimant's concurrent employment should be included in the Claimant's AWW. The Employer/Carrier first disputed the propriety of including concurrent earnings in the Claimant's AWW in their Motion for Rehearing before the First District Court of Appeal.

SUMMARY OF THE ARGUMENT

The question certified by the First District Court of Appeals involves an issue so narrow that, contrary to the District Court's conclusion, it is not of great public importance. The issue of how to determine an injured worker's average weekly **wage** where the worker was employed by one of his employers for substantially the whole of thirteen weeks prior to his accident and by **a** second employer for less than thirteen weeks will affect only a small segment of concurrent employment cases. With the clarification and guidance provided by the First District Court of Appeals in the present case, the Judges of Compensation Claims will be able to resolve these disputes without further clarification from this court. Accordingly, this court should decline to exercise discretionary jurisdiction in the present case.

If this court elects to exercise discretionary jurisdiction, this court should decline the Employer/Carrier's belated invitation to expand the scope of the present dispute beyond the issues argued in front of the JCC and the First District Court of Appeals. The Employer/Carrier seek to have this court review the holding in Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993), and determine whether concurrent earnings are even includable in an injured worker's average weekly wage in light of the 1990 legislative changes to Section 440.02(24), Florida Statutes. This court should find that the Employer/Carrier are procedurally barred from raising this issue for the first time before this court, and therefore limit the scope of review to the specific question

certified by the District Court. If this court chooses to address this issue, this court should approve the holding therein. Vegas, The en banc majority opinion in Vegas is well reasoned, supported by sound judicial interpretation of the legislative changes to the Workers' Compensation Act, and consistent with the historical evolution of cases involving concurrent earnings.

Finally, with regard to the question certified by the District court, this court should find that Judges of Compensation Claims are empowered to exercise discretion, within the legislatively established framework of Section 440.14, Florida Statutes, to establish an average weekly wage that fairly approximates an injured worker's lost earning capacity. The holding in American Uniform & Rental v. Trainer, 262 So.2d 193 (Fla. 1972) should not be limited to sub-section 440.14 (1) (a), Florida Statutes even where such a limitation would result in an average weekly wage that does not fairly represent the injured worker's lost earning capacity.

ARGUMENT

I. Whether the instant case is of sufficient importance for this honorable court to accept jurisdiction.

The question certified by the First District Court of Appeals in the present case directly echoes the issue presented by the parties to the JCC. Specifically, the issue was whether the Claimant's concurrent earnings with Krystal, Inc., should be calculated by dividing his actual earnings by the number of weeks worked or whether those earnings should be added to the earnings with the Employer and divided by thirteen, With all due respect to the First District Court of Appeals, this is not an issue that arises with any significant frequency and resolution of this issue will not significantly reduce litigation.

Petitioners assert that resolution of this issue will effect all future AWW disputes involving concurrent employment. In fact, this issue only arises in a small segment of concurrent employment cases. Concurrent employment cases make up a very small segment of the litigated average weekly wage issues. Of those, the present issue will only arise in the few cases where an employee suffers an accident after having completed at least thirteen weeks with the employer, but fewer than thirteen weeks with the concurrent employer. This subset of concurrent employment cases does not appear to be substantial.

Petitioners argue that employer/carriers "have always balked when confronted with the concurrent employment question", suggesting that it is not fair to compel employer/carriers to pay

a claimant disability benefits that exceed the salary paid to that claimant. (PB: 9). However, this argument is wholly irrelevant to the issue pending before this court and fails to acknowledge that accepting jurisdiction in the present case will do nothing to relieve employer/carriers of this perceived unfairness. As Petitioners acknowledge, the only period during which any question arose concerning the inclusion of concurrent earnings was during the period from July 1, 1990, to December 31, 1993. Effective January 1, 1994, the legislature amended the definition of wages to include concurrent employment, thereby eliminating any argument that concurrent earnings should not be included in the average weekly wage. Thus, even if this court accepts jurisdiction in the present case, employer/carriers will continue to be confronted by concurrent employment questions.

Petitioners are correct that the decisions from the First District Court of Appeal appear inconsistent and precedential authority can be found in support of the positions of each party in the present case. However, with the opinion rendered by the District Court in the present case, the prior inconsistencies have been harmonized and the judges of compensation claims have been provided with necessary guidance in evaluating similar AWW disputes in the future. Additionally, it appears that the resolution reached by the First District Court of Appeals will reduce the number of appeals involving concurrent employment. Where the JCC is vested with discretion to weigh the evidence and determine a fair and reasonable AWW pursuant to Section 440.14(1)(d), as noted

by the District Court in present case, the standard of review on appeal will be whether the JCC abused his discretion.

Despite having failed to dispute the inclusion of the Claimant's concurrent earnings in his average weekly wage before the Judge of Compensation Claims or in their briefs before the First District Court of Appeal, the Employer/Carrier seek to have this court expand the issue to determine whether concurrent earnings are properly includable in the Claimant's AWW. Although if the Court accepts jurisdiction in the present case it may consider any issue relevant to the case, P.K. Ventures, Inc. v. Raymond James & Associates, Inc., 690 So.2d 1296, 1297 (Fla. 1997), this court should decline the Employer/Carrier's invitation to expand the issue in the present case. This court should find that the Employer/Carrier is procedurally barred from raising this issue for the first **time** in this court.

This court should deny the Employer/Carrier's Petition for Writ of Certiorari and allow the decision of the First District Court of Appeals to stand.

II. Whether concurrent **earnings are properly included in an injured worker's average weekly wage under the terms of Section 440.14, Florida Statutes and Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993).**

As discussed above, this court should decline the employer/carrier's invitation to reach the issue of whether earnings from concurrent employment should properly be included in an injured worker's average weekly wage. Although respondent recognizes that if this court assumes jurisdiction, it has the

discretion to consider any issue affecting the case, P.K. Ventures, Inc., 690 So.2d at 1297, this court should not expand the scope of the issues in the present case beyond the issue raised in the certified question. Revising the holding in Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1990), will create uncertainty and litigation where there is currently no uncertainty and very little litigation. In contrast, it will not provide any meaningful guidance in the vast majority of cases because of the very limited period during which the provisions of Sections 440.02(24) and 440.14, Florida Statutes (1990) were in effect, viz. July 1, 1990 to December 31, 1993. Even if this court elects to review the holding in Vegas, it should be found that the decision was founded upon sound and proper application of principles of statutory construction and therefore approved.

The only cases affected by the holding in Vegas are those involving accidents which occurred between July 1, 1990 and December 31, 1993. Effective July 1, 1990, the legislature amended the definition of "Wages" contained in Section 440.02(24). The relevant portion of the change provided, "Wages... includes only the wages earned on the job where he or she is injured and does not include wages from outside or concurrent employment..." Although the legislature substantially revised many portions of the Workers' Compensation Act in 1990, it did not make any substantive changes to Section 440.14, Florida Statutes. In 1993, the legislature once again substantially revised the Workers' Compensation Act and changed the above quoted language in Section 440.02(24) to

specifically include concurrent earnings.

In Vegas, the majority's en banc opinion, written by Justice Kahn, was extremely thorough in analyzing the legislative changes. The Court analyzed the changes in light of the history of concurrent employment opinions issued by this court. Id. at 79-80. The Court analyzed the legislative changes in light of several other portions of the Workers' Compensation Act. Finally, the court compared and contrasted the effect that the definition of "wages" has had in cases involving fringe benefits versus concurrent employment cases. In the end, the majority of the court, concluded that the changes to Section 440.02(24), Florida Statutes were not sufficient to effect a change in the interpretation of Section 440.14, with regard to concurrent employment.

With regard to the evolution of concurrent employment cases, the Court noted that this Court did not rely upon the definition of "wages" to reach the conclusion that earnings from concurrent similar employments could be combined to determine an injured worker's AWW in J.J. Murphy & Sons v. Gibbs, 137 So.2d 553 (Fla. 1962). Vegas at 80. "The J.J. Murphy case as a whole demonstrates quite clearly that the supreme court in no way questioned the proposition that the computation of AWW under section 440.14 could include concurrent employment." Vegas at Id.. The Court also found it significant that no reference was made to the definition of "wages" in American Uniform & Rental Service v. Trainer, 262 So.2d 193 (Fla. 1972), when the rule was expanded to allow the

combining of concurrent dissimilar employments. Vegas at Id.. In each of the cases establishing that earnings from concurrent employment must be included in the average weekly wage, this court confined its analysis to the provisions of Section 440.14.

After considering the evolution of concurrent employment opinions, the Veqas court looked to the amended legislative intent expressed in Section 440.15, Florida Statutes (1990). The legislative intent provides:

> [T]he reductions in benefits provided in this Act are necessary to ensure rates that will allow employers to continue to comply with the statutory requirement of providing workers' compensation coverage but are nonetheless calculated to provide an adequate level of compensation to injured employees.

Id. at 81. The court noted that the exclusion of concurrent earnings in the case of an individual who is required to earn his living through multiple employments "either overlooks the intent to provide an adequate level of compensation, or renders the term 'adequate' meaningless." Id.

In addition to the apparent conflict between the exclusion of concurrent earnings from the AWW and the statutory intent, Veqas also notes a conflict with Section 440.15(3) and (4), permanent and temporary wage loss benefits. Wage loss benefits are calculated by multiplying the claimant's AWW by 80%, subtracting their weekly post injury earnings from this sum, and then multiplying this sum by 80%. Each of these sections require that an injured worker's wage loss benefits "shall be based on actual wage loss." However, if concurrent earnings are excluded from the AWW, then the wage loss formula does not lead to benefits that reflect their "actual

wage loss."

Petitioners argue at some length that the First District Court of Appeals has repeatedly referred to the definition of "wages" to determine what forms of compensation should be included in the AWW calculation. However, in Vegas the court acknowledged this fact and explained that unlike most fringe benefit issues, concurrent employment cases have always hinged upon the language contained in Section 440.14 and the court refused to depart from the plain language of Section 440.14. Id. at 83. Ultimately, the holding in Vegas appears to have been founded upon the conclusion that "the legislature may not... change substantive law by merely expressing its intent. It is also necessary to amend the controlling substantive statute, which in this case is section 440.14" Id. at 84 and n.8. This conclusion is well supported and the holding in Vegas should be adopted by this court.

Overturning the holding in Vegas, as urged by Petitioners, would lead to significant turmoil. Employer/Carriers would immediately recalculate the average weekly wage of many injured workers. Sadly, considering the provisions of Section 440.15(3), Florida Statutes (1990), which places limits on wage loss eligibility depending on the injured worker's permanent impairment rating, it appears likely that the individuals still receiving compensation benefits as a result of an accident that occurred more than three years ago are likely to be the most severely injured. Nonetheless, after the average weekly wage is recalculated, any workers injured on their part time job would likely be required to

litigate to determine their average weekly wage pursuant to the similar employee provisions of Section 440.14(1)(c), or their full time weekly wages under Section 440.14(1) (d), Florida Statutes (1990). Cf. Jones Shutter Products, Inc. v. Jackson, 185 So.2d 476 (Fla. 1966) (employee's AWW must be calculated based upon similar employee, rather than part-time worker provisions where he worked part time for the employer and full time in concurrent dissimilar employment). Thereafter, either the claimant will seek recovery of an underpayment from the employer/carrier or, more likely, the employer/carrier will seek repayment of any overpayments made to the claimant. See Section 440.15(13), Florida Statutes (1994), and Brown v. L.P. Sanitation, 689 So.2d 332 (Fla. 1st DCA 1997) (holding provisions of S. 440.15(13) procedural and therefore allowing employer/carriers to recover overpayments occurring subsequent to January 1, 1994, in all cases).

In addition to the foregoing, litigation will arise regarding the proper calculation of temporary partial wage loss and permanent wage loss benefits under Sections 440.15. As addressed in Parrott v. City of Fort Lauderdale, 190 So.2d 326 (Fla. 1966), if concurrent earnings are excluded from an injured workers' average weekly wage, then fairness dictates that those same concurrent wages should not be used to reduce the claimant's post-injury disability or wage loss benefits.

As the Employer/Carrier failed to object to the inclusion of concurrent employment in the Claimant's AWW before the JCC and first raised this objection in a meaningful manner in their motion

for rehearing or rehearing en banc before the First District Court of Appeal, this court should find that they are procedurally barred from raising it in this Court. An issue not raised in the trial court or district court is not properly before the Supreme Court State v. Dupree, 656 So. 430 (Fla. 1995). Similarly, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Even if the issue is not considered to be procedurally barred, this court should decline to expand the issue raised by in the question certified by the District Court of Appeal. If this court chooses to address this issue, the District Court's opinion in Vegas should be approved.

III. Whether American Uniform & Rental Co. v. Trainer, 262 So.2d 193 (Fla. 1972), mandates the use of Section 440.14(1) (a) rather than Section 440.14(1)(d), where the injured employee has worked for the requisite 13 weeks for the employer but has worked for less than 13 weeks in the concurrent employment.

The holding in American Uniform & Rental Co. v. Trainer, 262 So.2d 193 (Fla. 1972) should not be construed as limiting all concurrent employment cases to determination under the provisions of Section 440.14(1) (a), Florida Statutes. Petitioners argue that language peculiar to subsection (1) (a) is the only basis upon which concurrent earnings can be included in an injured worker's average weekly wage and therefore the thirteen week method must be utilized to determine the Claimant's average weekly wage. However, such a restrictive construction is contrary to the purpose of the Workers'

Compensation Act, would result in inequitable results for many workers, and is not mandated by the provisions of Section 440.14.

Professor Larson's oft quoted treatise explains the objective of the average weekly wage calculation as follows:

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis. 2 Larson, The Law of Workmen's Compensation, Sec. 60.11(d), pp. 10-564 (1986).

Similarly, in Trainer, this Court noted:

> The purpose of the [Workers' Compensation1 Act is to compensate for loss of wage earning capacity due to work-connected injury. It is the capacity of the 'whole man' not the capacity of the part-time or full-time worker that is involved."

Id. at 194.

The need for flexibility to properly determine an injured worker's average weekly wage has long been established. In Wilkes & Pittman v. Pittman, 92 So.2d 822 (Fla. 1957), this court affirmed the Florida Industrial Commission's power to adopt a rule construing the phrase "substantially the whole of thirteen weeks" as contained in section 440.14(2), now 440.14(1)(b), as meaning 90 percent of the customary full time hours. However, in so doing, the court noted:

> We think the petitioners need not fear that because of the commission's brave effort, that meaning will become

> so crystallized that unjust administration of the act will result or that the legislative purpose will be thwarted. The rule prescribes a length of service measured as '90 per cent of the total customary full-time hours,' etc. We have italicized the word [customary] which we assume makes the rule adjustable to the particular job in question.

Id. at 825.

This need to allow the JCC's some discretion in arriving at a proper average weekly **wage** under the particular facts of a given case was endorsed **by** the First District Court of Appeals. In Florida Cast Stone v. Dehart, 418 So. 1271, 1272 (Fla. 1st DCA 1982), the court explained the role of the deputy commissioner/judge of compensation claims:

> [Tlhe deputy's task was... to determine the full-time weekly wages of the injured employee, section 440.14(4), by applying the statutory guidelines "reasonably and fairly . . . to the facts proven."... In this the deputy was not a cipher or a calculating robot, but was a judge of claimant's unique employment situation.

As did the First District court of Appeals in Dehart, this court should acknowledge the JCC's role as the finder of fact and allow the appropriate discretion to determine an injured worker's average weekly wage under the specific facts of the case. Absent **a** clear abuse of discretion, the JCC's resolution of this issue should not be reversed on appeal.

As noted by Professor Larsen, the calculation of an injured worker's AWW "is not intended to be automatic and rigidly arbitrary", 2 Larson, The Law of Workmen's Compensation, S. 60.11(a), p. 10-638 (1992), as there are a vast number of variables that might figure into the determination of an injured worker's AWW. Obviously the JCC's resolution of the AWW issue must adhere

to the framework of the statute, but absent an abuse of discretion in applying the law to the facts of a given case, the JCC's determination of an injured worker's AWW should be upheld.

This court should answer the certified question in the negative and hold that a JCC may consider the provisions of Section 440.14(1)(d), Florida Statutes in establishing an AWW that fairly and reasonably approximates an injured worker's full time weekly wages.

CONCLUSION

This court should find that the holding in American Uniform & Rental v. Trainer, 262 So.2d 193 (Fla. 1972), does not require the use of the thirteen week method set forth in Section 440.14(1)(a), Florida Statutes (1990), in every concurrent employment case in which an injured worker has worked in one of the employments for substantially the whole of thirteen weeks prior to the accident. Such a mechanistic application of the statute defies the very purpose of calculating an injured worker's average weekly wage, which is to fairly approximate the worker's lost earning capacity resulting from their compensable injury. This court should find that within the framework of Section 440.14, Florida Statutes, a Judge of Compensation Claims has discretion in the proper case to rely upon the provisions of Section 440.14(1)(d) to establish an average weekly wage that fairly and reasonably reflects the injured worker's lost earning capacity. Accordingly, the determinations reached by the First District Court of Appeals and the Judge of Compensation Claims in the present case should be affirmed.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 11th day of August, 1997 to WILLIAM H. ROGNER, 201 South Orange Avenue, Suite 640, Orlando, FL 32801, Attorney for PETITIONERS, WAL-MART STORES, INC. and CLAIMS MANAGEMENT, INC..

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