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THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

WAL-MART STORES and
CLAIMS MANAGEMENT, INC.,

Petitioners

v.

GEORGE CAMPBELL,

Respondent.

_____/

DOCKET NO. 90,757

FIRST DISTRICT COURT OF APPEAL
DOCKET NO: 96-02764

CLAIM NO: 384-56-9384

D/A : 12/13/90

INITIAL BRIEF OF PETITIONERS

William H. Rogner, Esquire
HURLEY & ROGNER, P.A.
201 South Orange Avenue, Suite 640
Orlando, Florida 32801

Counsel for Petitioners

Mark Tipton, Esquire
Post Office Box 700
Ocala, Florida 34478

Counsel for Respondent

This is an appeal from the decision of the First District Court of Appeal filed June 2, 1997.

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PRELIMINARY STATEMENT

The Petitioners, Wal-Mart Stores and Claims Management, Inc., will be referred to as "Petitioners" or the "employer/carrier". The Respondent, George Campbell, will be referred to as "Respondent" or the "claimant". The Judge of Compensation Claims will be referred to as the "JCC". Average weekly wage will be referred to as "AWW". References to the record on appeal will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE

The claimant was injured in a compensable accident on 12/13/90. His attorney filed a Request for Assistance seeking an increase in the AWW to include concurrent earnings, and for authorization of a psychiatrist on 04/19/95. (R 2) A Petition seeking the same benefits was filed on 05/25/95. (R 5) A second Petition was filed on 10/19/95 seeking authorization of physical therapy. (R 24) Neither the psychiatric issue nor the physical therapy issue are the subject of this appeal.

A pretrial stipulation was completed by the parties in May, 1996. (R 37) The trial occurred on 06/18/96 before the Honorable JCC Ohlman in Ocala. (R 211) The JCC entered an Order on 06/28/96 finding that the claimant was entitled to concurrent earnings calculated by a method proposed by the claimant. (R 251) The employer/carrier filed a Motion for Rehearing on 07/02/96. (R 263) Following argument from both attorneys the JCC denied the Motion for Rehearing. (R 249) This timely appeal followed. (R 270)

The First District Court of Appeal entered its original opinion on 04/04/97. Wal-Mart Stores, Inc. v. Campbell, 22 FLW D880 (Fla. 1st DCA April 4, 1997). In that opinion the First District affirmed the JCC's ruling. 22 FLW at D883. The employer/carrier filed a Motion for Rehearing and Motion for Rehearing En Banc. On 06/02/97 the First District withdrew its original opinion and filed a new opinion once again affirming the JCC's ruling. Wal-Mart Stores, Inc. v. Campbell, 22 FLW D1399

(Fla. 1st DCA June 2, 1997). The First District certified the following question as one of great public importance:

> "Whether American Uniform and Rental Service v. Trainer, 262 So.2d 193 (Fla. 1972), mandates use of §440.14(1)(a), Fla.Stat., to determine average weekly wage in all cases where the claimant has worked in one employment for substantially the whole of thirteen weeks prior to the industrial accident, but has worked in a concurrent employment for only a portion of the thirteen week period, by combining the total earnings in both employments and dividing by thirteen, or whether in such cases the legislature intended use of §440.14(1)(d) to determine average weekly wage as a fair and reasonable approximation of 'the full-time weekly wages of the injured employee."'

A timely Notice to Invoke the Discretionary Jurisdiction of this Court was served on 06/06/97.

STATEMENT OF THE FACTS

The claimant was injured in the course and scope of his employment with Wal-Mart Stores, Inc. on 12/13/90 while using a pallet jack. (R 255) He slipped and fell and two bird baths fell on his head. (R 255) At the time of the accident, the claimant was employed both by Wal-Mart Stores, Inc. and by Krystal, Inc. (R 214) Following his injury, the claimant returned to work with Wal-Mart Stores, Inc., but did not return to work with Krystal, Inc.

The parties stipulated to the wages earned by the claimant with both Wal-Mart Stores, Inc. and Krystal, Inc. (R 198) The parties differed, however, regarding the calculation of any concurrent earnings which might be includable in the AWW. The claimant's position was that separate AWW's should be calculated for each employment and then the two AWW's should be combined to calculate the overall AWW. Thus, the claimant argued that his AWW should be calculated by adding the AWW from Wal-Mart Stores, Inc. to the separately calculated AWW from Krystal, Inc., resulting in an "overall" AWW of $211.38. (R 212)

The employer/carrier's position was that it was completely illogical, given the plain language of the statute, to include any concurrent employment at all. (R 217) However, under the controlling case of Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993), the employer/carrier argued that the appropriate method was to add up all wages in any and all covered employments the claimant held during the thirteen weeks preceding his accident and to divide by thirteen. (R 217) .

The JCC, relying on language in prior cases suggesting that an "equitable" rate should be reached, rejected the position of the employer/carrier and adopted the position of the claimant. (R 256) The JCC ruled that the claimant's AWW is $211.38 rather than $178.92 as argued by the employer/carrier. (R 257) An appeal followed. (R 271)

SUMMARY OF ARGUMENT

This Honorable Court should accept jurisdiction in this case. Concurrent earnings have been one of the most litigious issues in workers' compensation. According the First District's own admission in the instant case, the cases are inconsistent and need this court's clarification. The outcome of this case will affect all concurrent earnings issues under all versions of the workers' compensation law.

In the instant case the First District in this case incorrectly held that Section 440.02(24), Fla. Stat. (1990) has no applicability when interpreting Section 440.14, Fla. Stat. (1990). In every single AWW case, other than those addressing concurrent earnings, the First District has repeatedly held that Section 440.02(24) does apply to interpretations of Section 440.14. Only in the case of concurrent earnings does the court take the completely irreconcilable position that Section 440.02(24) has no applicability whatsoever.

The JCC misapplied Section 440.02(24), Fla. Stat. (1990), Section 440.14, Fla. Stat. (1990), and American Uniform and Rental Service v. Trainer, 262 So.2d 193 (Fla. 1972). The statute specifically excludes concurrent earnings. In Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993), the First District found that very specific language in Section 440.14(1)(a) requires the inclusion of concurrent earnings despite the statutory exclusion. 627 So.2d at 85. In the instant case, the JCC applied

Section 440.14 without referencing any specific sub-section. The First District chose to apply Section 440.14(1)(d) sua sponte.

The First District erred in requiring the inclusion of concurrent earnings under Section 440.14(1)(d) because it does not contain the same operative language contained in Section 440.14(1)(a) that required the inclusion of concurrent earnings in Vegas. Rather, Section 440.14(1)(d) simply refers to "wages" which specifically excludes concurrent earnings under the 1990 statute. If the First District was correct in Vegas then the court should have applied the combined wages approach mandated in Trainer. Otherwise, this court should reverse the instant case, overrule Vegas in its entirety, and hold that concurrent earnings are not includable under the 1990 workers' compensation statute.

CERTIFIED QUESTION: WHETHER AMERICAN UNIFORM AND RENTAL SERVICE V. TRAINER, 262 SO.2D 193 (FLA. 1972), MANDATES USE OF §440.14(1)(A), FLA.STAT., TO DETERMINE AVERAGE WEEKLY WAGE IN ALL CASES WHERE THE CLAIMANT HAS WORKED IN ONE EMPLOYMENT FOR SUBSTANTIALLY THE WHOLE OF THIRTEEN WEEKS PRIOR TO THE INDUSTRIAL ACCIDENT, BUT HAS WORKED IN A CONCURRENT EMPLOYMENT FOR ONLY A PORTION OF THE THIRTEEN WEEK PERIOD, BY COMBINING THE TOTAL EARNINGS IN BOTH EMPLOYMENTS AND DIVIDING BY THIRTEEN, OR WHETHER IN SUCH CASES THE LEGISLATURE INTENDED USE OF §440.14(1)(D) TO DETERMINE AVERAGE WEEKLY WAGE AS A FAIR AND REASONABLE APPROXIMATION OF 'THE FULL-TIME WEEKLY WAGES OF THE INJURED EMPLOYEE.'

For the following reasons this Honorable Court should rule that the use of §440.14(1)(a) is mandated in all cases where the claimant has worked substantially the whole of the thirteen weeks in the employment where he was injured. If this Honorable Court concurs with the First District that §440.14(1)(d) applies, then the Court should rule that concurrent earnings should have been excluded from the AWW.

ISSUE I: WHETHER THE INSTANT CASE IS OF SUFFICIENT IMPORTANCE FOR THIS HONORABLE COURT TO ACCEPT JURISDICTION.

Petitioners concur with the First District Court of Appeal that this case is of extreme public importance. Concurrent employment has been one of the most litigated and most controversial workers' compensation issues over the years. Since this Court decided J. J. Murphy & Son, Inc. v. Gibbs, 137 So.2d 553 (Fla. 1962), the JCC's, the First District Court of Appeal, and this Court have repeatedly wrestled with concurrent employment

issues. There are three primary reasons that this Court should accept jurisdiction in the instant case.

First, concurrent employment is an important issue that needs clarification. Employer/carriers have always balked when confronted with the concurrent employment question. It simply does not seem fair that an employer/carrier can be compelled to pay a claimant disability benefits that exceed the salary paid to that claimant by the employer. When concurrent employment is involved, employer/carriers often find themselves paying benefits that are in excess of the calculated exposure at the time the premiums and reserves are set. The countervailing concern of the injured worker is that he or she may suffer a loss in earnings that is far greater than the wages paid at the job where the injury occurs.

A decision in this case will affect not only those cases with dates of accident from 07/01/90 through 12/31/93, but all cases in which concurrent earnings are at issue. This case involves both the requirement under the 1990 version of the statute that concurrent earnings be included at all, and the method of calculating concurrent employment that is applicable to all dates of accident. Thus, this is a very important issue that will continue to recur until this Court provides some firm guidelines.

The second reason this Court should accept jurisdiction is because the First District's decisions have been extremely inconsistent. An analysis of the First District's opinion in this case demonstrates a vain attempt to reconcile all of the prior opinions and, in some cases, to change the holdings of those

opinions. As in the instant case, concurrent employment issues always involve controlling precedent that supports both sides of the issue. The issue needs clarity and this Court is the only one that can provide it.

The final reason that this Honorable Court should accept jurisdiction in this case is because this Court is the great equalizer in the workers' compensation system. In most areas of the law, case law has a chance to develop in multiple districts. Different courts in different parts of the state reach different conclusions in many cases, reflecting a wide variety of ideas and arguments. In the workers' compensation system, however, we have but one district court of appeal to hear our cases. Thus, we are left with a single court's perspective on workers' compensation.

Because of the nature of the workers' compensation appellate system, we do not have conflicts between districts that lead to clarifications by this Honorable Court. Rather, we have a workers' compensation system that is primarily interpreted by five judges at the First District Court of Appeal. When those judges decide a case like **Vegas**, or like the instant case, there is usually no opportunity to appeal. When the First District, as they have done in this case, asks this Court to decide the question, this Honorable Court should accept jurisdiction and hear the merits.

ISSUE II: WHETHER THE FIRST DISTRICT COURT OF APPEAL INCORRECTLY HELD THAT §440.02(24), FLA.STAT. (1990) HAS NO APPLICABILITY WHEN INTERPRETING 5440.14, FLA.STAT. (1990).

If not for Blanca E. Vegas, the instant case would not exist. In 1990, the legislature amended the definition of "wages" in order to exclude concurrent earnings from the calculation of the AWW. §440.02(24), Fla.Stat. (1990). At that point, nearly everyone in the state other than Ms. Vegas and her attorneys assumed that concurrent earnings were no longer includable in calculating the AWW. Ms. Vegas proved us all wrong in Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993).

In Vegas, the claimant was injured on 07/02/90 when she tripped on a rug in the course of her employment with Globe Security. 627 So.2d at 77. At the time of her accident she was also working for another employer. Id. At trial, the JCC ruled that concurrent earnings were not includable under the plain language of §440.02(24). Id.

On appeal, the First District held that "wages" and "average weekly wages" were dissimilar terms that had no relationship to each other. Id. at 78. The Court conceded that the intent of the change to the definition of "wages" was to exclude concurrent earnings from the AWW. Id. at 84. The Court even reviewed the legislative history which demonstrated such an intent. Id. The Court concluded, however, that the legislative intent could not overcome the "plain language" of the statute. Id.

The ultimate Vegas holding was that changes to the definition of "wages" mean nothing when addressing the AWW in the context of

concurrent employment, The Court failed to reconcile, however, the obvious futility of amending a meaningless statute. The only place in the workers' compensation law that the definition of "wages" has any applicability is in connection with the AWW. The Vegas Court's conclusion was that the legislature changed the words in the statute but did not change the meaning of the statute. Petitioners respectfully assert that Vegas was an example of legislation by judicial fiat. The Court did not like the change to the statute so the Court ignored the change to the statute.

Not only was the Vegas Court's conclusion nonsensical in light of the plain statutory language and intent of the legislature, it is completely inconsistent with cases that were decided both before and after the Vegas decision. For every AWW issue other than concurrent employment, the First District has found the definition of "wages" to be controlling.

In Miller v. Bends Service Station, Inc., 417 So.2d 266 (Fla. 1st DCA 1982), the issue was whether commissions were includable in the AWW. In a rather summary opinion, the First District held that because commissions fell under the term "wages" they must be included in a determination of the AWW. Id. at 267. Thus, the Court recognized that the definition of "wages" controlled what could be included in the AWW.

In Viking Sprinkler Co. v. Thomas, 413 So.2d 816 (Fla. 1st DCA 1982), the Court addressed the inclusion of an expense allowance in the AWW. The Court concluded that the inclusion of the expense allowance comported with the statutory definition of "wages" and

therefore should be included in the AWW calculation. Id. at 817.

Another case addressing commissions was Witzky v. Westcoast Duplicating & Claims Center, 503 So.2d 1327 (Fla. 1st DCA 1987). The Whitzky court held that wages earned, but not paid, during the 13 weeks preceding the accident should be included in the AWW. Id. at 1328. In so doing, the First District once again looked to the definition of wages. Id.

There are many other cases decided prior to the 1990 statutory amendment to the definition of "wages" and every single one of them is consistent. When the Court was deciding what was includable in the AWW they looked to the definition of "wages" each and every time. The question of whether or not concurrent earnings were includable in the AWW had already been decided. It was decided years ago under the then-expansive definition of "wages". Effective 07/01/90 the legislature amended the definition of "wages" to exclude both certain fringe benefits and concurrent earnings. §440.02(24), Fla.Stat. (1990).

Many cases interpreting that statutory change were decided in the years following the amendment. The cases were of two types. The first were the fringe benefit cases where the Court consistently held that the definition of "wages" was controlling in the calculation of the AWW. The second type of cases were the concurrent earnings cases which began with Vegas. They universally held that the definition of "wages" had nothing to do with the calculation of the AWW. The two lines of cases are completely irreconcilable.

In Rudd Sod Co. v. Reeves, 595 So.2d 254 (Fla. 1st DCA 1992), the Court addressed the 1990 change to the definition of "wages". In this per curium opinion, the First District held that the statutory amendment to the definition of "wages" was controlling on the issue of which fringe benefits could be included in the AWW. Because the JCC had allowed the inclusion of fringe benefits that would have been includable in the AWW prior to the change to the definition of "wages", the First District remanded the case to the JCC to readdress the AWW issue and exclude the fringe benefits. Id. Thus, the Court recognized that the definition of "wages" was controlling in AWW calculations.

The First District compared and contrasted the pre-1990 and post-1990 definitions of "wages" in Value Rent-A-Car v. Liccardo, 603 So.2d 680 (Fla. 1st DCA 1992). The issue was when and under what circumstances tips could be included in the AWW. Id. In reaching its holding, the court focused very specifically on the new definition of "wages". Id. at 682.

Since 1993, the year the First District decided Vegas, multiple cases have been decided involving what may be included in the AWW. For every issue other than concurrent employment, the First District looks to the definition of "wages". For example, in Cable Vision of Central Florida v. Armes, 629 So.2d 274 (Fla. 1st DCA 1993), the First District reversed the JCC's inclusion in the AWW of various fringe benefits that would have been included prior to the statutory amendment to the definition of "wages" in 1990.

In Mehrer v. Creative Hair Dressers, Inc., 659 So.2d 333 (Fla. 1st DCA 1995), the issue was whether certain tips were includable in the AWW. In addressing the issue, the First District turned to the definition of "wages". Id. at 334. The Court went so far as to quote the definition of "wages":

> "'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and includes only the wages earned on the job where the employee is injured and does not include wages from outside or concurrent employment... and gratuities to the extent reported to the employer in writing as taxable income received in the course of employment from others than the employer..." (excerpting and underlining in original).

The Court held that the phrase "and gratuities to the extent reported to the employer in writing as taxable income" was controlling in calculating the AWW. Of course, in Vegas this same Court held that the phrase that immediately preceded the underlined phrase was completely irrelevant in calculating the AWW.

As recently as this year the First District held that the definition of "wages" is controlling in determining the AWW. In Curry Industries v. Maringer, 691 So.2d 4 (Fla. 1st DCA 1997) the First District held that the JCC improperly concluded that the employer's contributions to the claimant's pension and Medicare benefits were includable in the AWW. Id. The Court again expressed that the 1990 changes to the definition of "wages" controlled the determination of what could be included in the AWW.

Thus, in case after case, year after year, the First District repeatedly relies on the definition of "wages" when addressing the

AWW. Yet, at the same time, the Vegas court held that the "1990 amendment to the statutory definition of 'wages' in Section 440.02(24) did not affect the calculation of AWW under Section 440.14(1)." Wal-Mart Stores, Inc. v. Campbell, 22 FLW D1399, 1402 (Fla. 1st DCA June 2, 1997). The court went on to hold in the instant case that the Vegas ruling was not limited to any particular sub-section of Section 440.14, but rather applied to all sub-sections. 22 FLW at 1402. In fact, the court specifically clarified in the instant case that the term "full time weekly wages of the injured employee" is a term of art and that the definition of "wages" has no applicability despite the fact that the term "wages" is contained in the phrase. Id. This holding is completely non-sensical when you consider that the only possible reason for containing a definition of "wages" in the workers' compensation statute is to apply it to AWW calculations.

How can the First District's two lines of cases be reconciled? The first line, addressing what fringe benefits may be included in the AWW, holds that the definition of "wages" is applicable and controlling in calculating the AWW. The second line, addressing concurrent employment, holds that the definition of "wages" is completely irrelevant in determining what may be included. In short, they cannot be reconciled because they are inherently inconsistent. Either the definition of "wages" is applicable in AWW calculations or it is not. It cannot be both applicable and inapplicable.

The root of this dilemma is revealed by comparing two cases. The first, J. J. Murphy & Son, Inc. v. Gibbs, 137 So.2d 553 (Fla. 1962) is the first concurrent earnings case decided by this Honorable Court. The second, Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993), is the first case addressing the 1990 change to the definition of "wages" as applied to the concurrent earnings question. A comparison of the analysis used by this Honorable Court and that used by the First District demonstrates why the current First District analysis is deficient.

In J. J. Murphy & Son, this Honorable Court first enunciated the requirement that concurrent earnings be included in the definition of the AWW. At that time, "wages" was defined as follows:

> "'Wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer, only when such gratuities are received with the knowledge of the employer. In employment where an employee receives consideration other than cash as a portion of this compensation the value of such compensation shall be subject to the determination of the commission." §440.02(12), Fla.Stat. (1959).

Nothing in that section addressed concurrent earnings. Thus, the statute was vague and required interpretation by the Court, In addressing the issue, this Honorable Court focused on §440.14(1)-(5). 137 So.2d at 557. The Court quoted the language it found to be operative:

> "If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer... his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the said thirteen weeks." (excerpting in original).

The Court held that the terms "in the employment in which he was working at the time of the injury" and "in such employment" mandated the inclusion of concurrent earnings as long as the claimant was involved in similar employment at the time of the injury. 137 So.2d at 558. Of course, the limitation to similar employment was subsequently overruled by this Honorable Court. American Uniform and Rental Service v. Trainer, 262 So.2d 193 (Fla. 1972).

In Vegas, the First District held as follows:

> "Our examination of §440.14(1)(a) has not convinced us that this particular statute is 'of doubtful meaning.' We are thus guided by the plain meaning of the statutory language, and are inescapably drawn to the legislature's retention in §440.14(1)(a) of the provision requiring consideration of the claimant's earnings 'whether for the same or another employer' during the thirteen weeks immediately preceding the injury, and also to the statutory requirement establishing AWW at one-thirteenth 'of wages earned in such employment.' These phrases, completely unaffected by the 1990 amendments, are neither ambiguous nor are they modified by the new definition of wages." 627 So.2d at 85.

The First District simply adoped the original analysis put forth by this Court in J. J. Murphy & Son. The Court did so without considering the definition of "wages" in effect at the time that this Court decided J. J. Murphy & Son. The First District

seemed to assume that this Court would have decided J. J. Murphy & Son in exactly the same manner had the statute explicitly excluded concurrent earnings from the definition of "wages". Petitioners assert that the First District's speculation is both presumptuous and incorrect.

An examination of precedent is part of every court's function. In the instant case, the First District examined precedent starting with this Court's decision in J. J. Murphy & Son. The Court adopted the identical analysis while quoting extensively from prior cases and from Professor Larson. The Vegas Court, however, failed to recognize another primary function of the appellate courts. That is, appellate courts are supposed to acknowledge the will of the legislature through its duly enacted statutes. Petitioners respectfully submit that the Vegas Court did not like the removal of concurrent earnings from the definition of "wages". Therefore, the Vegas court chose to ignore the will of the legislature as expressed in the plain language of the statute.

Workers' compensation is a limited statutory substitute for common law rights and liabilities. Grice v. Suwanee Lumber Manufacturing Co., 113 So.2d 742 (Fla. 1st DCA 1959). Workers' compensation is purely a creature of statute and has no life outside of Chapter 440. Humana of Florida v. McKaughan, 652 So.2d 852 (Fla. 2nd DCA 1995). As a creature of statute, workers' compensation is governed by what the statute says, not what courts feel the law should be. Evergreen Sod Farms, Inc. v. McClendon,

513 So.2d 1311 (Fla. 1st DCA 1987), affirmed, Tarver v. Evergreen Sod Farms, Inc., 553 So.2d 765 (Fla. 1988).

The right to benefits under Chapter 440 is not a right, it is a privilege. Florida Farm Bureau v. Ayala, 501 So.2d 1346, 1348 (Fla. 4th DCA 1987). All of the parties' rights and liabilities are created by Chapter 440. Travelers Insurance Co. v. Sitko, 496 So.2d 921 (Fla. 1st DCA 1986). The relationship of the parties is unique in the workers' compensation system as they exist solely as a result of the statutory language in Chapter 440. Florida Erection Services, Inc. v. McDonald, 395 So.2d 203 (Fla. 1st DCA 1981).

In Vegas, and in the instant case, the First District has abandoned its obligation to apply the statute as written. The legislature's intent expressed in the plain language of the statute excludes concurrent earnings from the calculation of the AWW because the definition of "wages" only has applicability in the context of the AWW. The First District, throughout all the cases addressing fringe benefits, has recognized that the definition of "wages" is controlling in calculating the AWW.

A close reading of the very lengthy opinion below along with the Vegas opinion demonstrates that the basis of the decisions was the Court's supposition regarding what is "fair", It is clear that the Court did not think it was "fair" that the legislature chose to exclude concurrent earnings from the calculation of the AWW. It is certainly debatable as to whether or not it was fair. In response

to that argument, however, the employer/carrier would turn this Court's attention to its own language:

> "[S]ympathetic compassion for injured persons does not constitute a legal basis for allowing increased compensation not properly supported by the law." Jay Livestock Market v. Hill, 247 So.2d 291, 292 (Fla. 1971).

The First District's holding that Section 440.02(24), Fla. Stat. (1990) has no applicability when addressing Section 440.14, Fla. Stat. (1990) is both inconsistent with its own decisions and incorrect. The instant case should be reversed.

ISSUE III: WHETHER THE JCC MISAPPLIED 5440.02, FLA.STAT. (1990), 5440.14, FLA.STAT. (1990), AND AMERICAN UNIFORM AND RENTAL SERVICE V. TRAINER, 262 SO.2D 193 (FLA. 1972).

In J.J. Murphy & Son, Inc. v. Gibbs, 137 So.2d 553 (Fla. 1962) this Honorable Court first ruled that concurrent earnings were includable in the AWW. The J.J. Murphy & Son court, however, limited the application of the concurrent earnings analysis to those cases involving "similar" employment, 137 So.2d at 558. Therefore, a claimant that worked in concurrent, but dissimilar, employment was not entitled to the inclusion of concurrent earnings under J.J. Murphy & Son. Id.

In American Uniform and Rental Service v. Trainer, 262 So.2d 193 (Fla. 1972) this court overruled the J.J. Murphy & Son case to the extent that it limited the application of the concurrent earnings analysis to "similar" employment. 262 So.2d at 195. Under Trainer, all covered employments were subject to the concurrent earnings analysis originally set forth in J.J. Murphy & Son. 262 So.2d at 196. The Trainer court then went on to address the actual mechanism for calculating the AWW in a concurrent earnings case. Id.

The Trainer claimant suffered an injury while working for American Uniform and Rental Service on 01/17/69. 262 So.2d at 193. The claimant was also concurrently employed by Master Plastics. Id. The claimant was a part-time employee with American Uniform and Rental Service and a full-time employee with Master Plastics. Id. at 194.

At the time of the accident the claimant had apparently been working the full 13 weeks with Master Plastics. However, he had only been working for 2 weeks for American Uniform and Rental Service when the accident occurred. Similarly, in the instant case, the claimant had worked the full 13 weeks with Wal-Mart Stores, Inc., but had only worked 6 weeks for Krystal, Inc.

The Trainer court initially addressed the requirement that employment be "similar" in order to include concurrent earnings in the calculation of the AWW. 262 So.2d at 194. After analyzing the history of the similar employee requirement and concluding that it had very little merit, the court overruled it. Id. at 195. The court then addressed the mechanism for calculating the AWW in concurrent earnings cases. Id. at 196.

The court adopted the combined wages approach. Id. The appropriate calculation is to add up all earnings in all concurrent employments during the 13 weeks preceding the accident and divide by 13. Id. This method, the court felt, was the best and most practical method of calculating the AWW in the presence of concurrent earnings. Id. at 196.

The method of calculation adopted by the Trainer court is consistent with the statutory mandate contained in Section 440.14(1)(a), Fla. Stat. (1990):

> "If the injured employee has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury, his average weekly wage shall be 1/13th of the total amount of wages earned in such employment during the 13 weeks."

It is important to note that the current definition of "wages", which specifically excludes concurrent earnings, did not exist at the time the Trainer court addressed this question. In the instant case, the First District assumed that Trainer would have been decided in exactly the same manner had the definition of "wages" explicitly excluded concurrent earnings. The employer/carrier's position is that such an assumption is flawed.

When the First District decided Vegas, the court used extremely tortured logic in order to overcome the legislature's will in amending the definition of "wages" to exclude concurrent earnings. In order to justify the inclusion of concurrent earnings in the face of an explicit statutory exclusion, the court seized on the "plain language" of Section 440.14(1)(a), Fla. Stat. (1990):

> "Our examination of Section 440.14(1)(a) has not convinced us that this particular statute is 'of doubtful meaning.' We are thus guided by the plain meaning of the statutory language, and are inescapably drawn to the legislature's retention in Section 440.14(1)(a) of the provision requiring consideration of the claimant's earnings 'whether for the same or another employer' during the 13 weeks immediately preceding the injury, and also to the statutory requirement establishing AWW at 1/13th 'of wages earned in such employment.' These phrases, completely unaffected by the 1990 amendments, are neither ambiguous nor are they modified by the new definition of wages." 627 So.2d at 85.

The operative language for the First District was the term "whether for the same or another employer." It was this "plain language" that mandated the inclusion of the current earnings despite the legislature's clear intent to exclude such earnings by the amendment to the definition of "wages". The fact that the term "wages" is contained in this section meant nothing because the

court held that the definition of the term did not apply to the term.

The problem that the First District created by seizing upon the "whether for the same or another employer" language was that it only appears in Section 440.14(1)(a). It does not appear in 440.14(1)(b), 440.14(1)(c), 440.14(1)(d), or 440.14(1)(e). Thus, the "plain language" of the statute that mandates the inclusion of concurrent earnings is only in Section 440.14(1)(a) and it is not contained in any other sub-section. The term that is contained in the other sub-sections is "wages".

Thus, when the First District was faced with the instant case, the court had two options. The first was to apply the method mandated in Trainer and Vegas and urged by the employer/carrier and simply combine all wages earned during the 13 weeks preceding the accident and divide by 13. Again, that is the method mandated by Section 440.14(1)(a), the section that contains the "plain language" that requires the inclusion of concurrent earnings according to the First District.

The court's only other option was to further torture the statutory analysis and hold that concurrent earnings are includable under all other sub-sections despite the absence of the "whether for the same or another employer" language that the court found controlling in Vegas. Thus, the court simply went on to hold that the definition of "wages" has no applicability in any part of Section 440.14, despite the fact that the term "wages" appears again and again, and despite the fact that the only place in

Chapter 440 that the definition of "wages" has any applicability is in defining the AWW.

When the instant case was tried before the JCC, neither party argued that Section 440.14(1)(d) should be applied. The order itself does not mention Section 440.14(1)(d). The first time that sub-section was mentioned was when the First District decided this case.

Section 440.14(1)(d) reads as follows:

> "If any of the foregoing methods cannot reasonably and fairly be applied, the full-time weekly wages of the injured employee shall be used, except as otherwise provided in paragraph (e) or paragraph (f)." (emphasis added).

In order to remain consistent with Vegas, at least from an outcome perspective, if not from an intellectual perspective, the court again held that the definition of "wages" had no applicability to this section. 22 FLW at D1402. At the same time, however, the court completely abandoned the analysis in Vegas which mandated the inclusion of concurrent earnings because of language specific to Section 440.14(1)(a) that is not contained in Section 440.14(1)(d) (i.e. "whether for the same or another employer."). 22 FLW at D1402. Furthermore, the court abandoned the combined wages approach mandated by this court in Trainer and adopted by the First District in Vegas. 22 FLW at D1402.

In both Vegas and the instant case, the primary reason given by the First District for the holdings is the concept of "fairness". Vegas was a reflection of the court's belief that it was not fair for the legislature to exclude concurrent earnings

from the calculation of the AWW. The instant case was a reflection of the court's belief that Trainer mandates a method that is not "fair" to the claimant in this case. The employer/carrier asserts that the First District's concepts of "fairness" do not justify ignoring the mandate of the legislature.

If the Vegas court was correct that the "plain language" of Section 440.14(1)(a) requires the inclusion of concurrent earnings, where is the same "plain language" in Section 440.14(1)(d) which was applied by the First District in the instant case? It simply does not exist.

The First District, in Vegas and in the instant case, has created an analysis that is, quite frankly, a mess. The only way that all of the sub-sections in Section 440.14 can be reconciled is by applying the plain language and the intent of the statute and to exclude concurrent earnings. If the language "whether for the same or another employer" mandates the inclusion of concurrent earnings then it does so only in the sub-section where it appears, Section 440.14(1)(a). That language cannot mandate the inclusion of concurrent earnings in any other sub-section because it does not exist in any other sub-section.

If the First District was correct in the instant case and the judge should have used Section 440.14(1)(d), then concurrent earnings should not have been included at all. That sub-section does not contain the operative language "whether for the same or another employer". It certainly does contain the term "wages" which specifically excludes concurrent earnings.

Let us be intellectually honest here. It is not the "plain language" of the statute that requires the inclusion of concurrent earnings. It is not precedent and it is not Professor Larsen. It is the First District's opinion as to what is "fair" that has mandated the inclusion of concurrent earnings. The instant case should be reversed and Vegas should be overruled.

CONCLUSION

The instant case should be reversed and remanded to the Judge of Compensation Claims for a new order. This court should rule that concurrent earnings should be excluded altogether. In the alternative, this court should rule that Section 440.14(1)(a) applies and the combined wages approach should be used in calculating the AWW.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to Mark Tipton, Esquire, Post Office Box 700, Ocala, Florida 34478 this 14 day of July, 1997.

William H. Rogner, Esquire
HURLEY & ROGNER, P.A.
201 South Orange Avenue, Suite 640
Orlando, Florida 32801
(407) 422-1455
Florida Bar #857629

Attorney for Petitioners